

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 595KK(WBA)

Mr. bin 'Atash's Reply to AE 595II(GOV),
Government Response to AE 595FF(AAA),
Motion to Reconsider the Military Judge's
Denial of Recusal

24 April 2019

1. **Timeliness:** This Reply is timely. (AE 595GG(ORD) at ¶ 2.b).

2. **Reply:**

The Military Judge and the Prosecution have denied Defense Counsel necessary discovery in the AE 595 series regarding Military Judge Parrella's work as a lawyer at the Counterterrorism Section ("CTS") of the National Security Division ("NSD") of the Department of Justice ("DOJ") from June 2014 to June 2015. Therefore, the true nature and circumstances of Military Judge Parrella's time at CTS remains hidden. But in In re Al-Nashiri, No. 18-1279, 2019 U.S. App. LEXIS 11067 (D.C. Cir. April 16, 2019), Judge David Tatel and the D.C. Circuit recently reminded every party in the Military Commissions system that appearances matter. And the appearances in this case are damning.

As the AE 595 series has developed, Mr. bin 'Atash has focused the majority of his argument that Military Judge Parrella should be disqualified as the presiding judge in this matter under R.M.C. 902(a), which requires the military judge to disqualify himself or herself "in any

proceeding in which that military judge's impartiality might reasonably be questioned.” (AE 595W(WBA) at 27-33). The D.C. Circuit has explained that an inquiry under R.M.C. 902(a) involves a determination as to “whether a ‘reasonable person, knowing the relevant facts’ would perceive ‘an appearance of partiality.’” In re Mohammad, 866 F.3d 473, 477 (D.C. Cir. 2017).

In his first ruling denying that specific basis for disqualification, Military Judge Parrella devoted a single sentence of analysis to that question and concluded that “[n]othing about my brief service at NSD; my limited association with one of the prosecutors; or my recollection regarding the events of 11 September 2001 raises any negative implication.” (AE 595O(RUL) at 9). Upon receipt of AE 595W(WBA), which provided factual details regarding Military Judge Parrella's time at CTS learned from interviews with CTS attorneys and paralegals and photographs of CTS attorney Jeffrey Groharing with Judge Parrella in 2007 and 2008 during their Dale Milton Racing Team years, Military Judge Parrella again found that “there is nothing that would cause me to give Mr. Groharing's input any greater or lesser weight than any other counsel for any party.” (AE 595EE(RUL) at ¶ 4.c.(3)).

Now the D.C. Circuit has given the parties and this Military Judge a clear warning:

[W]henver 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 encouragement . . . to more carefully examine possible grounds for disqualification would be especially appropriate under the circumstances.

In re Al-Nashiri, 2019 U.S. App. 11067, at *40-41 (internal quotations and citations omitted). The Supreme Court has explained that the Due Process Clause's “insistence on the appearance of neutrality is . . . an essential means of ensuring the reality of a fair adjudication [and] the appearance and reality of impartial justice are necessary to the public legitimacy of judicial

pronouncements and thus to the rule of law itself.” Williams v. Pennsylvania, 136 S. Ct. 1899, 1909-10 (2016). In this case, assessment by a disinterested judge of factors affecting Military Judge Parrella’s impartiality is of paramount import because the United States is seeking death. The Supreme Court warns that the Eighth Amendment requires a heightened degree of fairness and reliability in capital prosecutions. Beck v. Alabama, 447 U.S. 625, 638 (1980).

In In re Al-Nashiri, this was the appearance of partiality:



In re Al-Nashiri, 2019 U.S. App. 11067, at *18 (citing Carol Rosenberg, Controversial Guantanamo Judge Joins Jeff Sessions in Immigration Judge Ceremony, McClatchy, Sept. 14, 2018, available at: <https://www.mcclatchydc.com/news/nation-world/national/national-security/article218303315.html>).

In this case, this is the appearance of partiality:



(AE 595W(WBA), Attach. V).

Finally, it is not surprising that the same Prosecution that handled the In re Al-Nashiri case—which is the same Prosecution as the 9/11 case—has taken the position that it now does in this matter. Only the same Prosecution—led by BG Mark Martins, and entrusted with prosecuting both this case and the case against Mr. al-Nashiri on behalf of the United States—could read In re Al-Nashiri and have the take away that it requires Military Judge Parrella to remain as presiding judge. The Military Commission’s Prosecution can make these arguments because it has long since detached itself from reality when addressing inquiries by the Defense into grounds for

judicial disqualification. After the In re Al-Nashiri decision, the Military Commission's Prosecution should have no credibility left. When reports surfaced that Military Judge Vance Spath was applying for employment with DOJ as an immigration judge and upon request for discovery by the Defense, the Prosecution refused to investigate the matter and called such claims "unsubstantiated assertions." In re Al-Nashiri, 2019 U.S. App. 11067, at *17, *39. The D.C. Circuit notes that the Prosecution "failed to live up" to its shared responsibility to seek justice. In re Al-Nashiri, 2019 U.S. App. 11067, at *40. The Military Commission's Prosecution similarly should have no credibility when it asserts that Judge Parrella "did not work on any military commission matters" and objects to further discovery that would detail exactly what the nature and circumstances of Judge Parrella's work at CTS was. (AE 595II(GOV) at 11; Tr. at 20585; AE 595A(WBA) at Attach. N). As the world now knows, the Prosecution has objected to such discovery before, only to have a picture surface of Judge Spath standing next to Attorney General Jeff Sessions at a welcome ceremony for new immigration judges surface a week later.

In light of In re Al-Nashiri, this Military Judge should reconsider his prior rulings and recognize that a reasonable person, knowing the relevant facts regarding his time at CTS and relationship with Jeffrey Groharing, would perceive the appearance of partiality. As emphasized in AE 595W(WBA), Mr. bin 'Atash need not prove actual bias or that Military Judge's specific duties at DTS involved (directly or indirectly) the prosecution of this case. (AE 595W(WBA) at 33). It was similarly not necessary for Mr. Al-Nashiri to prove that Judge Spath had an actual bias in favor of DOJ when he was applying to become one of its immigration judges. See In re Al-Nashiri, 2019 U.S. App. 11067, *33-34 (concluding that Judge Spath's application "cast an intolerable cloud of doubt of partiality over his subsequent judicial conduct"). In the alternative,

this Military Judge should order further discovery and voir dire regarding his time at CTS, as the Defense requested in AE 595(MAH), AE 595A(WBA), and AE 595E(RBS).

3. Attachments:

A. Certificate of Service.

4. Signatures:

/s/

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Learned Counsel

/s/

EDWIN A. PERRY

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Attachment A

CERTIFICATE OF SERVICE

I certify that on 24 April 2019, I electronically filed with the Trial Judiciary the attached AE 595KK(WBA), Mr. bin 'Atash's Reply to AE 595II(GOV), Government Response to AE 595FF(AAA), Motion to Reconsider the Military Judge's Denial of Recusal, and provided copies to all parties.

//s//

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