MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 595II (GOV)** **Government Response** To AE 595FF (AAA) Motion To Reconsider the Military Judge's Denial of Recusal 23 April 2019

1. Timeliness

The Prosecution timely files this Response pursuant to the Military Commission's Expedited Briefing Order set forth in AE 595GG.

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 595FF (AAA), Mr. Ali's Motion to Reconsider the Military Judge's Denial of Recusal.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* Rule for Military Commission ("R.M.C.") 905(c). The Commission may reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial. R.M.C. 905(f). Either party may move for reconsideration, but granting of the request is in the Military Judge's discretion. Reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.

4. Facts

The Prosecution hereby incorporates the facts provided in its previous two responses to Defense motions to recuse the Military Judge.[1]

On 18 April 2019, Mr. Ali filed AE 595FF (AAA), requesting that the Commission reconsider its previous three denials of Defense recusal motions. Mr. Ali based his Motion to Reconsider on a recent decision by the Court of Appeals for the District of Columbia Circuit ("Court of Appeals") arising out of the *United States v. Al-Nashiri* military commission,[2] which Mr. Ali claims has a material effect on the Military Judge's several rulings denying Defense recusal motions in this case. Apart from the inapposite decision in *Al-Nashiri*, Mr. Ali's renewed bid for recusal rests on the same facts and reasoning as the previous thirteen iterations of the recusal efforts made by Mr. Ali and his co-Accused to the Commission, this Court, and the Court of Appeals.[3]

[1] *See* AE 595J (GOV); AE 595BB (GOV).

[2] No. 18-1279, 2019 U.S. App. LEXIS 11067 (D.C. Cir. Apr. 16, 2019) (hereinafter, "*Al-Nashiri*") (citations to slip op.).

[3] *See* (1) Co-Accused Mohammad's September 10, 2018 oral motion for recusal at the Commission (joined by Mr. Ali), (2) co-Accused Hawsawi's motion for recusal (AE 595I (MAH), Oct. 19, 2018), (3) Hawsawi's petition for mandamus to the U.S. Court of Military Commission Review (U.S.C.M.C.R. No. 18-004 (Nov. 27, 2018)), (4) Mr. Ali's substantive "Notice of Joinder" brief to Hawsawi's petition (U.S.C.M.C.R. No. 18-004 (Dec. 7, 2018)), (5) Mohammad's petition for mandamus to the Court of Appeals (No. 19-1012 (Jan. 18, 2019)), (6) Mohammad's motion for a stay of proceedings pending consideration of his petition for mandamus at the Court of Appeals (No. 19-1012 (Jan 18, 2019)), (7) Mr. Ali's substantive "memo" attached to his motion to join Mohammad's petition to the Court of Appeals (No. 19-1012 (Jan. 25, 2019)), (8) Mohammad's petition for mandamus to the C.M.C.R. (U.S.C.M.C.R. No. 19-001 (Feb. 13, 2019)), (9) co-Accused bin 'Attash's motion to disqualify the Military Judge (AE 595W (WBA), Feb. 27, 2019), (10) bin 'Attash's motion to transfer his motion to disqualify the Military Judge to the Chief Judge of the Military Commissions Trial Judiciary (AE 595X (WBA), Feb. 27, 2019), (11) Ali's motion to supplement his "Notice of Joinder" to Hawsawi's petition for mandamus before the C.M.C.R. with bin 'Attash's motion to disqualify the Miltiary Judge (U.S.C.M.C.R. No. 18-004 (Mar. 7, 2019)), (12) Ali's motion to supplement his "Notice of Joinder to Hawsawi's petition for mandamus with the *Al-Nashiri* decision (U.S.C.M.C.R. No. 18-004 Apr. 16, 2019), and (13) Mohammad's motion for a stay of proceedings pending consideration of his petition for mandamus to the C.M.C.R. (U.S.C.M.C.R. No. 19-001 (Apr. 19, 2019)).

5. Law and Argument

R.M.C. 905(f) permits the Military Judge to reconsider any ruling, other than one amounting to a finding of not guilty, prior to the authentication of the record of trial. However, granting of the request for reconsideration is in the Military Judge's discretion.[4] Generally, courts grant motions for reconsideration where "there has been an *intervening change in controlling law*, there is new evidence, or there is a need to correct clear error or prevent manifest injustice."[5] Contrary Mr. Ali's generous characterizations of the *Al-Nashiri* decision, that decision does not represent "an intervening change in controlling law." Indeed, *Al-Nashiri* is a "prospective employment" case based on the particular facts there and analyzed under prospective employment case law, while this case is—at best—a "prior government employment" case, with none of the facts that were present in *Al-Nashiri* and to be analyzed under prior government employment case law. Thus, *Al-Nashiri* is inapposite here.

However, with that said, the Prosecution does not oppose the Commission taking judicial notice of *Al-Nashiri*, a recent decision issued by a superior court. Otherwise, the decision announces no new rule of law, provides no basis for a change in the legal analysis of the Commission's previous rulings, and does not rescue any of the Defense's motions seeking the disqualification of the Military Judge. As such, the Commission should again deny the Defense request for recusal.

In his Motion To Reconsider, Mr. Ali mischaracterizes and expands the "holdings" of the *Al-Nashiri* decision in attempt to make that decision applicable to this case. A fair analysis of the *Al-Nashiri* decision, however, reveals Mr. Ali's claims to be unpersuasive.

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[4] *See* AE 155F at 1 ("Either party has the right [to] move for reconsideration but granting of the request is in the discretion of the Military Judge.")

[5] *United States v. Libby*, 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006) (internal quotation marks omitted); *accord Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000); *see also* AE 108AA at 2 ("Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.") (emphasis added).

I. The *Al-Nashiri* Decision Did Not Hold that the Military Judge in that Case Had a "Conflict of Interest," and the Factual Circumstances in that Case Are Wholly Unlike the Circumstances Related to Judge Parrella

Mr. Ali states that the Court of Appeals held "that a military judge had a conflict of interest due to his employment application with the Department of Justice [("DOJ")] while presiding over a military commission case in which the DOJ was a participant."[6] This is inaccurate. Rather, the court in *Al-Nashiri* concluded that, there, the military judge's job application and months of direct employment negotiations or communications with the DOJ, while he presided over a military commission to which a DOJ prosecutor was detailed, would cause a reasonable observer to question the military judge's impartiality.[7] The court in *Al-Nashiri* was careful to explain that its ruling addressed only "prospective" employment situations.[8] Thus, the court in *Al-Nashiri* found that the military judge's "job application . . . cast an intolerable cloud of partiality over his subsequent judicial conduct."[9]

This distinction between an appearance of partiality and, as Mr. Ali frames it, an actual "conflict of interest," is important because, unlike in that case, Judge Parrella did not submit a job application to the DOJ while presiding over this case. Judge Parrella did not use one of his orders in this case as a writing sample in such an application, as the court found in *Al-Nashiri* that the judge there did. Judge Parrella did not conduct months of direct employment negotiations with the DOJ while presiding over this case, as the court found in *Al-Nashiri* that the judge there did. Finally, and wholly unlike in *Al-Nashiri*, where the court found that judge's failure over the course of two years to disclose to the parties his employment-seeking efforts with the DOJ showed a "lack of candor" that might cause a reasonable observer to "wonder whether the judge had done something worth concealing," Judge Parrella fully disclosed to all parties, before his first appearance on the record, his U.S. Marine Corps fellowship assignment to

[6] AE 595FF (AAA) at 1.

[7] Slip. Op. at 23–24.

[8] *Id*. at 19 ("To begin with, it is beyond question that judges may not adjudicate cases involving their prospective employers.").

[9] *Id.* at 24.

the DOJ, which took place over four years ago. In addition, he answered numerous questions about that fellowship during his *voir dire* from defense counsel for all of the Accused.[10]

Unlike in *Al-Nashiri* (where the court applied the appearance-of-bias standard articulated in Rule for Military Commissions ("R.M.C.") 902(a) as the basis for that judge's disqualification), no reasonable observer, informed of all the facts, could question the Military Judge's impartiality. This is because, unlike the *prospective* employment situation in *Al-Nashiri* that relied on R.M.C. 902(a) and the equivalent appearance-of-bias standard in 28 U.S.C. § 455(a), Judge Parrella's *past* involvement with the DOJ expressly falls within one of the enumerated categories of R.M.C. 902(b)(2) (or the federal parallel 28 U.S.C. § 455(b)(3)). As the recusal of the Military Judge is unjustified under R.M.C. 902(b)(2), the catch-all provision of R.M.C. 902(a) (or 28 U.S.C. § 455(a)) provides no additional justification for his recusal.[11] However, even under a R.M.C. 902(a) analysis, the Military Judge's disclosure of and submission to extensive *voir dire* on his past Marine Corps assignment as a fellow at the DOJ (which is itself entirely different than the *Al-Nashiri* judge's personally conducted, ongoing, and prospective employment negotiations), "fully met" and answered the "appearance of bias" concerns of R.M.C. 902(a).[12]

Accordingly, the *Al-Nashiri* decision has no effect on the much more common (and widely held as non-disqualifying) situation where a judge has previously worked for—or, in Judge Parrella's case, with—a government agency but never worked on any matter now before him as a judge.[13] Mr. Ali has yet to cite any case law to support his claim that a judge who

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[10] *See* Unofficial/Unauthenticated Transcript ("Tr.") at 20420–568.

[11] *See, e.g.*, *United States v. Norwood*, 854 F.3d 469, 471–72 (8th Cir. 2017) (holding 28 U.S.C. § 455(a) and 455(b)(3) do not require recusal for prior service as an AUSA where judge had "no significant personal involvement in a critical decision" in the case); *United States v. Di Pasquale*, 864 F.2d 271, 278–79 (3d Cir. 1988) (holding recusal not required even where judge was a supervisory AUSA in same office prosecuting case now before him); *United States v. Champlin*, 388 F. Supp. 2d 1177, 1184 (D. Haw. 2005) (same, and finding that § 455(a) and 455(b)(3) do not require different standards for recusal for prior service as an AUSA).

[12] *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000).

[13] *See Baker & Hostetler LLP v. United States DOC*, 471 F.3d 1355, 1357–58 (D.C. Cir. 2006) (explaining that only "rare and extraordinary circumstances" could "conceivably" support

previously worked for a government agency that later appears before him (whether the agency is regarded as a "party" or otherwise) must recuse himself when the judge did not work on any matter related to the case now before him. That is the case here. Mr. Ali's suggestion that the court in *Al-Nashiri*, implicitly overturned settled case law and held that no person who has ever served in government can later preside as a judge over any case where that agency has a connection, let alone appears as the official prosecuting agency, is wholly inaccurate and appears based merely on wishful thinking. However, wishful thinking does not make the *Al Nashiri* decision—an inapposite decision limited to its particular facts—into a major change in the law governing instances of past employment situations that were disclosed on the record and addressed in extensive *voir dire*.

II. The *Al-Nashiri* Decision Did Not Hold that the Department of Justice Is "A 'Party' to Military Commissions Proceedings"

Mr. Ali characterizes the *Al-Nashiri* decision as holding "that the DOJ is a 'party' to military commissions proceedings," which therefore "negates" the Commission's "argument" that, while the Military Judge was assigned as a Marine Corps fellow at the DOJ, he and the DOJ prosecutors detailed to the Department of Defense ("DoD") Office of the Chief Prosecutor of Military Commissions effectively worked for two separate government agencies.[14] In fact, the *Al-Nashiri* decision merely states that "On the issue of judicial impartiality, however, we confront a question of reasonable appearances, not just formal designations. And we cannot escape the conclusion that the average, informed observer would consider [the military judge] presided over a case in which his potential employer appeared."[15]

Mr. Ali fails to acknowledge the well-established (and common sense) distinction between "prospective" employment and "past" employment. Unlike the judge in the *Al-Nashiri*

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recusal under the catchall appearance-of-bias standard in light of Congress's express statement in 28 U.S.C. § 455(b)(3)—and, by extension, R.M.C. 902(b)(2)—that prior government attorneys who are appointed to the bench need only recuse themselves if they have "personal[ly] participat[ed]" in a matter before the judge).

[14] AE 595FF (AAA) at 5.

[15] Slip Op. at 21.

case, even while Judge Parrella was assigned by a DoD component to DOJ for broadening and developmental experience, he did not later seek to become employed with the DOJ such that he would derive a financial interest. While assigned by DoD to the DOJ, at no time did he become a DOJ employee. However, as is required by extensive case law and the applicable rules, the court in *Al-Nashiri* repeatedly emphasized this distinction in concluding the judge's actions in that case could give rise to an appearance of bias.[16] This is why the court in *Al-Nashiri* cited to and analyzed the case consistent with the *Pepsico* and *Scott* cases; those cases dealt with prospective employment negotiations. As such, those cases, like the *Al-Nashiri* decision, have no bearing on Mr. Ali or his co-Accused's repeated attempts to force Judge Parrella's recusal.

Further, the presence of a prospective financial component was an important factor to the court's analysis in *Al-Nashiri*.[17] As detailed above, Judge Parrella has not applied to work for the DOJ and has no prospective employment connections with the DOJ or any other government agency tangentially related to the proceedings in the *Mohammad* commission. It is therefore impossible for an "average, informed observer"[18] to consider Judge Parrella as presiding over a

[16] *See* Slip Op. at 19 (analyzing authorities concerning prospective employment of current judges, stating that "judges may not adjudicate cases involving their *prospective* employers" . . . and "cannot have a *prospective* financial relationship with one side". . . and such principles apply to "*exploration* of employment opportunities with a law firm" and "other *potential* employers") (citing *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460–61 (7th Cir. 1985)) (emphases added); *see also id.* at 22 (stating that judges are obliged "to avoid *seeking* employment" from an employer "appearing before him," and that this obligation does not change "simply because the *prospective* employer is a component" of the DOJ) (citing *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989)) (emphases added).

[17] *Id.* at 19 ("Simply put, 'a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case.'") (*citing Pepsico*, 764 F.2d at 461).

[18] Notably, the court in *Al-Nashiri* did not cite or discuss Supreme Court precedent that established the requirement that a hypothetical "reasonable observer" employed by courts in considering questions on the appearance of bias must be "*informed of all the surrounding facts and circumstances*." *See Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 924 (2004) (citations omitted) (emphasis in original). In fact, the court in *Al-Nashiri* seems to suggest that courts must pander to people who "are often all too willing to indulge suspicions and doubts concerning the integrity of judges" in order to maintain an appearance of impartiality. Slip Op. at 24 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–64 (1988)). *Cheney*, however, made clear that indulging in suspicions and doubts, rather than considering what a reasonable person informed of all of the surrounding facts and circumstances would believe, is not "reasonable." *Cheney,* 541 U.S. at 924, 928–29. *See also*, *e.g.*, *Liteky v. United States*, 510 U.S. 540, 552

case in which his "potential employer appeared." Indeed, far from seeking employment with the DOJ—as the judge in *Al-Nashiri* did—Judge Parrella was assigned by his actual employer, the Marine Corps, to spend an academic year from 2014–2015 at the DOJ as part of an established Marine Corps program to send senior officers to "other government agencies, private corporations, and various think tanks in order to observe, inform, and exchange ideas."[19]

There is simply no indication that the court in *Al-Nashiri*, by grounding its decision in what it supposed a reasonable observer might think about the judge in that case, intended to set down a new, *per se* rule that the detailing of a DOJ attorney to another agency to aid that agency's prosecution of a case therefore makes the DOJ the prosecuting agency of that case. Indeed, the court in *Al-Nashiri* acknowledged that it was true that the Military Commissions Act of 2009 "gives the Secretary of Defense, not the Attorney General, authority to convene military commissions" and to prosecute those cases on behalf of the United States.[20]

Moreover, none of the *Al-Nashiri* court's references to the Attorney General's role in military commissions can be separated from its heavy reliance on the fact that (1) the judge in that case had actively sought employment with the DOJ as an immigration judge; (2) "the

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(1994) (noting that demanding "child-like innocence" in interpreting 28 U.S.C. § 455(a) is "not reasonable"); Respondent's Answer to Mr. Hawsawi's Petition for Mandamus at 14–16 (detailing extensive case law from across the federal circuits generally denouncing speculation, suspicion, rumor, or innuendo as a basis for determining an appearance of partiality to a reasonable observer). Thus, to the extent that the court in *Al-Nashiri* required appeasing such "suspicions and doubts concerning the integrity of judges" in finding that a reasonable observer in that case would question the judge's impartiality, any such requirement is doubtful in light of the existing post-*Liljeberg* Supreme Court rulings and consistent case law within and beyond the Court of Appeals stating otherwise.

[19] Tr. at 20602–04.

[20] Slip Op. at 20–21. The court in *Al-Nashiri* also noted that the Regulation for Trial by Military Commission ("R.T.M.C.") requires the Chief Prosecutor, who must be a military officer per 10 U.S.C. § 948k(d)(1) and appointed by the Secretary of Defense per R.T.M.C. ¶ 8-1, to "supervise all trial counsel, including any special trial counsel of the [DOJ] who may be made available by the Attorney General." *Id.* at 22. However, in citing the R.T.M.C., which allows for DOJ attorneys to be "made available" to the DoD for the Chief Prosecutor to supervise, the court in *Al-Nashiri* merely illustrated the Attorney General's nominal connection to military commissions, and it did not offer any further discussion of the inherent contradiction in the claim, as made by Mr. Ali, Mr. Hawsawi, and Mr. Mohammad, that the DOJ is *the* agency "prosecuting" their military commission cases.

Attorney General himself is directly involved in selecting and supervising immigration judges"; (3) immigration judges "are appointed directly by the Attorney General"; and (4) once appointed, immigration judges "are subject to such supervision and obligated to perform such duties as the Attorney General shall prescribe."[21] Plainly, none of these facts apply to Judge Parrella, and there is no evidence (and it strains credulity to believe) that the Attorney General was personally and directly involved in the selection and assignment by the Marine Corps of Judge Parrella to fill its fellowship slot at the DOJ in 2014.

As described above, it is well-established that past associations with a government agency, even one appearing before a judge as the official party or prosecuting agency, do not require recusal where the judge did not work on the case or issue now before him.[22] This is not surprising because, under Mr. Ali's reasoning that Judge Parrella must be disqualified because (in Mr. Ali's view) the DOJ is now a "party" in his commission, every military judge in every military court would have to recuse because they have not only "worked for," but still continue to work for, a "party" to the case as DoD employees. This absurd result is presumably why the *Al-Nashiri* court drew the specific connections to the Attorney General regarding the judge's new job in that case, as well as the distinction highlighting "prospective," as opposed to "past," employment scenarios.

As a result, the *Al-Nashiri* decision is relevant to this case only in the aspect that, under facts such as those in that case, a reasonable observer might not comprehend the distinction between (1) the DoD as the prosecuting agency with a DOJ attorney detailed to work for the DoD's Office of the Chief Prosecutor and (2) a situation where the DOJ is actually the prosecuting agency in a case.[23] In either case, however, the "United States" is the "party" to the

[21] *Id.* at 20 (citations omitted).

[22] *See*, *e.g.*, *Baker & Hostetler LLP*, 471 F.3d at 1357–58; *Norwood*, 854 F.3d at 471–72; *Di Pasquale*, 864 F.2d at 278–79.

[23] However, as described *supra* at note 18, the "reasonable observer" is supposed to be fully informed of all the facts and circumstances, so it is unclear how the reasonable observer employed in *Al-Nashiri* would be confused by the distinction recognized by the Court of Appeals, which did not offer further analysis of this point.

case, and the official prosecuting agency prosecutes on behalf of the United States (in this case, the DoD, as the court in *Al-Nashiri* acknowledged).

In any event, regardless of the characterization of the nature of the DOJ's role in the prosecution of the Accused's military commission, it remains that no reasonable observer, *informed of all of the facts* here, could question the Military Judge's impartiality in presiding over this case. Even in a hypothetical situation where military commissions were actually prosecuted by the DOJ, and the Chief Prosecutor in charge of supervising all other prosecutors in commission cases was a DOJ attorney, and accordingly the *Al-Nashiri* court had definitively found (rather than stating that it could appear to an observer) that the DOJ was a party in all commissions where it had detailed attorneys "made available" to the Chief Prosecutor, those facts would change nothing in the analysis within the Commission's multiple rulings that the Military Judge is not disqualified from presiding over this case.

First, to the extent that the Military Judge's finding that, during his fellowship at the DOJ, he and the DOJ attorneys that had been detailed to the DoD's Office of the Chief Prosecutor "effectively worked for two separate government agencies" matters at all in the recusal analysis,[24] such a finding is still demonstrably correct. Judge Parrella, a DoD employee, worked at the DOJ during his fellowship in 2014–2015, while DOJ employees Mr. Groharing and Mr. Trivett, have been detailed to this case by the DoD's Office of the Chief Prosecutor since 2012. Either both sets completely switched their employment status to the other agency, or neither did. Logically it cannot be that the DOJ prosecutors detailed to the Office of the Chief Prosecutor fully retained their DOJ status, while Judge Parrella completely lost his DoD status while assigned as a fellow at the DOJ. Therefore, it remains true that, during Judge Parrella's

[24] Defense calls this statement a "core finding" *ad nauseum*. *See* AE 595FF (AAA) at 2, 4; *see also* Mr. Ali's Motion to Supplement at 2 (U.S.C.M.C.R. No. 18-004 (Apr. 16, 2019); Mr. Mohammad's Motion for a Stay at 3 (U.S.C.M.C.R. No. 19-001 (Apr. 19, 2019). However, Judge Parrella worked with DOJ over four years ago, never worked on any military commission matters while there, and disclosed his fellowship and submitted to *voir dire* on the issue. Thus, the finding the Defense has seized upon ultimately makes little practical difference in the outcome of the recusal analysis under these circumstances. *See supra* notes 6–8.

fellowship year, "the Military Judge and the DOJ prosecutors assigned to this case *effectively* worked for two separate government agencies."[25]

Second, as described above, Judge Parrella's connection to the DOJ is based on a one-year military assignment to work with the DOJ over four years ago. Judge Parrella has and had no concurrent or prospective interactions or pending negotiations for employment with the DOJ while presiding over this case. During his fellowship, Judge Parrella did not work on any military commission matters, let alone any matters related to the case over which he is currently presiding. Crucially, Judge Parrella also disclosed his minor past connection with the DOJ on the record and answered numerous questions and allegations from the Defense about that connection, both during *voir dire* and in considering and ultimately denying repeated motions for his recusal.

Without providing any authority, Mr. Ali claims that "the fact that [the Military Judge] is directly associated with a party," and not the facts that the Military Judge did not work on any matter now before him and that disclosed and submitted to *voir dire* on the subject, "is decisive."[26] Mr. Ali's lack of authority for such a confused argument is not surprising, as the applicable authority says the opposite.[27] Nothing about Judge Parrella's past experience with DOJ implicates R.M.C. 902(b)(2) as requiring recusal. Because of this, and because of Judge Parrella's disclosure and submission to *voir dire* on the subject (among myriad other subjects), recusal is also not warranted under R.M.C. 902(a).[28]

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[25] AE 595O at 3.

[26] AE 595FF (AAA) at 5.

[27] *See*, *e.g.*, *Baker & Hostetler LLP*, 471 F.3d at 1357–58 (explaining that only "rare and extraordinary circumstances" could "conceivably" support recusal under the catchall appearance-of-bias standard in light of Congress's express statement in 28 U.S.C. § 455(b)(3)—and, by extension, R.M.C. 902(b)(2)—that prior government attorneys who are appointed to the bench need only recuse themselves if they have "personal[ly] participat[ed]" in a matter before the judge).

[28] *See supra* notes 11–13.

The *Al-Nashiri* decision in no way changes the fact that the applicable rules and extensive case law still do not require Military Judge's recusal here; rather, the law and applicable rules actually require Judge Parrella to remain as the presiding judge. Just as there is an important public policy interest in ensuring judicial proceedings appear impartial, there is an equally important public policy interest in "prevent[ing] parties from too easily obtaining the disqualification of a judge, thereby manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[29] In addition, the facts and circumstances related to the Commission's denial of the Accused's recusal motions are nothing like the particular facts and circumstances of the *Al-Nashiri* decision. Thus, that decision has no discernable effect on the application of the relevant rules and case law to the facts of this case.

Finally, the United States acknowledges the caution from the Court of Appeals in *Al-Nashiri* that

> whenever and however military judges are assigned, rehired, and reviewed, they must always maintain the appearance of impartiality demanded by Rule for Military Commission 902(a). It would seem, therefore, that some additional "encourag[ement] . . . to more carefully examine possible grounds for disqualification," *Liljeberg*, 486 U.S. at 868, would be especially "appropriate under the circumstances," *Cheney*, 542 U.S. at 381.[30]

Yet here, a still more careful examination for a possible appearance of partiality turns up no such grounds for disqualification. Absent any new considerations the Military Judge seeks to incorporate into his weighing of this matter, the Motion should be denied.

6. Conclusion

For the reasons listed above, the Defense Motion for Reconsideration should be denied.

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[29] *In re Allied Signal Inc*., 891 F.2d 967, 970 (1st Cir. 1989). *See also Cheney*, 541 U.S. at 929 ("If I could have done so in good conscience, I would have been pleased to demonstrate my integrity . . . by getting off the case. Since I believe there is no basis for recusal, I cannot."); *Doe v. Cabrera*, 134 F. Supp. 3d 439, 444 (D.D.C. 2015) ("[A] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.") (quoting *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

[30] Slip Op. at 28.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 23 April 2019

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd day of April 2019, I filed AE 595II (GOV), Government Response To AE 595FF (AAA), Mr. Ali's Motion to Reconsider the Military Judge's Denial of Recusal, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher Dykstra
Major, USAF
Assistant Trial Counsel