MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ʿATTASH; RAMZI BIN AL SHIBH; ALI ABDUL-AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 595X(WBA)** **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 **27 February 2019**

1. Timeliness: This request is timely filed.

2. Relief Sought: Mr. bin 'Atash moves to transfer AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al., to be heard before Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions, pursuant to R.M.C. 502(c) and 503(b)(1).

3. Burden of Proof: The defense bears the burden of persuasion. R.M.C. 905(c)(1).

4. Facts:

a. On 27 August 2018, Colonel James Pohl, USA, Chief Judge of the Military Commissions, detailed Colonel Keith Parrella, USMC, as Military Judge in the instant case. (AE 001A at ¶ 1). Chief Judge Pohl also announced his retirement as Chief Judge effective 30 September 2018. (AE 001A at ¶ 2).

b. On 17 October 2018, Secretary of Defense James Mattis detailed Colonel Douglas K. Watkins, USA, as Chief Judge of the Military Commissions.

c. On 10 September 2018, Defense Counsel for the Accused questioned Judge Parrella regarding his qualifications to serve as military judge in this case. At the conclusion of the voir dire, Defense Counsel for Messrs. Mohammad, bin 'Atash, Bin al Shibh, and al Baluchi moved

jointly that the Military Judge Parrella recuse himself. In particular, Counsel for Mr. Mohammad argued that based on the information adduced during voir dire that in 2014-2015 Judge Parrella had worked in the Department of Justice National Security Division's Counterterrorism Section ("CTS")—the very entity that has been jointly prosecuting this case since the Accused were arrested—it was reasonable to assert that Judge Parrella "served as a lawyer in the matter in controversy." (Tr. 20570). Accordingly, Judge Parrella would be disqualified to serve as military judge, pursuant to 10 U.S.C. § 948j(c) (2018) and R.M.C 902(b)(2). Counsel for Mr. Mohammad also argued that disqualification is necessary based on his work at CTS and relationship with current and former members of the Prosecution, including Mr. Jeffrey Groharing. Because of those relationships, Judge Parrella's impartiality is reasonably subject to question and/or he possesses a personal bias in favor of the Prosecution. (Tr. at 20570-71). Impartiality or bias would warrant disqualification under R.M.C. 902(a) and 902(b)(1). Counsel for Mr. bin 'Atash adopted the argument of Counsel for Mr. Mohammad, but noted that they intended "brief it" because their team members were in midst of developing factual record and evidence. (Tr. at 20575).

d. On 11 September 2018, from the bench, Judge Parrella denied the oral motions to recuse himself or to abate the proceedings, finding no cause under R.M.C. 902(b). (Tr. at 20601-20603, 20605). Despite working as a Trial Counsel in CTS from 2014-15, and having a long-standing relationship with members of the Prosecution such as Mr. Groharing, Judge Parrella rejected any argument that his "impartiality as a military judge might reasonably be questioned pursuant to R.M.C. 902(a)." (Tr. at 20602). Judge Parrella's conclusion rested on the following: while he worked at CTS, he remained a U.S. Marine, was never technically employed by the Department of Justice, and "did not undergo any type of hiring process or training within the Department of Justice." (Tr. at 20603). Interestingly, Judge Parrella ended with this qualified statement: "to the best of my knowledge, I never worked on any matter involving 9/11 or any other commissions

case." (Tr. at 20604).

e. On 19 October 2018, Counsel for Mr. al Hawsawi filed a motion to recuse Judge Parrella. (AE 595I(MAH)). Mr. bin 'Atash, per RC 3.5.i, was automatically joined to the motion. In the motion, Mr. al Hawsawi argued that Judge Parrella should recuse himself because of his time spent at CTS, long-time relationship with Mr. Groharing, and extensive interaction and continued loyalties to the FBI and CIA. (AE 595I(MAH) at 1-3). Mr. al Hawsawi emphasized that Judge Parrella's evasiveness during voir dire heightened the appearance of bias and that mere assurances from Judge Parrella—that he could be fair and set-aside his loyalties to the very agencies assisting Trial Counsel prosecuting the instant case—could not cleanse that. (AE 595I(MAH) at 3-5).

f. On 19 November 2018, Judge Parrella denied the motion to recuse and denied a defense motion to abate proceedings pending an appeal of that decision. (AE 595O(RUL) at 13). With respect to the allegation that his work at CTS and relationships with Mr. Groharing and others would be a basis for recusal, Judge Parrella agreed that CTS attorneys have been and continue to be members of the Prosecution in the instant case, but parsed that those CTS attorneys "are explicitly assigned to the Department of Defense's Office of the Chief Prosecutor (OCP)." (AE 595O(RUL) at 6), quoting (AE 595J(GOV) at ¶ 5). Without citing any basis for his conclusion, Judge Parrella found that he and the CTS prosecutors assigned to this case worked for two separate government agencies during the Military Judge's time as a prosecutor at CTS (2014-2015)." (AE 595O(RUL) at 6). Judge Parrella also found that nothing about his prior relationship with the intelligence community that would prevent him from exercising his duties as military judge under the Military Commissions Act of 2009 and Rules for Military Commission. (AE 595O(RUL) at 7-8). In misinterpreting R.M.C. 902(a)'s requirement of disqualification when the military judge's impartiality might reasonable be questioned, Judge Parrella noted similar language in 28 U.S.C. 455(a) for federal judges and then quoted Justice Kennedy's concurrence in

Liteky v. United States, 510 U.S. 540, 557 (1994), for the following proposition: disqualification is a high bar and is warranted "only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." (AE 595O(RUL) at 7). In a mere sentence of analysis, Judge Parrella found that Defense Counsel had not demonstrated an aversion, hostility, or disposition warranting recusal and that R.M.C. 902(a)provided no basis for disqualification. (AE 595O(RUL) at 9).

g. On 27 November 27 2018, Mr. al Hawsawi filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings, in the United States Court of Military Commission Review ("CMCR"), styled as In re al Hawsawi, Case No. 18-004, arguing that Judge Parrella should be disqualified. The Government filed its response on 10 December 2018. On 31 January 2019, the CMCR granted the request of Mr. al Baluchi to join the petition filed in In re al Hawsawi.

h. Additionally, Mr. Mohammad has a pending petition for writ of mandamus seeking the disqualification of Judge Parrella before the CMCR, styled as In re Mohammad, Case No. 19-001. On 13 February 2019, the CMCR ordered the Government to respond to the petition filed in In re Mohammad no later than 15 March 2019.

i. On 27 February 2019, Mr. bin 'Atash filed AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al. In the motion, Mr. bin 'Atash gave notice that he intended the motion to be heard not by Judge Parrella, but rather by Chief Judge Watkins or, in the alternative, a military judge detailed by Chief Judge Watkins qualified to hear the Motion, pursuant to R.M.C. 502(c) and 503(b)(1).

5. Argument:

Judge Parrella should be disqualified to serve as military judge in this matter and Judge Parrella should not rule on the motion for his disqualification. The Military Commissions Act of 2009 ("MCA") requires, at a bare minimum, that the "military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under [26 U.S.C. § 826] as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member." 10 U.S.C. § 948j(b) (2018). An otherwise qualified military judge is ineligible to serve on the case "if such person is the accuser or a witness or has acted as investigator or a counsel in the same case." 10 U.S.C. § 948j(c).

The Rules for Military Commission further require the military judge to disqualify himself or herself "in any proceeding in which that military judge's impartiality might reasonable be questioned." R.M.C. 902(a). The Rules delineate specific grounds in which the military judge "shall disqualify himself or herself," including where the military judge: (1) has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; (2) has acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charge or in the same case generally; and (3) has been or will be a witness in the same case, the accuser, has forwarded charges in this case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the Accused. R.M.C. 902(b). Nearly every disqualifying principle listed above applies to Judge Parrella.

a. Judge Parrella is unwilling or unable to review the relevant facts and rule on a motion for disqualification.

Judge Parrella's denial of the oral motion for his recusal on 11 September 2018

demonstrates that Chief Judge Watkins should hear the instant Motion to Disqualify. On 10 September 2018, at the conclusion of voir dire, Defense Counsel for Messrs. Mohammad, bin 'Atash, Bin al Shibh, and al Baluchi moved that Judge Parrella recuse himself under R.M.C. 902. Judge Parrella denied the oral motion with almost no analysis. His ruling did not address how or why R.M.C. 902(a) would not require disqualification. Judge Parrella rested on one finding: despite working at CTS from 2014-15, he remained a U.S. Marine, was never technically employed by the Department of Justice, and "did not undergo any type of hiring process or training within the Department of Justice." (Tr. at 20603). What United States entity paid Judge Parrella for his prosecution work at CTS is not dispositive. Rather, the judge must analyze "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). Judge Parrella failed to engage in such an analysis.

Judge Parrella's subsequent 19 November 2018 denial of Mr. al Hawsawi's motion to recuse further demonstrates why Chief Judge Watkins must hear the instant Motion to Disqualify. In myriad instances during voir dire, Judge Parrella failed to answer questions going to the heart of his qualifications to judge the 9/11 case. In addressing his refusals to answer questions about his qualifications, Judge Parrella tersely labeled those instances as Defense mischaracterizations or inaccurate assessments of his testimony. (AE 595O(RUL) at 2-4). Misinterpreting the relevant legal principles applicable to R.M.C. 902(a)'s disqualification mandate when the military judge's impartiality might reasonable be questioned, Judge Parrella noted the similar language of 28 U.S.C. 455(a) for federal judges. Judge Parrella then quoted Justice Kennedy's concurrence in Liteky for the proposition that such a disqualification is a high bar and is warranted "only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." (AE 595O(RUL) at 7).

The problem with Judge Parrella's single sentence analysis in AE 595O(RUL) is that he misapplied Liteky. Liteky did not apply Section 455(a). Liteky was instead a challenge by the petitioner to the re-assignment of his case to the same trial judge after appellate remand; the petitioner had been unsatisfied with some of the trial judge's comments during the original proceedings and wanted a different judge on remand. See Liteky, 510 U.S. at 554-56. Because the only bases for judicial disqualification in Liteky were previous rulings against the petitioner and comments that the trial judge made during earlier proceedings, the Supreme Court held that disqualification without some extrajudicial basis was inappropriate under Section 455(a). See Liteky, 510 U.S. at 555 (providing Berger v. United States, 255 U.S. 22 (1921), as an example of when the extra-judicial statements of a trial judge required recusal). Here, where the parties adduced extra-judicial evidence and questioned the judge's work history, relationship with members of the prosecution, and duties of loyalty and confidentiality with the government agencies that materially support the prosecution, Liteky does not apply. See Liteky, 510 U.S. at 554-56.

Judge Parrella's cursory dismissal of the facts presented by Mr. al Hawsawi also demonstrates why Chief Judge Watkins should hear the instant Motion to Disqualify. After misapplying Liteky, Judge Parrella engaged in a single sentence of analysis, concluding that "[n]othing about my brief service at [CTS]; 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). Any subsequent motion to disqualify heard by Judge Parrella will be met with a similar terse analysis and misapplication of the law, contrary to requirements of the Constitution of the United States, the MCA of 2009, and international law.

b. Federal practice and due process considerations warrant transfer of the Motion to Disqualify to a disinterested judge.

Rule 902 of Rules for Military Commission tracks the federal statute governing the disqualification of justices, judges, and magistrates: 28 U.S.C. § 455. A review of the federal system demonstrates that the determination of motions to disqualify by the target judges are disfavored. In the Western District of Washington, the local rules specifically provide that motions to disqualify be heard by a judge other than the target judge:

> Whenever a motion to recuse directed at a judge of this court is filed pursuant to 28 U.S.C. § 144 or 28 U.S.C. § 455, the challenged judge will review the motion papers and decide whether to recuse voluntarily. If the challenged judge decides not to voluntarily recuse, he or she will direct the clerk to refer the motion to the chief judge. If the motion is directed at the chief judge, or if the chief judge is unavailable, the clerk shall refer it to the active judge with the highest seniority.

L. Civ. R. W.D. Wash. 3(f). Section 144 of Title 28, which provides a statutory basis to move for disqualification of a judge with an affidavit that establishes the judge has a personal bias or prejudice against the movant or in favor of any adverse party, specifically requires the motion to be directed to a judge other than the target judge. See 28 U.S.C. § 144.

At a minimum, the Rules for Military Commission do not prohibit the Chief Judge from hearing the instant Motion to Disqualify or, in the alternative, detailing another military judge to hear it. A fair reading of Rule 902 allows for the Chief Judge or his designee rule on a motion to disqualify a presiding military judge. Rule 902(d)(1) provides that "the military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified." Because Rule 902(d)(1) does not use the reflexive verb "disqualify himself or herself"—as is used earlier in the Rule—it is a reasonable to interpret that the Secretary of Defense, especially upon consideration of the detailing provisions of R.M.C. 502(c) and 503(b)(1), contemplated that the Chief Judge would detail a different military judge to hear a motion to disqualify.

Academia and jurists have long favored a system that requires disqualification motions be

heard by disinterested judges. The Brennan Center for Justice put it thus:

> [T]hat judges in many jurisdictions decide on their own disqualification and recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of U.S. disqualification law, and for good reason. When significant rights and interests are at stake, the American legal system is generally careful to ensure a neutral decisionmaker. Disqualification motions are not like other procedural motions because they challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner—they speculate on the judge's interests and biases; they may imply unattractive things about him or her. Allowing judges to self-regulate with respect to these motions conflicts with our general commitment to impartiality in adjudication and our specific commitment, as manifested in ABA Canon 3E(1), to objectivity in the disqualification decision. To avoid these problems, states should consider a system similar to the one employed by certain state courts in which the challenged judge must transfer disqualification motions immediately to a colleague chosen by a presiding judge or the chief judge.

James Sample and David Posen, Making Judicial Recusal More Rigorous, 46 Judges' J. 17, 57 (Winter 2007). Leslie Abramson, Professor of Law at the University of Louisville School of Law, after comparing and contrasting the processes and outcomes between states requiring motions to disqualify be heard by the target judge vice a disinterested judge, summarized in two sentences the superiority of the states that direct such motions to a disinterested judge:

> The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.

Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges?, 28 Val. U. L. Rev. 543, 561 (Winter 1994) (emphasis added).

Regardless of whether the Rules for Military Commissions specifically provide for the assignment of a disinterested judge to hear a motion to disqualify, the Fifth and Eighth Amendments to the United States Constitution, and international law, require the transfer of the instant Motion to Disqualify to Chief Judge Watkins. Because Mr. bin 'Atash is entitled a system

devoted to impartial justice, Mr. bin 'Atash is entitled to a process that fairly addresses his Motion to Disqualify Judge Parrella.

Due process entitles Mr. bin 'Atash to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." Marshall v. Jerrico, Inc., 446 U. S. 238, 242 (1980). As the Supreme Court noted in Williams v. Pennsylvania, "[b]ias is easy to attribute to others and difficult to discern in oneself." 136 S. Ct. 1899, 1905 (2016). Accordingly, when determining whether a judge should have been recused from a case, the Supreme Court explains the question is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" Id. at 1905, quoting Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 881 (2009).

The Due Process Clause entitles an accused to an impartial and neutral judge in his criminal case. The requirement of neutrality "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process . . . [and] helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Marshall, 446 U.S. at 242 (internal citations omitted). "At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Id.; see also Williams, 136 S. Ct. at 1909-10 ("An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.").

In this case, assessment by a disinterested judge of factors affecting 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).

Transfer of the instant Motion to Disqualify to a disinterested judge is also required under international law. Common Article 3 of the Geneva Conventions of 1949 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention (Third) Relative to the Treatment of Prisoners of War, art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The right to have a disinterested judge hear a motion to disqualify the presiding judge must be one of those indispensable judicial guarantees. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, Jun. 8, 1977, 1125 U.N.T.S. 3, which provides that any procedure "shall afford the accused before and during his trial all necessary rights and means of defence").

Given Judge Parrella's prior work as a Prosecutor at CTS—the very division of the Department of Justice that has been prosecuting Mr. bin 'Atash since his capture in 2003—and Judge Parrella's self-described friendly association with at least one member of the prosecution team (Mr. Jeffrey Groharing), due process considerations and, at minimum, the goal of giving the appearance of fundamental fairness, require that AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, be transferred to and heard by Chief Judge Watkins. In the alternative, Chief Judge Watkins could detail a military judge other than Judge Parrella to hear the motion, pursuant to R.M.C. 502(c) and 503(b)(1).

As famed political strategist Lee Atwater said, "Perception is reality." Not only must the

determination of AE 595W(WBA) be fair, but it must appear to be fair. See Williams, 136 S. Ct. at 1909-10. The only mechanism by which the public can be assured that Mr. bin 'Atash Motion to Disqualify is given an appropriate determination on the merits is to transfer it away from Judge Parrella to a disinterested judge. To do less violates the the Fifth and Eighth Amendments to the United States Constitution, the MCA of 2009, and international law.

6. Request for Oral Argument: Counsel for Mr. bin 'Atash request oral argument.

7. Request for Witnesses: None.

8. Conference with Opposing Counsel: The Prosecution objects to the transfer of AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, to a neutral and disinterested judge.

9. Attachments:

A. Certificate of Service

10. Signatures:

/s/
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Attachment A

CERTIFICATE OF SERVICE

I certify that on 27 February 2019, I electronically filed, via e-mail, with the Trial Judiciary, and all counsel of record, AE 595X(WBA), 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.

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