

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 595Z</p> <p>NOTICE OF RECEIPT</p> <p>Of Letter Sent To Chief Trial Judge</p> <p>1 March 2019</p>
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On 28 February 2019, Counsel for Mr. bin ‘Attash sent the attached letter and its enclosures via email to the Staff Director of the Office of Military Commissions Trial Judiciary requesting that he forward the letter and its enclosures to the Chief Trial Judge. The Commission notifies the parties of the existence of the letter and its contents and that the letter and its enclosures have been sent to the Chief Trial Judge. This Notice and its attachment will be marked as an appellate exhibit and included within the record of trial.

So **ORDERED** this 1st day of March, 2019.

Attachment:

A. Memorandum for Chief Judge Douglas K. Watkins, USA

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

Attachment A



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

28 February 2019

MEMORANDUM FOR Chief Judge Douglas K. Watkins, USA

FROM: Defense Counsel for Mr. bin 'Atash

SUBJECT: Request 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., from Judge Parrella to Chief Judge Douglas K. Watkins

- Encls: 1. Email from Ms. Denise Lind to Mr. William Montross, dated 25 February 2019 (2 pages).
2. 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. (341 pages).
 3. 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 (14 pages).

Request

Defense Counsel for Mr. Walid bin 'Atash request that 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. be transferred from the docket of Judge Parrella to the Chief Judge or a judge designated to hear the matter. The Chief Judge may hear AE 595W(WBA) or detail a different military judge to hear it. Consideration of AE 595W(WBA) before a neutral and disinterested military judge is necessary for a proper resolution of the motion. Permitting Judge Parrella to rule on AE 595W(WBA) violates the Fifth and Eighth Amendments to the United States Constitution, the Military Commissions Act of 2009, and international law.

When Counsel requested from Trial Judiciary the procedure for filing a motion before the Chief Judge of the Military Commissions, Trial Judiciary directed that Counsel submit a letter to the Chief Judge through Mr. Fred Taylor. (Encl. 1). Accordingly, Counsel submits this Memorandum to the Chief Judge via email, with copies delivered to Mr. Taylor, Counsel for the Accused, and Trial Counsel.

Enclosure 2: AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Judge Parrella

Mr. bin 'Atash moves to disqualify Colonel Keith Parrella as Military Judge in United States v. Mohammad, et al. because his impartiality has been reasonably questioned. Although R.M.C. 902(a) requires the military judge to disqualify himself when his impartiality might reasonably be questioned, Judge Parrella denied a joint oral motion by the Defense for recusal on 11 September 2018 and a similar written motion by the Defense on 19 November 2018.

SUBJECT: Request to Transfer AE 595W(WBA) from Judge Parrella to Chief Judge

Defense Counsel put questions to Judge Parrella bearing on his qualifications during pretrial hearings on 10 September 2019. During voir dire, Judge Parrella testified that he worked as a prosecutor in 2014-15 with the Department of Justice in its National Security Division's Counterterrorism Section ("CTS")—the very entity that has been jointly prosecuting this case with the Department of Defense since the Accused were arrested. Judge Parrella also testified concerning the nature and scope of his relationship with Prosecutor Jeffrey Groharing. 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). Over the course of the next couple months, Counsel obtained additional information further substantiating that Judge Parrella must be disqualified as military judge in this matter, pursuant to R.M.C. 902(a) and 902(b)(1). In particular, a reasonable person, knowing the relevant facts, would perceive the appearance of partiality and would have no confidence that Judge Parrella is the neutral arbiter as required by the Fifth and Eighth Amendments to the United States Constitution, the MCA of 2009, and international law.

Enclosure 3: AE 595X(WBA), Mr. bin 'Atash's Motion to Transfer AE 595W(WBA) from Judge Parrella to Chief Judge Watkins

Because Judge Parrella has demonstrated an inability or unwillingness to recognize the facts that would cause a reasonable person to question his impartiality, your Honor should hear the instant motion for disqualification and ensure that the Rules for Military Commission are enforced. See 10 U.S.C. § 948j(a); R.T.M.C. 17-1(a); R.M.C. 108.

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 targeted 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 to rule on a motion to disqualify a presiding military judge. Rule 902(d)(1) provides that "the military judge shall, upon

SUBJECT: Request to Transfer AE 595W(WBA) from Judge Parrella to Chief Judge.

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.

Due process entitles Mr. bin ‘Atash to a determination on the merits of AE 595W(WBA) by a neutral and disinterested arbiter. See Marshall v. Jerrico, Inc., 446 U. S. 238, 242 (1980). Actual impartial justice and the *appearance* 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 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). Finally, transfer of AE 595W(WBA) 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.

Conclusion

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), public perception of the impartiality of Judge Parrella is now reasonably subject to question. Due process considerations, the MCA of 2009, international law, and, at minimum, the goal of giving the appearance of fundamental fairness, therefore, 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 a disinterested military judge. See Williams, 136 S. Ct. at 1909-10. If your Honor chooses not to hear the motion, as Chief Judge your Honor could detail a military judge, pursuant to R.M.C. 502(c) and 503(b)(1), and transfer the matter to him or her.

Signatures

/s/

CHERYL T. BORMANN
Learned Counsel

/s/

WILLIAM R. MONTROSS, Jr.
Detailed Defense Counsel

/s/

EDWIN A. PERRY
Detailed Defense Counsel

/s/

MATTHEW H. SEEGER
Detailed Defense Counsel