

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 595LL</b></p> <p><b>RULING</b></p> <p><b>Mr. al Baluchi’s Motion</b> To Reconsider the Military Judge’s Denial of Recusal</p> <p>and</p> <p><b>Mr. Bin al Shibh’s Motion</b> to Reconsider the Military Judge’s Denials of Recusal and <i>Ex Parte Voir Dire</i></p> <p><b>25 April 2019</b></p>
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**1. Procedural History.**

**a. Motion of Mr. Ali (a.k.a. al Baluchi).**

(1) On 18 April 2019, Mr. Ali moved<sup>1</sup> the Commission to reconsider its denials<sup>2</sup> of three prior motions by various Accused to disqualify the Military Judge (most recently on 15 March 2019). He argued reconsideration was appropriate because those denials were inconsistent with *In re Al-Nashiri*, a recent (16 April 2019) decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)—in which several years of decisions by a former military commission judge were vacated due to his failure to disclose that he was seeking

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<sup>1</sup> AE 595FF (AAA), Mr. al Baluchi’s Motion To Reconsider the Military Judge’s Denial of Recusal, filed 18 April 2019.

<sup>2</sup> Specifically, a bench ruling and two subsequent written rulings, dated 11 September 2018, 19 November 2018, and 15 March 2019, respectively. AE 595FF (AAA), para. 2. The two written rulings fully describe the relevant earlier procedural history. *See* AE 595O, Ruling: Defense Motion to Recuse Military Judge, Colonel Parrella, dated 19 November 2018, para. 1; AE 595EE, Ruling: Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al., and Mr. bin ‘Atash’s Motion to Transfer AE 595W (WBA), Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions, dated 15 March 2019, para. 1.

employment with the Department of Justice (DOJ).<sup>3</sup> Mr. Ali specifically argued that certain conclusions reached by the *In re Al-Nashiri* Court were inconsistent with findings previously made by the Military Judge concerning his 2014-2015 U.S. Marine Corps fellowship at the Counterterrorism Section (CTS) of DOJ's National Security Division (NSD).<sup>4</sup>

(2) On 18 April 2019, the Commission directed expedited briefing.<sup>5</sup> On 23 April 2019 the Government responded, asserting *In re Al-Nashiri* to be inapposite and the Defense construction of its holdings to be overbroad; and arguing that, since the relevant facts and applicable legal standards remained unchanged, no differing result was warranted.<sup>6</sup>

(3) On 24 April 2019, Mr. bin 'Attash filed the sole reply received by the Commission, arguing that *In re Al-Nashiri*'s emphasis on avoiding appearance of bias required recusal (or, at least, further discovery and *voir dire*) due to both the 2014-2015 fellowship and my past acquaintance with a member of the Prosecution (Mr. Jeffrey Groharing).<sup>7</sup>

**b. Motion of Mr. bin al Shihb.** On 22 April 2019, Mr. Bin al Shihb filed a separate motion for the following relief:

Mr. Bin al Shihb moves the military judge to reconsider the motion to recuse in light of . . . *In re Al-Nashiri* . . . . He requests that the judge take this opportunity to voluntarily recuse himself without further litigation—to prevent even the appearance of impartiality that has arisen from serving as the adjudicator on the merits of this pending commission after prior employment during the pendency of this case with one of the litigants in this case. The judge should also vacate all orders and rulings entered while sitting as military judge on this case. Alternatively, Mr. Bin al Shihb moves this court to abate proceedings to reconsider the merits of the previously argued motions to recuse in light of *Al-Nashiri* and find that recusal is warranted. Although it would not provide adequate relief, if the Judge refuses to reconsider recusal, he should at the very least reconsider the ruling . . . denying *ex parte voir dire* . . . to inquire into the details of the assistance provided while employed

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<sup>3</sup> AE 595FF (AAA), para. 2 (citing *In re Al-Nashiri*, 2019 WL 1601994 (D.C. Cir. 2019)).

<sup>4</sup> AE 595FF (AAA) at 2.

<sup>5</sup> AE 595GG Expedited Briefing Order, Mr. al Baluchi's Motion To Reconsider the Military Judge's Denial of Recusal, dated 18 April 2019.

<sup>6</sup> AE 595II (GOV), Government Response To AE 595FF (AAA) Motion To Reconsider the Military Judge's Denial of Recusal, filed 23 April 2019.

<sup>7</sup> 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, filed 24 April 2019.

with the Department of Justice National Security Division (NSD) from June 2014 through June 2015.<sup>8</sup>

Ultimately, the Commission reads Mr. bin al Shibh's motion as a request (1) that it reconsider, in light of *In re Al-Nashiri*, its denials of recusal and of *ex parte voir dire*, and (2) that it abate these proceedings pending those reconsiderations.

c. **Oral Argument.** Messrs. Ali and bin al Shibh requested oral argument.<sup>9</sup> The Government did not, but requested the opportunity to respond to any Defense argument.<sup>10</sup> Neither oral argument<sup>11</sup> nor further briefing<sup>12</sup> are required to resolve these matters.

## 2. Law.

a. **Burden of Proof.** As the moving parties, Messrs. Ali, bin 'Attash, and bin al Shibh bear the burden of proving by a preponderance of the evidence any facts prerequisite to relief they seek. R.M.C. 905(c)(1)-(2).

b. **Reconsideration and Judicial Disqualification.** The Commission adopts and incorporates its statements of law on these subjects from prior written rulings in this series,<sup>13</sup> with the addition of the *In re Al-Nashiri* decision.

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<sup>8</sup> AE 595HH (RBS), Mr. Bin al Shibh's Motion to Reconsider the Military Judge's Denials of Recusal and *Ex Parte Voir Dire*, filed 22 April 2019, para. 2. The Commission denied the referenced request for additional *ex parte voir dire* on 10 October and 11 November 2018. AE 595G Ruling, Defense Motion to Compel Material and Information Related to the Qualifications of Judge Keith Parrella and Defense Request for Voir Dire of Military Judge in a Closed *Ex Parte* Hearing, dated 10 October 2018; AE 595M Ruling, Mr. bin al Shibh's Notice of Additional Names Described in the AE 292 Series and Motion to Abate for the Commission's Failure to Disclose Information Related to AE 595H (RBS), dated 11 November 2018. The Commission notes that while Mr. bin al Shibh's initial motions regarding this matter are *ex parte* and under seal, his present motion to reconsider is not. As a precaution, the Commission will reference herein only those matters already openly discussed by Mr. bin al Shibh's Counsel.

<sup>9</sup> AE 595FF (AAA), para. 7; AE 595HH (RBS), para. 6. Mr. bin 'Attash's reply was silent as to whether he sought oral argument. AE 595KK (WBA).

<sup>10</sup> AE 595II (GOV), para. 7.

<sup>11</sup> The opportunity to orally argue pretrial motions is afforded at the discretion of the military judge. Rule for Military Commissions (R.M.C.) 905(h); Rule of Court 3.5.m.

<sup>12</sup> R.M.C. 108, 801; R.C. 3-7.d(1), e(2).

<sup>13</sup> AE 595O, para. 3 (statement of law regarding judicial disqualification); AE 595EE, para. 2.c (statement of law regarding reconsideration).

**3. Analysis: Reconsideration.** As Messrs. Ali, bin ‘Attash, and bin al Shibh have presented newly decided superior appellate authority that could arguably impact the prior rulings they contest, the Commission will reconsider those rulings.<sup>14</sup> Having done so, however, for reasons explained below, the Commission concludes no sufficient basis for substantive relief has been shown.

**4. Analysis: Mr. Ali’s Motion.**

a. Mr. Ali argues that (1) *In re Al-Nashiri*’s conclusion that DOJ was a party to that case applies equally here; (2) this is inconsistent with the Commission’s prior finding that “the Military Judge and DOJ prosecutors assigned to this case effectively worked for two separate government agencies during the Military Judge’s . . . fellowship;”<sup>15</sup> and (3) the undersigned is therefore “directly associated with a party . . . and should . . . recuse himself.”<sup>16</sup> In his reply, Mr. bin ‘Attash (relying on both the Marine Corps fellowship and my acquaintance with Mr. Groharing) claims the holdings and factual circumstances of *In re Al-Nashiri* require recusal or, in the alternative, further discovery and *voir dire*.<sup>17</sup>

b. The Commission, however, finds *In re Al-Nashiri* distinguishable, such that it requires no differing outcome. To begin with, Mr. Ali’s core premise is questionable: though the analysis of *In re Al-Nashiri* indicates DOJ is a *party* to this litigation,<sup>18</sup> it does not necessarily follow that I was *employed by* DOJ during my fellowship. At no time did I apply to DOJ, get evaluated by

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<sup>14</sup> The Commission has determined that Mr. Ali was not joined to all of the motions addressed by the three rulings at issue—a conclusion with which his counsel disagrees. AE 595FF (AAA), fn 2. Given the conclusion reached below, however, the fact that Mr. Ali was joined in at least one instance suffices to render further discussion of this issue unnecessary at present.

<sup>15</sup> AE 595FF (AAA) at 2 (quoting AE 595O at 3).

<sup>16</sup> AE 595FF (AAA) at 2.

<sup>17</sup> AE 595KK (WBA) at 5-6 (“In light of *In re Al-Nashiri*, this Military Judge should reconsider . . . 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.” *Id.* at 5).

<sup>18</sup> This appears to be so, at least for purposes of assessing potential appearance of judicial conflict. *In re Al-Nashiri*, 2019 WL 1601994 at \*9.

DOJ personnel, or receive formal DOJ training. Throughout my fellowship, I remained assigned to and evaluated by the U.S. Marine Corps.<sup>19</sup> I never sought, much less established, any employer-employee relationship with DOJ. As noted previously on the record, during my fellowship I had no exposure to this case, and no significant association or interaction with any member of the Prosecution. In short, the prior finding that during my fellowship I effectively worked for a different agency from the Prosecution remains accurate.

c. Furthermore, and perhaps more importantly, the *In re Al-Nashiri* decision hinged on the fact that the judge in that case sought a *prospective financial relationship* with DOJ.<sup>20</sup> The D.C. Circuit focused strongly on the facts that the trial judge (1) had applied for future employment from DOJ; (2) had expressly drawn the DOJ hiring authority's attention to his role as trial judge in that case; and (3) had never disclosed the pendency of his application to the parties.<sup>21</sup>

d. This is in marked contrast to the facts here. My relatively brief (about 9 month) Marine Corps fellowship is entirely in the past, having ended some 4 years ago. At that time, I had no inkling that on 27 August 2018<sup>22</sup> I would be detailed to preside over this Commission. As stated on the record, I have no intention to seek employment or any other future benefit from the DOJ. I openly disclosed the matter early on (as reflected in the biography and relevant Marine Corps

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<sup>19</sup> Of note, as I indicated during *voir dire*, the fellowship is considered an academic endeavor, and as such warranted only an "unobserved" fitness report, which lacks the typical evaluation marks. Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 10 September 2018 from 1:32 P.M. to 2:34 P.M. at 20556.

<sup>20</sup> *Id.* at \*8 ("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." *Id.*, quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (internal quotation marks omitted)).

<sup>21</sup> *Id.* at \*10.

<sup>22</sup> See AE 001A, Memorandum for Colonel Keith A. Parrella, USMC, Subject: *United States of America v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa Shmed Adam Al Hawsawi*, dated 27 August 2018.

evaluation provided to the parties),<sup>23</sup> and it has been explored at length in *voir dire*. It is not a prospective matter, nor does it involve any potential future benefit contingent on any act or omission by me. Rather, it is a past event I have openly discussed and personally fully assessed. My brief fellowship at DOJ does not by itself warrant recusal, as I had no involvement with or exposure to this case or any related matter while there.<sup>24</sup>

e. Similarly, my relationship with Mr. Groharing was fully disclosed to the parties; discussed extensively in *voir dire*; and demonstrated to be limited in nature and frequency.<sup>25</sup> As such, it forms no reasonable basis for either actual or apparent conflict.

f. On reconsideration, and fully considering the *In re Al-Nashiri* decision, for reasons previously recited I again conclude neither my 2014-2015 Marine Corps fellowship nor my past acquaintance with Mr. Groharing establish any actual or apparent conflict warranting recusal, discovery, or further *voir dire*.

##### **5. Analysis: Mr. bin al Shibh's Motion.**

a. To the extent Mr. bin al Shibh seeks reconsideration of the Commission's prior denials of recusal, his motion is denied for the reasons given in paragraph four (4), above.

b. To the extent he seeks reconsideration of the Commission's denial of additional *voir dire* in an *ex parte* setting, the Commission again affirms that (a) it has no knowledge of or exposure to the investigation with which Mr. bin al Shibh is concerned, and (b) no professional

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<sup>23</sup> See AE 001B, Colonel Keith A Parrella Biography, submitted in the record on 27 August 2018 and AE 595B, U.S. Marine Corps Form 1610, U.S. Marine Corps Fitness Report concerning Lieutenant Colonel Keith A. Parrella (2 July 2015), submitted in the record on 9 September 2018.

<sup>24</sup> See, e.g., *Kendrick v. Carlson*, 995 F.2d 1440 (8th Cir. 1993) (“[A] judge is not subject to mandatory disqualification arising from prior government service based on the mere fact that another lawyer in his office served as a lawyer concerning the matter. The issue, rather, is whether a judge, while in government employment, himself served as counsel in the case.” *Id.* at 1444.)

<sup>25</sup> See Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 10 September 2018 from 9:03 A.M. to 10:38 A.M. at 20455 (Military Judge advising parties of prior acquaintance with Mr. Groharing).

or personal acquaintance with any of the persons Mr. bin al Shibh has previously identified in this series. The Commission further notes Mr. bin al Shibh's own recitation of fact recognizes that (a) the investigation at issue was conducted by a U.S. Attorney's Office in Illinois, not any part of the NSD; and (b) it ultimately ended with a disposition favorable to him. Accordingly, the Commission sees no reason why the facts he states would form any persuasive basis for finding apparent or actual conflict or bias, or for allowing additional *voir dire* (*ex parte* or otherwise).

c. Given the foregoing, Mr. bin al Shibh's request for abatement is moot.

6. **Conclusion.** The Commission well marks the *In re Al-Nashiri* Court's recitation of the stringent need to avoid even the appearance of judicial bias,<sup>26</sup> and its "encouragement to more carefully examine possible grounds for disqualification" of military judges<sup>27</sup>—particularly in capital cases.<sup>28</sup> The Commission has fully considered all these factors in reevaluating its prior decisions, and, having done so, finds no sufficient basis for any differing result.

7. **Ruling.** Messrs. Ali's and bin al Shibh's motions are (a) **GRANTED IN PART**, in that the Commission has reconsidered its prior rulings, but (b) otherwise **DENIED**.

So **ORDERED** this 25th day of April, 2019.

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K. A. PARRELLA  
Colonel, U. S. Marine Corps  
Military Judge

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<sup>26</sup> *In re Al-Nashiri*, 2019 WL 1601994 at \*7-8 ("Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label. And because deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges, jurists must avoid even the appearance of partiality." *Id.* at \*7 (quoting *U.S. v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001))(internal alterations and quotation marks omitted).

<sup>27</sup> *Id.* at \*12 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988)) (internal alteration omitted).

<sup>28</sup> *Id.*