

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 643(WBA)

Mr. bin 'Atash's Motion to Disqualify the
Convening Authority

9 July 2019

1. **Timeliness:** This Motion is timely filed.

2. **Relief Sought:**

Mr. bin 'Atash requests that the Military Judge disqualify Mr. Christian Reismeyer from acting as Convening Authority in this case because of his partiality and the appearance of partiality, his inability to fulfill critical post-trial responsibilities, and his personal interest in this proceeding.

3. **Overview:**

Mr. Reismeyer has served many roles for the Prosecution. He has been their advocate and their consultant. He has been their subject-matter expert. He has mentored an attorney on their team. He has shaped and crafted their legal arguments. He has placed his name and rank on pleadings supporting the Prosecution's position before the United States Court of Appeals for the District of Columbia Circuit. And not one of those actions was problematic until the moment he accepted the position of Convening Authority in the instant case. Then there was a problem. Mr. Reismeyer has conceded that his past actions on behalf of the Prosecution created an appearance of partiality in two cases before the Military Commissions: United States v. al Nashiri and United

States v. Bahlul. He properly recused himself from both those cases; he must do the same in Mr. bin ‘Atash’s case for three reasons.

First, Mr. Reismeier’s continued role as the Convening Authority in this case would cause any objective observer to question his partiality. No reasonable person would feel or believe that an advocate who has consistently and willfully aligned himself for years with the Prosecution would now, suddenly, be wholly impartial and neutral. Mr. Reismeier’s assistance to the Prosecution was substantial. He advised and consulted with the Chief Prosecutor—BG Mark Martins—in “his spaces” on the issue of hostilities/jurisdiction. That is an issue in Mr. bin ‘Atash’s case. He attended a briefing by BG Martins on the issue of whether the offense of conspiracy was properly before the military commissions and subsequently submitted a brief to the D.C. Circuit in support of Chief Prosecutor Martins (and in that brief advanced a position wholly opposite to that of Mr. bin ‘Atash’s interests in this case). He served as a “subject matter expert” and participated in a “moot argument” in the al Nashiri case. He was a mentor, and discussed matters related to the case, for one of three prosecutors in the al Nashiri case. Mr. Reismeier’s concession that he must recuse himself from the al Nashiri case is important because Mr. bin ‘Atash’s name appears no less than nineteen times in Mr. al Nashiri’s Charge Sheet. If recusal was appropriate in al Nashiri, it is equally appropriate in Mr. bin ‘Atash’s case.

Lawrence J. Fox is a renowned ethicist and Lecturer in Law at Yale Law School. Eugene R. Fidell served on active duty as a judge advocate in the United States Coast Guard; he has practiced military law for 50 years. He has also taught courses on Military Commissions and Military Justice at Yale Law School. Together, they have prepared a report, attached to this pleading (Attachment L), on the question whether “[i]n light of the facts set forth in the Convening Authority’s recusal memoranda in Bahlul and al Nashiri, must he recuse himself from all

Commission cases?” They conclude that he must. Mr. Fox and Mr. Fidell identify no less than four pre-appointment activities by Mr. Reismeier that raise a substantial question about his impartiality and independence. As to one of them—Mr. Reismeier’s participation in a moot court argument in the al Nashiri case—Mr. Fox and Mr. Fidell find it “hard to imagine another activity that, by assisting one party to a controversy, is better calculated to destroy any semblance of impartiality downstream.” (Attach. L at 6). They also find that the “Convening Authority’s service as an amicus in support of a government legal position is similarly tainted[.]” and noted that Mr. Reismeier “chose a side (or permitted himself to be drafted, which amounts to the same thing) and contributed to the development of a brief that was filed for the express purpose of supporting the government’s position.” (Attach. L at 7). That these “events took place in different cases from the present case is of no moment” as the “issues addressed in those two matters are just as important to this proceeding as they were to the earlier ones.” (Attach. L at 7).

The second and third reasons rest in the peculiarities of the military commissions system. In the military commissions, the Convening Authority is vested with unique and vast powers. The convening authority—in the first instance—decides which resources the Defense can obtain. R.T.M.C. 2-3(10); R.T.M.C. 2-3(11). The Convening Authority can settle the case. R.T.M.C. 12-1. Upon a finding of guilt and following imposition of sentence, the Convening Authority possesses the sole and absolute discretion to modify both the charges and the sentence, 10 U.S.C. § 950b(c) (2018), as well as order a new trial, 10 U.S.C. § 950b(d)(3). In those cases where the convening authority is vested with such great powers and disqualification is at issue, the courts’ analyses generally fall into two categories. The first recognizes the unique post-trial duties of the convening authority and the focuses on the inability of the convening authority to perform his or her post-trial duties because of an “inelastic attitude.” United States v. Davis, 58 M.J. 100, 102

(C.A.A.F. 2003). The second occurs when the convening authority is also an “accuser” in the case, defined as an individual having a personal or unofficial interest in the proceedings. United States v. Voorhees, 50 M.J. 494, 499 (C.A.A.F. 1999). Both infirmities are present in the instant case.

Should Mr. bin ‘Atash be convicted and sentenced to death, Defense Counsel would seek to have the Convening Authority discharge his post-trial responsibilities “by setting aside a finding of guilty thereto,” 10 U.S.C. § 950b(c)(2)(A), or “disapprove, commute, or suspend the sentence in whole or in part.” 10 U.S.C. § 950b(c)(3)(C). Because this Convening Authority has already publicly decided some of the critical issues in this case—namely the issues of conspiracy and jurisdiction—in favor of the Prosecution, however, Mr. bin ‘Atash’s post-trial remedies would be impermissibly limited. Indeed, Mr. Reismeier’s “inelastic attitude” on critical issues has been memorialized in pleadings before the D.C. Circuit. He cannot discharge his post-trial duties as Convening Authority in this case and must be disqualified.

Likewise, Mr. Reismeier is a “Type Three” Accuser and possesses an interest in this proceeding that disqualifies him as the Convening Authority. R.M.C. 504(c)(1); R.M.C. 601(c); R.M.C. 504(c)(1). A “Type Three” Accuser is an individual who has a personal interest or “who has an interest other than an official interest in the prosecution of the accused.” 10 U.S.C. § 801(9). The United States Court of Appeals for the Armed Forces has clarified that a “personal interest” can “relate to matters affecting the convening authority’s ego, family, and personal property.” Voorhees, 50 M.J. at 499. It is clear that Mr. Reismeier has demonstrated a personal interest in matters in *these* proceedings and not limited his “interest” to issues unique to the al Nashiri and Bahlul cases. In addition, Mr. Reismeier’s career has been marked by his attempted legitimization of the military commissions. Indeed, he takes credit for drafting the Military Commissions Act (“MCA”) of 2009. Mr. bin ‘Atash cannot now plead before this Convening Authority for funding

to demonstrate the exact opposite of what Mr. Reismeier has worked for and expect an impartial determination. It is unlikely that Mr. Reismeier will assist Mr. bin ‘Atash in challenging the legality, legitimacy and constitutionality of the MCA of 2009—the very statute and system Mr. Reismeier is proud to have been tasked with creating. Mr. Reismeier’s personal interest—and his ego—are vested in protecting the very interests Mr. bin ‘Atash is challenging. Mr. Reismeier must be disqualified; his recusal is required.

4. Burden of Proof:

The Defense bears the burden of persuasion and must prove any disputed factual issue necessary for the determination of this Motion by a preponderance of the evidence. R.M.C. 905(c).

5. Facts:

Background

a. Pursuant to the MCA of 2009, the Government has lodged multiple charges against Mr. bin ‘Atash and his four codefendants in this case. The very first charge is conspiracy. (Charge Sheet, United States v. Khalid Shaikh Mohammad, et. al., Referral dated 4 April 2012, at 16-32 (copy provided as Attach. B)). The Government, through Chief Prosecutor BG Martins, sought and obtained authorization from the Convening Authority to prosecute Mr. bin ‘Atash and, if successful, argue for his execution.

b. Also pending before the Military Commissions is United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri. Pursuant to the MCA of 2009, the Government has lodged multiple charges against Mr. al Nashiri. Among the charges is conspiracy. (Charge Sheet, United States v. al Nashiri, Referral dated 28 September 2011, at 5-9 (copy provided as Attach. C)). BG Martins also serves as the Chief Prosecutor in al Nashiri, and also sought and obtained authorization to prosecute Mr. al Nashiri and, if successful, argue for his execution.

c. The Charge Sheet in the matter of United States v. al Nashiri lists the name of “Walid Muhammad Salih Mubarak bin ‘Attash [sic]” or “Khallad” nineteen times. (Attach. C at 5-9). “Khallad” is Mr. bin ‘Atash’s nickname. In United States v. al Nashiri, Mr. bin ‘Atash is an alleged, but yet uncharged, conspirator with Mr. al Nashiri. The Government claims that Mr. bin ‘Atash willfully conspired, agreed, and joined with Mr. al Nashiri to “commit Terrorism and Murder in violation of the Law of War.” (Attach. C at 6).

d. Effective 22 May 2019, Rear Admiral Christian L. Reismeier, USN (Ret) was designated by Acting Secretary of Defense Patrick M. Shanahan to serve as Convening Authority for Military Commissions. (Memorandum of Acting Secretary of Defense Shanahan, dated 23 May 2019 (copy provided as Attach. D)).

Recusal of Mr. Reismeier as Convening Authority in the Matters of United States v. al Nashiri and United States v. Bahlul

e. On 14 June 2019—twenty-three days after his appointment as the Convening Authority—Mr. Reismeier released two one-page Memoranda for the Secretary of Defense; the subjects were his immediate recusal as Convening Authority from two cases before the Commission: United States v. al Nashiri and United States v. Bahlul. (Memorandum of Convening Authority Reismeier, dated 14 June 2019 (copies provided as Attach. E (al Nashiri) and F (Bahlul)).

f. Defense Counsel for Mr. bin ‘Atash have neither been provided information regarding the nomination and selection process for the appointment of Mr. Reismeier in the first instance nor information on what or who precipitated the recusal memoranda issued by Mr. Reismeier on 14 June 2019.

g. Mr. Reismeier has not recused himself from Mr. bin ‘Atash’s case.

Grounds for Recusal as Detailed by Convening Authority Reismeier

h. In the one-page Memorandum providing notice of recusal from the matter of United States v. al Nashiri, the Convening Authority disclosed that the basis for his recusal rested “on my previous contacts with the prosecution team in United States v. al Nashiri.” (Attach. E at 1). The Convening Authority noted that:

I provided assistance on certain legal issues on two separate occasions in 2014 and 2016. The prosecution sought my opinion as a subject matter expert in military justice. Additionally, in my role as mentor, I had several conversations with a prior member of the prosecution team concerning general aspects of the case.

(Attach. E at 1). The Convening Authority expressed his opinion that “these conversations alone would not require recusal since they did not address any substantive issues” but acknowledged that “considering these additional contacts, along with my advice on the aforementioned legal issues . . . may create an appearance of partiality and further necessitates recusal.” (Attach. E at 1).

i. Attached to each of the one-page Memorandum for the Secretary of Defense in al Nashiri and Bahlul was a three and one-half-page “Memorandum for File.” (Attach. E at 2-5; Attach. F at 2-5). The “Memorandum for File” is identical in each recusal memorandum and provides some additional detail underlying the decisions to recuse, including the disclosure of communications with BG Martins directly implicating “substantive issues” before the Military Commission in this case.

j. Specifically, the Convening Authority revealed that he “had contact with General Martins at OMC – Prosecution sometime in 2014 regarding a jurisdictional matter that arose in United States v. al Nashiri. I knew General Martins from the DPTF [Detention Policy Task Force], where we served together in 2009. Although I had no role in military commissions in 2014, he [BG Martins] contacted me to discuss the timing of offering proof of jurisdiction, as there was an issue

regarding whether that proof was to be offered pretrial or during the case-in-chief.” (Attach. E at 4).

k. In the Memorandum to File, Mr. Reismeier also disclosed additional interactions with the Prosecution beyond assisting with “a jurisdictional matter that arose in United States v. al Nashiri.”

Mr. Reismeier revealed that he:

was also asked to sign onto an amicus brief in November 2015, after I had retired from the Navy, which I believe was sponsored by the Washington Legal Foundation, in Mr. al Bahlul’s case before the D.C. Circuit. The issue was Congressional authority in defining conspiracy as a violation of the law of war. General Martins also contacted me about the issue, and I attended a briefing regarding the matter in [BG Martins’] spaces.

(Attach. E at 4). Mr. Reismeier decided to join the group of Amici Curiae supporting the position of the government after attending a “briefing” by the very same Chief Prosecutor who is prosecuting Mr. bin ‘Atash on very similar charges. (Attach. E at 4).

1. The “amicus brief” referenced by the Convening Authority was signed and filed in Bahlul v. United States, No. 11-1324, on 2 November 2015, and provided as Attachment G to this Motion. The “Brief for the United States”—which the “amicus brief” was filed in support of—was also submitted on 2 November 2015. Listed as an attorney on the front page of the “Brief for the United States” is “MARK S. MARTINS, Brigadier General, Chief Prosecutor.” (Brief for the United States, Bahlul v. United States, No. 11-1324, dated 2 November 2015). Listed on the front page of the “amicus brief” supporting BG Martins’ position is the name, in bold font, of the current Convening Authority: “**CHRISTIAN L. REISMEIER, Rear Adm. (Lower Half), JAGC, U.S. Navy (Ret.)**.” (Attach. G at 1).

m. In the amicus brief supporting the prosecution’s brief, the Convening Authority is identified as:

Rear Admiral (Lower Half) Christian L. Reismeier, JAGC, U.S. Navy (Retired), served for 31 years on active duty, five as a Naval Intelligence officer and 26 as a judge advocate. He retired in September 2015 after serving as the Assistant Judge Advocate General for the Navy from 2014 to 2015, and Chief Judge, Department of the Navy from 2012-2015. His previous tours included assignments as a trial judge, Director of the Navy's Criminal Law Division, Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, and Executive Secretary of the President's Detention Policy Task Force.

(Attach. G at 3).

n. In the 2015 pleading filed to support the prosecution, Mr. Reismeier and his fellow amici advocate for a position that is diametrically opposed to the legal interests of Mr. bin 'Atash. Indeed, on behalf of prosecution, including BG Martins, Mr. Reismeier claims that Congress' "war powers" ought to be extended to bar the Courts of the United States of America from even questioning whether subject matter jurisdiction is properly invoked in the Military Commissions.

(Attach. G at 7).

o. In addition to his consultancy with BG Martins regarding "a jurisdictional matter that arose in United States v. al Nashiri" and his advocacy of the Prosecution's position on conspiracy as a proper charge before the Military Commissions, Mr. Reismeier's Memorandum to File summarizes yet more assistance provided to the Office of the Chief Prosecutor. Mr. Reismeier participated in additional consultancies with Chief Prosecutor Martins: "Since retiring in 2015, I was contacted by General Martins again in 2016 and asked to sit on a moot involving Mr. al Nashiri. The issue involved the scope of evidence admissible on the issue of damage allegedly caused by explosions in the harbor. I did in fact participate in that moot argument as a subject matter expert." (Attach. E at 4).

p. In his Memorandum to File, Mr. Reismeier concedes that his assistance to Chief Prosecutor Martins went further than the aforementioned consultation with prosecutors on issues of Military Commission jurisdiction, advocacy of Office of the Chief Prosecutor legal positions on the charge

of conspiracy before the D.C. Circuit, work with BG Martins in “his spaces” on the issue of conspiracy as a law of war crime, and participation in “moot arguments.” In the Memorandum to File, Mr. Reismeier summarizes the circumstances of a “dinner [BG Martins] hosted at a restaurant in late 2009 or early 2010 when he was promoted to Brigadier General.” At that dinner, Mr. Reismeier socialized with BG Martins and BG Martins’ wife. (Attach. E at 4).

q. The Convening Authority’s interaction with the Prosecution has not been not limited to assisting and advocating for only BG Martins. Mr. Reismeier served as a mentor and consultant to one of Mr. al Nashiri’s prosecutors. That prosecutor worked for BG Martins. The Convening authority disclosed:

I did have case specific conversations with regard to Mr. al Nashiri when I left the Task Force. Back in the 2010-2011 time frame, one of the prosecutors was a mentee, and from time to time she would call me to discuss her professional work. Because she was assigned to a billet outside of a traditional Navy duty station, with limited contact with her parent community (the Navy JAG Corps), I maintained contact with her to keep her directly involved with the Navy JAGC. I was one of her mentors, and I took a strong professional interest in her development as an office and attorney. While most of the talk addressed professional development, leadership and management, she would share things colleagues would normally share, such as information about where she was going and what she was doing. Included in those discussions were references she made to travelling to various places and interviewing witnesses/family members/alleged victims. My impression was that she travelled extensively to interview witnesses, and I know that she expressed her admiration for some of the potential witnesses/alleged victims, but I have no idea who specifically she was talking about, even if she did mention it to me. At some point, she also sent me a copy of the charge sheet, so that I could see the complexity of what she was working on. She is no longer on the case, and has not been for a few years.

(Attach. E at 3-4). In 2011, BG Martins had detailed three attorneys to the al Nashiri case: himself, Anthony Mattivi (a civilian attorney from the Department of Justice), and Andrea Lockhart (a Navy Commander). (United States v. al Nashiri, Trial Counsel Detailing Memorandum, AE 004, dated 5 October 2011 (copy provided as Attach. K)). As the only female member of the

al Nashiri prosecution team, and based on information and belief, Andrea Lockhart was the individual that was mentored by Mr. Reismeier.

r. Mr. Reismeier mentored CDR Lockhart on a case—a case he would later recuse himself from—that charges: “NASHIRI, bin Laden and Khallad ultimately prepared al Qaeda’s boat operation,” (Attach. C at 6); that “at the direction of bin Laden, NASHIRI and Khallad travelled to Yemen, at the southern tip of the Arabian Peninsula, to prepare for the boats operation,” (Attach. C at 6); that “[a]s NASHIRI and Khallad collected information, they and bin Laden began to focus their attention on mounting an attack in Aden Harbor,” (Attach. C at 6-7); that “[i]n approximately the summer of 1998, in response to direction by bin Laden, NASHIRI and Khallad assisted in another al Qaeda plot” (Attach. C at 7); that “[i]n approximately early 1999, at the direction of bin Laden, NASHIRI and Khallad continued preparing for the boats operation, including (but not limited to) obtaining and storing explosives for use in the boats operation” (Attach. C at 7); that “[d]uring late 1999 and early 2000, NASHIRI spoke with Khallad on the phone several times to relay information about the boats operation, and on at least one occasion Khallad relayed this information to bin Laden” (Attach. C at 7); that “[d]uring approximately the summer of 2000, NASHIRI informed Khallad that the boats operation was nearly ready and that bin Laden should send the suicide bombers” (Attach. C at 8); that “[i]n or about September 2000, NASHIRI informed Khallad that the boats operation was ready to execute and further informed Khallad that he had already chosen the suicide bombers for the attack” (Attach. C at 8); that “[i]n or about September 2000, NASHIRI spoke again with Khallad, who relayed to NASHIRI a directive from bin Laden that Nashiri leave Yemen before the attack and return to Afghanistan” (Attach. C at 8); and that “in approximately September or October 2000, prior to the attack, NASHIRI left Yemen,

as instructed by bin Laden [and] NASHIRI met Khallad, and the two travelled together to Qandahar, Afghanistan, to meet with bin Laden.” (Attach. C at 9).

s. Mr. Reismeier was actively involved in creating the MCA of 2009. Mr. Reismeier, with assistance from attorneys from the Departments of Defense and Justice, claimed responsibility for developing procedural and evidentiary rules for military commissions practice under the earlier MCA of 2006. (Attach. E at 2). The MCA of 2006 was invalidated. As a result, Mr. Reismeier and another attorney from the Office of the Counsel for the President were “personally tasked with rewriting the MCA entirely, working from the [MCA of 2006] as a baseline.” (Attach. E at 2). Following implementation of the MCA of 2009, Mr. Reismeier “was involved in the interagency rewrite of both the rules of procedure and evidence for the military commissions” (Attach. E at 2).

t. The Prosecution has not disclosed its prior interactions with Mr. Reismeier.

The Convening Authority Advised, Counseled, and Assisted the Prosecution on Matters and Issues that Remain Open and Pending Before the Military Commission

u. The Convening Authority advised and counseled BG Martins “sometime in 2014 regarding a jurisdictional matter that arose in United States v. al Nashiri” and “discuss[ed] the timing of offering proof of jurisdiction, as there was an issue regarding whether that proof was to be offered pretrial or during the case-in-chief.” (Attach. E at 3). In the instant case where Mr. bin ‘Atash stands capitally charge, the question of jurisdiction—whether the offense was committed “in the context of and associated with hostilities,” as defined by 10 U.S.C. C. § 948p—is a matter disputed by Mr. bin ‘Atash. It remains an open question.

v. As recently as 4 April 2019, the Military Judge presiding over Mr. bin ‘Atash’s capital case recognized that “existence of hostilities significantly underlay [a discovery matter] and a number of other pending motions” and therefore “directed briefing and argument on several questions

regarding 10 U.S.C. § 948p's requirement that "[a]n offense . . . [be tried] by military commission . . . only if . . . committed in the context of and associated with hostilities." (AE 617K(RUL) at 2). Indeed, critical to the 2019 inquiry is the nature and scope of evidence that could be presented before any panel in the case-in-chief, including whether the Military Judge could and should "determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter, while reserving the question of nexus to hostilities to the panel." (AE 617K(RUL) at 4). On 31 May 2019, the Military Judge "decline[d] at this time to further consider resolution of existence of hostilities for purposes of 10 U.S.C. § 950p(c) as a matter of law," but notified all parties that "[s]hould the Government wish to again raise the possibility of the Commission taking such judicial notice regarding the existence of hostilities, it is free to renew its request closer to trial." (AE 617K(RUL) at 5, n.27).

w. Mr. Reismeier submitted an amicus brief advocating that conspiracy charges were properly before the Military Commissions and that federal courts must have little or no supervisory role in determining the constitutionality and legality of that decision by Congress. Mr. bin 'Atash continues to challenge the charges of conspiracy prosecuted against him by Chief Prosecutor BG Martins in the above captioned case. Mr. bin 'Atash's asserts and will continue to assert that the Courts of the United States of America have a role and function in this process. This issue has not yet been resolved in the instant case. (AE 490F(AAA)).

x. Mr. Reismeier was "personally tasked with rewriting the MCA entirely, working from the [MCA of 2006] as a baseline." (Attach. E at 2). He crafted the rules of procedure and evidence for the military commissions. Mr. bin 'Atash has challenged and continues to challenge numerous provisions of the MCA of 2009 as unconstitutional and/or violative of internationally recognized principles of the Law of War. See, e.g., AE 104 (Defense Motion to Dismiss the Charges Because

the Military Commissions Act of 2009 Exceeds Congress' Power Under the Define and Punish Clause); AE 091 (Motion to Dismiss Because the Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants); AE 106 (Defense Motion to Dismiss the Charges Because the Military Commissions Act of 2009 Violates the Due Process Clause).

Denial of Discovery

y. On 19 June 2019, Defense Counsel submitted requests for discovery styled as DR-394-WBA (copy provided as Attach. H) and DR-395-WBA (copy provided as Attach. I). The requests sought information regarding the recusal of Mr. Reismeier from the al Nashiri and Bahlul cases (Attach. H at 2), as well as communications, documentation, and records related to: (1) the Convening Authority's 2014 contact and/or consultation with BG Martins "regarding a jurisdictional matter that arose in United States v. al Nashiri"; (2) the Prosecutor and Convening Authority's work and cooperation with the 2015 Amicus Brief filed in support of the Prosecution in the Bahlul case before the D.C. Circuit; and (3) the "mooting" of the OCP's argument in United States v. al Nashiri where BG Martin requested the assistance and advice of Mr. Reismeier. (Attach. I at 2).

z. On June 2019, the Prosecution declined to produce any discovery. (Attach. J). The Prosecution's refusal to provide discovery rests on its unsupported claims that Mr. Reismeier's recusal memoranda of 14 June involved "limited and enumerated contacts with prosecutors" regarding two cases "and no others" as well as the "stated lack of personal bias," "his confidence in his ability to remain impartial," "his lack of personal interest in the outcome of any litigation" and his "clear compliance with the R.M.C. 601(c) prohibition on accusers serving as convening authorities. (Attach. J at 2).

Joint Report of Lawrence J. Fox and Eugene R. Fidell

aa. Since 2009, Lawrence J. Fox has been the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School, teaching ethics and professional responsibility. (Joint Report of Lawrence J. Fox and Eugene R. Fidell, dated 4 July 2019, at 1 (copy provided as Attach. L)). He also serves as the Supervising Lawyer of the Ethic Bureau at Yale, a clinic that provides ethics advice, counseling, and support to those who cannot otherwise afford those services. (Attach. L at 1). Mr. Fox has “regularly been consulted and has testified about the ethics and professional responsibilities of lawyers and judges in proceedings in state and federal courts throughout the United States.” (Attach. L at 2). Eugene R. Fidell served on active duty as a judge advocate in the United States Coast Guard and has practiced military law for 50 years. (Attach. L at 2). Mr. Fidell co-founded the National Institute of Military Justice, of which he is president emeritus, and has taught courses on Military Commissions and Military Justice at Yale Law School where he is currently the Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar. (Attach. L at 2). Mr. Fox and Mr. Fidell prepared a joint report, dated 4 July 2019, that addressed the question whether “[i]n light of the facts set forth in the Convening Authority’s recusal memoranda in Bahlul and al Nashiri, must he recuse himself from all Commission cases?” (Attach. L at 3).

bb. In their learned opinion, “Rear Admiral Reismeier cannot serve as Convening Authority for any commission case” and concluded that because a “number of the important functions that [the Convening Authority] will be required to perform are judicial,” that his “prior activities raise a substantial question about his impartiality and independence.” (Attach. L at 3). Mr. Fox and Mr. Fidell identify four pre-appointment activities that are disqualifying and require the Convening Authority’s immediate recusal. First, Mr. Fox and Mr. Fidell determine that participation in the

moot argument—designed to “prepare one side” by “learn[ing] the innermost concerns of the side conducting the moot court and then helping that side to shape its responses to any weaknesses”—requires recusal. (Attach. L at 6). “In fact, it is hard to imagine another activity that, by assisting one party to a controversy, is better calculated to destroy any semblance of impartiality downstream.” (Attach. L at 6). Mr. Fox and Mr. Fidell also conclude that “[t]he situation involving the Convening Authority’s service as an amicus in support of a government legal position is similarly tainted and created a conflict of interest. Here again, Admiral Reismeier chose a side (or permitted himself to be drafted, which amounts to the same thing) and contributed to the development of a brief that was filed for the express purpose of supporting the government’s position.” (Attach. L at 7). Mr. Fox and Mr. Fidell deem it “immaterial” how involved Mr. Reismeier was in the actual development of the brief—whether he drafted, edited, or objected to any part of it—“so long as he authorized the lawyers who filed it to use his name.” (Attach. L at 7). Mr. Fox and Mr. Fidell also note that the “fact that these events took place in different cases from the present case is of no moment.” (Attach. L at 7). They explain that the “issues addressed in those two matters are just as important to this proceeding as they were to the earlier ones. The issues were and remain central to the work of the military commissions and Admiral Reismeier chose to give aid to the prosecution side in what Congress intended to be an adversary system.” (Attach. L at 7).

cc. The third ground for recusal concerns the mentoring of the al Nashiri prosecution member, believed to be CDR Lockhart, by then-Admiral Reismeier. Mr. Fox and Mr. Fidell do not discount the importance of mentoring—indeed, characterizing it as an “appropriate and desirable practice.” (Attach. L at 8). However, where Mr. Reismeier’s “interaction with one of the al Nashiri prosecutors included conversations about the junior officer’s trial preparation for a commission

case, including her interactions with witnesses and victims” and where “the charge sheet in that case mentions Mr. bin ‘Atash many times, it is clear that those two cases are intimately related. They cannot be treated as distinct for recusal purposes.” (Attach. L at 8). Finally, Mr. Fox and Mr. Fidell recognize Mr. Reismeier’s “earlier participation in a range of official activities relating to the military commissions, including most notably his extensive work drafting military commission legislation[.]” (Attach. L at 8). However, in his new role as the Convening Authority, “fundamental issues relating to the commissions’ constitutionality and conformity with international law will come before [Mr. Reismeier].” (Attach. L at 8). “Given the investment of time, energy and thought Admiral Reismeier made in connection with what became the Military Commissions Act before assuming his present position, an objective observer would reasonably harbor a substantial doubt as to whether, in exercising his various functions, he ‘had a horse in the race.’” (Attach. L at 8). Recusal is, therefore, again, required.

6. Law and Argument:

Mr. Reismeier has been an advocate, consultant, mentor, adviser, and subject-matter expert for the Prosecution. He has consulted with BG Martins in “his spaces,” signed briefs in support of the prosecution’s legal positions, “s[a]t on a moot” in the al Nashiri case at the behest of BG Martins, mentored one of three members of the al Nashiri prosecution team, and dined, socialized, and celebrated with BG Martins and his family. He is now the Convening Authority on the instant case.

The role of Convening Authority’s in the 9/11 case litigation is substantial. The position has obvious administrative components: employing the Commission’s reporters and interpreter, 10 U.S.C. § 948l(a), or preparing the transcripts of the proceedings, 10 U.S.C. § 948i(c), among others. But it is also much more. The Convening Authority wields great authority far beyond

issuing paychecks and preparing papers, and much of that authority is of a quasi-judicial or judicial nature. Moreover, that power and responsibility vests well before any trial commences.

In the first instance, the Convening Authority decides which resources—including expert assistance—are “relevant and necessary” to the Defense. R.T.M.C. 2-3(10) (Convening Authority may “[o]rder that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the Convening Authority for a fair trial”); R.T.M.C. 2-3(11) (Convening Authority shall “[r]eview requests from the prosecution and the defense for experts and determine whether the experts sought are relevant and necessary”). If Defense Counsel seek an expert on the question whether conspiracy may properly be charged and tried in a military commission, Defense Counsel must seek funding first from Convening Authority Reismeier—the same Convening Authority that has already taken a position contrary to Mr. bin ‘Atash. If Defense Counsel seek an expert to assist in a challenge to the jurisdiction of the military commission, Defense Counsel must first seek funding from Convening Authority Reismeier—the same Convening Authority that has previously conferenced and consulted with Mr. bin ‘Atash’s Chief Prosecutor on the question of jurisdiction.

Of course, and importantly, Convening Authority Reismeier also possesses the singular power to resolve this case through a negotiated settlement. R.T.M.C. 12-1 (“Unless such authority is withheld by a superior competent authority, the Convening Authority is authorized to enter into or reject offers to enter into Pretrial Agreements (PTAs) with the accused. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the Convening Authority who referred the case to trial.”); R.M.C. 705 (same). Should Defense Counsel seek to obtain a settlement, Defense Counsel must pursue negotiations with Convening Authority Reismeier—the same person who served as a mentor to a member of the Prosecution team, dined

and celebrated with the Chief Prosecutor BG Martins, and was repeatedly consulted by the same Prosecution as a trusted advisor.

In the Military Commissions, the Convening Authority's power does not diminish after trial is completed and the defendant is sentenced. Instead, the Convening Authority has sole and absolute discretion to modify both the charges and the sentence. 10 U.S.C. § 950b(c). With regard to the findings of guilt, the Convening Authority "may, in the sole discretion of the convening authority . . . (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge." 10 U.S.C. § 950b(c)(2)(A), (B). Simply put, the Convening Authority, after a panel's finding of guilt, can wholly vacate findings of guilt and/or reduce the severity of the findings. In terms of sentencing, the Convening Authority possesses comparable power. The Convening Authority, "after consideration of any matter submitted by the accused," may "in the sole discretion of the convening authority, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission." 10 U.S.C. § 950b(c)(3)(C).

Not only does the Convening Authority sit with powers that would be possessed by a trial judge—the ability to dismiss charges and reduce sentence—but a Military Commissions Convening Authority also possesses the powers of a reviewing appellate court. The Convening Authority, after completion of the trial and imposition of sentence, can order a proceeding in revision or a complete rehearing. 10 U.S.C. § 950b(d)(3). The power to order a rehearing is substantial:

A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does not order a rehearing, the convening authority shall dismiss the charges. A

rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence.

10 U.S.C. § 950b(d)(3).

The Convening Authority who wields tremendous power in Mr. bin ‘Atash’s case is the same person who was consulted by the Mr. bin ‘Atash’s Chief Prosecutor—namely, BG Martins—about the issue of hostilities/jurisdiction (an issue in the present case), who was sought by the Prosecution and consented to serving as a “subject matter expert” on a “moot argument,” who attended a briefing by BG Martins on the issue whether conspiracy was a charge properly before the military commission, who submitted a brief to the D.C. Circuit to support BG Martin’s position that conspiracy is properly charged (a position completely opposite from that of Defense Counsel in the present case), who served as a mentor for a prosecutor involved in the al Nashiri case, and who celebrated with BG Martins and his family the Prosecutor’s promotion to Brigadier General. (Attach. E at 2-5). While recognizing that it was improper for him to serve as Convening Authority in the al Nashiri and Bahlul cases, he nevertheless remains on the Mr. bin ‘Atash’s case. There is no viable distinction. For the following reasons, the Military Judge should order his recusal.

A. Mr. Reismeier’s Partiality and Appearance of Partiality Render Him Unfit to Serve as Convening Authority in this Matter.

In a letter dated 14 June 2019, the Convening Authority disclosed to Defense Counsel, for the first time, a series of “contacts with the prosecution team in United States v. al Nashiri.” (Attach E at 1). The contacts were substantial: Mr. Reismeier provided assistance and consultation to the Prosecution “in 2014 regarding a jurisdictional matter that arose in United States v. al Nashiri,” including “whether that proof [of jurisdiction] was to be offered pretrial or during the case-in-chief.” (Attach. E at 4). Mr. Reismeier “was contacted by General Martins again in 2016

and asked to sit on a moot involving Mr. al Nashiri. The issue involved the scope of evidence admissible on the issue of damage allegedly caused by explosions in the harbor.” (Attach. E at 4). Mr. Reismeier “did in fact participate in that moot argument as a subject matter expert.” (Attach. E at 4). Mr. Reismeier also had “case specific conversations with regard to Mr. al Nashiri” with “one of the prosecutors [who] was a mentee.” (Attach. E at 3). Among those conversations “were things colleagues would normally share, such as information about where she was going and what she was doing” and included “references she made to traveling to various places and interviewing witnesses/family members/alleged victims.” (Attach. E at 4). Mr. Reismeier recalled that his mentee “expressed her admiration for some of the potential witnesses/alleged victims.” (Attach. E at 4). Finally, “[a]t some point, she also sent me a copy of the charge sheet, so that I could see the complexity of what she was working on.” (Attach. E at 4).

Mr. Reismeier claims that he does “not have a personal interest in the outcome of [Mr. al Nashiri’s] case” and professes to “believe that [he is] impartial.” (Attach. E at 1). Nevertheless, Mr. Reismeier concedes that after “considering these additional contacts, along with [his] advice on the aforementioned legal issues, [he found] that it may create an appearance of partiality and further necessitates recusal.” (Attach. E at 1). Recusal should not have been a tough decision for the Convening Authority; any objective observer would have questioned his partiality.

In light of the foregoing, the failure of the Convening Authority to recuse himself from Mr. bin ‘Atash’s case is troubling. If there exists an appearance of partiality as to Mr. al Nashiri’s case—a conclusion rightly reached by the Convening Authority—then the same appearance of partiality exists as to Mr. bin ‘Atash. The basis for that conclusion is simple: Mr. bin ‘Atash is a named co-conspirator of Mr. al Nashiri and his name is all over Mr. al Nashiri’s Charge Sheet. (Attach. C). In Mr. al Nashiri’s Charge Sheet, the name “Walid Muhammad Salih Mubarak bin

‘Atash [sic]’ or “Khallad” appears at least nineteen times. (Attach. C at 5-9). Indeed, the three most prominent individuals in the al Nashiri charge sheet are Mr. al Nashiri himself, Mr. bin ‘Atash, and Usama bin Laden.

As set forth in the fact section above, in the al Nashiri charges prepared by Chief Prosecutor Martins and referred by Mr. Reismeier’s predecessor, Mr. bin ‘Atash’s enumerated acts are more numerous than in the 9/11 case. In the Charge Sheet provided to Mr. Reismeier by his mentee, it is alleged that: “NASHIRI, bin Laden and Khallad ultimately prepared al Qaeda’s boat operation,” (Attach. C at 6); that “at the direction of bin Laden, NASHIRI and Khallad travelled to Yemen, at the southern tip of the Arabian Peninsula, to prepare for the boats operation,” (Attach. C at 6); and that “[a]s NASHIRI and Khallad collected information, they and bin Laden began to focus their attention on mounting an attack in Aden Harbor,” (Attach. C at 6-7). There are many more allegations involving Mr. bin ‘Atash: BG Martins claims, and the previous Convening Authority referred charges, that “[i]n approximately the summer of 1998, in response to direction by bin Laden, NASHIRI and Khallad assisted in another al Qaeda plot” (Attach. C at 7); that “[i]n approximately early 1999, at the direction of bin Laden, NASHIRI and Khallad continued preparing for the boats operation, including (but not limited to) obtaining and storing explosives for use in the boats operation” (Attach. C at 7); that “[d]uring late 1999 and early 2000, NASHIRI spoke with Khallad on the phone several times to relay information about the boats operation, and on at least one occasion Khallad relayed this information to bin Laden” (Attach. C at 7); that “[d]uring approximately the summer of 2000, NASHIRI informed Khallad that the boats operation was nearly ready and that bin Laden should send the suicide bombers” (Attach. C at 8); that “[i]n or about September 2000, NASHIRI informed Khallad that the boats operation was ready to execute and further informed Khallad that he had already chosen the suicide bombers for the

attack” (Attach. C at 8); that “[i]n or about September 2000, NASHIRI spoke again with Khallad, who relayed to NASHIRI a directive from bin Laden that Nashiri leave Yemen before the attack and return to Afghanistan” (Attach. C at 8); and that “in approximately September or October 2000, prior to the attack, NASHIRI left Yemen, as instructed by bin Laden [and] NASHIRI met Khallad, and the two travelled together to Qandahar, Afghanistan, to meet with bin Laden.” (Attach. C at 9). Recusal in the *al Nashiri* case because of the appearance of partiality requires similar recusal in Mr. bin ‘Atash’s case.

Mr. Fox and Mr. Fidell agree. Indeed, regarding the mentoring of Commander Lockhart by then-Admiral Reismeier, Mr. Fox and Mr. Fidell note that mentoring is “an appropriate and desirable practice.” (Attach L. at 8). The mentoring now becomes a problem only because the mentee was Commander Lockhart—the only other detailed military officer on the al Nashiri case besides BG Martins—and involved communications regarding her “interactions with witnesses and victims” in a case where the same charge sheet “mentions Mr. bin ‘Atash many times.” (Attach. L at 8). Mr. Fox and Mr. Fidell conclude that a simple review of the al Nashiri Charge Sheet makes it “clear that those two cases are intimately related” and that the al Nashiri and bin ‘Atash cases “cannot be treated as distinct for recusal purposes.” (Attach. L at 8). If recusal was proper in the al Nashiri case (it was), it is also proper in the instant case.

However, even if Mr. bin ‘Atash were not an alleged coconspirator of Mr. al Nashiri—indeed, even if his name appeared nowhere in the Charge Sheet in the al Nashiri case—Mr. Reismeier’s connections with and assistance to Mr. bin ‘Atash’s prosecutors nevertheless demonstrates partiality and raises an appearance of partiality in the eyes of any objective observer. Indeed, the same “appearance of partiality” that “necessitate[d] recusal” in the al Nashiri and Bahlul cases is present here. Before accepting his current position as the Convening Authority,

Mr. Reismeier, in his personal capacity—not as part of any job or official position—placed his name on a brief before the United States Court of Appeals for the District of Columbia Circuit on behalf of Mr. bin ‘Atash’s Chief Prosecutor on an issue germane to and opposed to the interests of Mr. bin ‘Atash. Mr. Reismeier argued not only that conspiracy is a charge properly prosecuted before the military commission, but that United States courts should have no role in determining the legality of that decision. (Attach. G at 4, 5, 7, 9, 10, 26, 31.) That is a far-reaching position—it is a position that would affect each and every case before the Military Commissions. It is a shocking position, and it is a position that Mr. Reismeier advocated on behalf of the very same Prosecutor seeking to execute Mr. bin ‘Atash.

Before Mr. Reismeier submitted his Amicus Brief, he consulted with the Chief Prosecutor. In the Memorandum to File, where Mr. Reismeier summarizes his participation in the amicus brief, he notes: “The issue was Congressional authority in defining conspiracy as a violation of the law of war. General Martins also contacted me about the issue, and I attended a briefing regarding the matter in his spaces. After reading the brief, I agreed to join the brief, but I did not provide any edits.” (Attach. I at 4). Mr. Reismeier’s attempt to minimize his involvement by claims that he “agreed to join the brief,” but “did not provide any edits” is evasive and ineffective—Lawrence Fox and Eugene Fidell view that answer as similar to former President Clinton’s openly-mocked non-denial denial to smoking marijuana: “I didn’t inhale.” (Attach L. at 7). Moreover, Mr. Fox and Mr. Fidell assert that “[a]ctions such as . . . joining in an amicus brief where the issues at stake are generic and apply to numerous proceedings in the same jurisdiction raise significant concerns of the appearance of partiality and prejudgment.” (Attach. L at 12).

Yet, Mr. Reismeier’s coordination of joint advocacy before the D.C. Circuit in the “spaces” of the Chief Prosecutor was not the only assistance he provided the Prosecution. Mr. Reismeier

also accepted BG Martins' invitation to discuss "a jurisdictional matter." (Attach E at 4). Much like the issue of conspiracy, that is a matter that remains hotly-debated in Mr. bin 'Atash's case. Mr. Reismeier also participated in a moot argument—again at the invitation of BG Martins—to assist in the crafting of a prosecutorial argument. (Attach. E at 4). Mr. Fox and Mr. Fidell describe in detail the nature and purpose of moot arguments. (Attach. L at 9-11). They are invaluable for developing, on behalf of one party or side to the argument—a "silver bullet" answer to be used in future proceedings. (Attach. L at 9 (quoting Harold Hongju Koh, Ten Lessons About Appellate Oral Argument, 71 Conn. B.J. 218, 220-21 (1997)). Again, moot arguments are "an accepted part of preparation for real-life legal proceedings." (Attach. L at 10). But when then-Admiral (Ret.) Reismeier chose to accept the position of Convening Authority, his prior actions became not only relevant, but wholly problematic "because he was aiding one side to a controversy." (Attach. L at 11).

In sum whether or not the moot court judge and the arguing counsel have an agreement as to confidentiality, and whether or not the moot court judge does nothing more than read the briefs and ask a few questions, participation in a moot court becomes highly problematic when, as here, he surfaces later on in a capacity that involves the exercise of quasi-judicial functions. Either in substance or appearance, such a lawyer has become a member of the team of lawyers involved in being mooted. That the end-state was not predicted by either the future official or those he assisted by serving as a moot court judge is immaterial; the result is intolerable because it would cause an objective disinterested observer to harbor a significant doubt as to the later-appointment official's impartiality.

(Attach. L at 11).

Of course, Mr. Reismeier's actions must be viewed in the cumulative. In addition to submitting the amicus brief and participating in discussions with the Prosecution on matters of jurisdiction and serving as a subject-matter expert in a moot argument, Mr. Reismeier also established a mentorship role with a member of the prosecution team. (Attach. E at 3-4). The member of the prosecution team was CDR Lockhart. CDR Lockhart was not a rarely-seen and

never-heard-from detailed military counsel in the al Nashiri case; indeed, she had an active and prominent presence in the case. Mr. Reismeier also dined with and celebrated the promotion of BG Martins to General. (Attach. E at 4). None of this is to argue that Mr. Reismeier could not properly lend his name and authority to briefing before the D.C. Circuit in support of the Prosecution, or that he could not have served as a mentor to a member of the Prosecution, or that he could not have participated in a moot argument, or that he could not have advised the Prosecution on the presentation and timing of evidence. All of that assistance to the Office of the Chief Prosecutor was proper at the time Mr. Reismeier provided it. Now, however, the vocal and repeated advocate of the Chief Prosecutor cannot properly serve as Convening Authority in this case.

The Convening Authority possesses both judicial and quasi-judicial authority—whether funding experts, dismissing charges, or reducing a sentence—and this Convening Authority was clearly joined at the hip to the Prosecution. The instant inquiry is simple: Whether a reasonable person, knowing the relevant facts, would perceive an appearance of partiality. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850 (1988); In re Mohammad, 866 F.3d 473, 477 (D.C. Cir. 2017). Despite Mr. Reismeier’s protestations that he “do[es] not have a personal interest in the outcome of [the al Nashiri] case” and his belief that he is “impartial” (Attach. E at 1), no person, and especially not any capital defense attorney, would believe that this Convening Authority sits neutrally in the middle. Any person, knowing the relevant facts, would believe that Mr. Reismeier clearly chose to align himself with the Prosecution. At the time he did so, there was no impropriety; when he accepted the position of Convening Authority, his partiality became an issue. Justice must not only provide actual justice; it must satisfy the appearance of justice. In

re Murchison, 349 U.S. 133, 136 (1955). Justice is not served here: neither the appearance of justice nor actual justice.

B. Mr. Reismeier Has Demonstrated an Inelastic Attitude to the Fulfillment of Critical Post-Trial Responsibilities.

Independent of his assistance to and advocacy on behalf of the Prosecution and his many connections to the Prosecution, basic principles of military justice law also command his recusal. Military decisions that disqualify convening authorities generally fall into two categories. The first involves the unique post-trial duties of the convening authority, in a “role . . . similar to that of a judicial officer.” Davis, 58 M.J. at 102. The second concerns the disqualification of a convening authority when he or she is an accuser (type one, two, or three) and/or possesses a personal, unofficial interest in the outcome of any case. Voorhees, 50 M.J. at 499.

The unique role—post-trial—of the Convening Authority is extensive. Indeed, the post-trial powers ascribed to the Convening Authority—described by the military courts as “similar to that of a judicial officer”—has no comparison in the civilian context. Davis, 58 M.J. at 102. There is no “judicial officer” in the civilian criminal justice system who can, in their sole discretion, not only “dismiss any charge or specification by setting aside a finding of guilty thereto[] or [] change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge,” 10 U.S.C. § 950b(c)(2)(A), (B), but also “approve, disapprove, commute, or suspend the sentence in whole or in part.” 10 U.S.C. § 950b(c)(3)(C). In the civilian criminal justice system, no entity, other than a judge, possesses the Convening Authority power to order a proceeding in revision or a complete rehearing. 10 U.S.C. § 950b(d)(3). As a result of these broad, unilateral powers, the Military courts recognize convening authorities as “an accused’s best hope for sentence relief.” Davis, 50 M.J. at 102; United States v. Lee, 50 M.J. 296, 297 (C.A.A.F. 1999).

Imposed simultaneously with these broad powers is the requirement of convening authority impartiality. “The requirement for impartiality assures that the convening authority gives full and fair consideration to matters submitted by the accused and determines appropriate action on the sentence.” Davis, 50 M.J. at 102. It is a *right*—enjoyed by the accused—to an individualized, appropriate, and careful review by the convening authority. “This right is violated where a convening authority cannot or will not approach post-trial responsibility with the requisite impartiality. When a convening authority cannot or will not approach post-trial responsibility with the requisite impartiality, a convening authority ‘must be disqualified from taking action on a record of court-martial.’” Id. If the Convening Authority exhibits “an inelastic attitude toward the performance of their post-trial responsibility,” the Convening Authority cannot fulfill his or her post-trial duties. Id.

In Davis, the appellant, an airman, entered a pretrial agreement with the Convening Authority, pleading guilty to the use of cocaine and marijuana. Following the plea, a panel of officer members then sentenced him to a bad-conduct discharge and three months confinement. Davis, 58 M.J. at 101. After sentencing, Appellant’s defense counsel petitioned the convening authority for clemency, and simultaneously objected to a particular major general “being the convening authority for purposes of taking action on the sentence in this case.” Id. The objection rested on the fact that the major general Convening Authority “gave several briefings at Lackland Air Force Base, Texas where he discussed illicit drug use by military members as being on the rise. During the briefings, [the major general] also publicly commented that people caught using illegal drugs would be prosecuted to the fullest extent, and if convicted, they should not come crying to him about their situations of their families[‘], or words to that effect.” Id. The major general Convening Authority did not respond to the objection and approved the sentence.

On review, the Court of Appeals for the Armed Forces found it was error for that convening authority to perform the post-trial review of the appellant's case. Davis, 58 M.J. at 101. The court's assessment was objective: did the words of the convening authority and the record before the court "demonstrate predisposition to take any particular post-trial action . . ." Id. The answer was yes. In that case, the words "unmistakably reflect[ed] an inelastic attitude and predisposition to approve certain adjudged sentences." Id.

The words of the Convening Authority, in the instant case, are far more problematic. As an initial matter, this is not a case involving the use of marijuana and cocaine, resulting in a period of confinement of three months. It is a capital case, where Mr. bin 'Atash faces death, for among other things, charges that allege he was involved in a conspiracy that resulted in the deaths of thousands. Should Mr. bin 'Atash stand convicted of the charge of conspiracy and sentenced to death, he would certainly seek to exercise his right to have the Convening Authority "dismiss . . . by setting aside a finding of guilty thereto," 10 U.S.C. § 950b(c)(2)(A), or "disapprove, commute, or suspend the sentence in whole or in part." 10 U.S.C. § 950b(c)(3)(C). Mr. bin 'Atash's chances of getting any relief from Mr. Reismeier are slim; this Convening Authority has already indicated that he has decided the issue of conspiracy in favor of the Prosecution. This Convening Authority—not in offhand remarks made at an Air Force base in Texas, but in a formal pleading before the United States Court of Appeals for the District of Columbia Circuit—avowed that any argument that the charge of conspiracy is not a "law-of-war crime" would be met with a firm and inflexible rejection. Instead, this Convening Authority views it as a "serious threat to separation of powers" that any judicial authority would "seek[] to wrest control of the war-making powers from the elected branches of government" and that the "federal courts almost surely are abusing their powers when they interfere with national-security operations undertaken by the military with

the full support of Congress.” (Attach. G at 31). Mr. bin ‘Atash is precluded from making that argument, given the “inelastic attitude” of Mr. Reismeier, before the Convening Authority.

Unfortunately, this “inelastic attitude” is not limited to the issue of conspiracy as a “law-of-war crime.” Mr. Reismeier, working with lawyers from the Departments of Defense and Justice, claimed responsibility for “developing procedural and evidentiary rules for military commissions practice under the [MCA of 2006].” (Attach. E at 2). When that Act was invalidated and discarded, Mr. Reismeier related that he and an attorney from the Office of the Counsel for the President were “personally tasked with rewriting the MCA entirely, working from the [MCA of 2006] as a baseline.” (Attach. E at 2). Mr. Reismeier “was involved in the interagency rewrite of both the rules of procedure and evidence for the military commissions” (Attach. E at 2). As a member of the Detention Policy Task Force, Mr. Reismeier “attended, and at times chaired, interagency meetings regarding military commissions’ rules, processes and procedures.” (Attach. E at 3). If Mr. bin ‘Atash is convicted of the offenses in the instant matter, he will ask the Convening Authority to “dismiss . . . by setting aside a finding of guilty thereto,” 10 U.S.C. § 950b(c)(2)(A), or “disapprove, commute, or suspend the sentence in whole or in part,” 10 U.S.C. § 950b(c)(3)(C), arguing the constitutional infirmities presented by the MCA of 2009. The defects of the MCA of 2009 and the rules of procedure and evidence developed from that Act are independent and sufficient grounds to vacate all findings against Mr. bin ‘Atash. The question, therefore, is simple—by basis of serving as the sole military officer “personally tasked with rewriting the MCA entirely,” (Attach. E at 2)—does Mr. Reismeier have a “predisposition to take any particular post-trial action[.]” Davis, 58 M.J. at 103. The answer can only be yes. He wrote the Act as well as the rules of procedure and evidence. He clearly believed it was legal, legitimate, and constitutional. Though strictly applicable to a different question, the logic and rationale of

Mr. Fox and Mr. Fidell are equally applicable here. “Given the investment of time, energy and thought Admiral Reismeier made in connection with what became the Military Commissions Act before assuming his present position, an objective observer would reasonably harbor a substantial doubt as to whether, in exercising his various functions, he ‘had a horse in the race.’” (Attach. L at 8). Whether couched in terms of “appearance of partiality” or “an inelastic attitude toward the performance of their post-trial responsibility,” Defense Counsel cannot now be forced to now argue to the author of the Act and its rules that he was wrong. Mr. Reismeier must be disqualified.

C. Mr. Reismeier is a Type Three Accuser and Possesses a Personal Interest in this Proceeding that Disqualifies Him from Serving as the Convening Authority.

In the Military Commissions, as in any court martial, the convening authority shall not also be an accuser in the trial of the person accused. R.M.C. 504(c)(1); R.M.C. 601(c); R.C.M. 504(c)(1). Who is an accuser is defined in the military justice system. Under the Uniform Code of Military Justice, an accuser might be the individual “who signs and swears to charges”—the so-called “type one accuser.” 10 U.S.C. § 801(9). Mr. Reismeier is not a “type one accuser” in the instant matter. An accuser might also be a person “who directs that charges nominally be signed and sworn to by another”—the so-called “type two accuser.” 10 U.S.C. § 801(9). For purposes of this immediate litigation, Mr. Reismeier is not a “type two accuser”. The third type of accuser is “any other person who has an interest other than an official interest in the prosecution of the accused.” 10 U.S.C. § 801(9). Mr. Reismeier is a “type three accuser.”

Defense Counsel are cognizant that not all interests in a case requires the Convening Authority’s recusal. Military courts that have considered cases where a Convening Authority was a “type three accuser” have looked to whether the Convening Authority’s interest arose as part of his/her official duties or arose outside of an official capacity and/or constituted a personal interest. See Voorhees, 50 M.J. at 499 (providing test for determining interest of convening authority is

“whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter); see also United States v. Gordon, 2 C.M.R. 161, 167 (1952) (recognizing a test of “whether the appointing authority was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter”). The United States Court of Appeals for the Armed Forces has clarified that a “personal interest” can “relate to matters affecting the convening authority’s ego, family, and personal property.” Voorhees, 50 M.J. at 499.

There are clearly instances where the convening authority’s interest in a case arises in his or her official capacity and is not the result of any personal interest. For example, a base commander may order an investigation into an event and later serve as the convening authority in the same matter where ordering the initial investigation was simply part of his official duties. See United States v. Ashby, 68 M.J. 108, 130-31 (C.A.A.F. 2009) (“Concerning Ashby’s claim that Lt. Gen. Pace was a ‘type three’ accuser, this record contains no evidence of personal interest or bias on the part of Lt. Gen. Pace such that he was transformed into a de facto accuser. Although Lt. Gen. Pace was involved in the preliminary investigation of the case, his interest appears to have been wholly official. Interest in an incident and the investigation thereof is not personal—it is in fact the responsibility of a commander.”). That is not what occurred here. None of Mr. Reismeier’s assistance to the Prosecution was provided in his official capacity, and, should Mr. Reismeier remain the convening authority on Mr. bin ‘Atash’s case, he would be deciding matters in which he has a direct, personal interest.

First, there is no doubt that Mr. Reismeier has staked out and demonstrated a personal interest in matters in *these* proceedings, and not issues limited to the al Nashiri and Bahlul cases. Mr. Reismeier’s amicus brief, submitted in the Bahlul case, had nothing to do with the facts of

Bahlul. Instead, it concerned matters that touch every case before the Commission and are of profound importance to Mr. bin ‘Atash. Mr. Reismeier argued that the United States remains, to this day, in a state of war against Al Qaeda, and as long as that state of war exists, judicial oversight over the military commissions is improper. (Attach. G at 26). That argument, if adopted, would forbid any court from deciding whether the charge of conspiracy may be brought and tried before a military commission. That position touches the Bahlul case, but also the al Nashiri case, the Hadi al-Iraqi case, the Majid Khan case and each 9/11 defendant, including Mr. bin ‘Atash, in the instant case. Mr. Reismeier has consulted with BG Martins and advised on questions of jurisdiction (hostilities). The existence and nexus of hostilities are critical issues in *this* case. Mr. Reismeier has participated in Prosecution moot arguments and provided assistance on a case where Mr. bin ‘Atash is a named co-conspirator. Evidence of *that* case—the U.S.S. Cole bombing—will play a role in *this* case, at the very least, in any penalty phase proceedings.

Second, none of Mr. Reismeier’s demonstrated interest in these proceedings occurred as part of his official duties and responsibilities. “[S]ometime in 2014,” when Mr. Reismeier “had contact with General Martins at OMC – Prosecution . . . regarding a jurisdictional matter that arose in United States v. al Nashiri . . . [and] discuss[ed] the timing of offering proof of jurisdiction, as there was an issue regarding whether that proof was to be offered pretrial or during the case-in-chief,” Mr. Reismeier was serving as the Assistant Judge Advocate General, Chief Judge, Department of the Navy. (Attach. E at 4). It was not within the official duties of the Assistant Judge Advocate General, Chief Judge, Department of the Navy to meet with and discuss “a jurisdictional matter” related to Military Commissions cases that included providing advice about “the timing of offering proof of jurisdiction” to the Chief Prosecutor. (Attach. E at 4). That was a matter of personal interest. In 2015, when Mr. Reismeier responded to a contact from BG

Martins and “attended a briefing” in BG Martins’ “spaces” concerning the “Congressional authority in defining conspiracy as a violation of the law of war,” and subsequently “sign[ed] onto an amicus brief in November 2015,” he had retired from the Navy. (Attach. E at 4). Because he held no office in 2015, his involvement with the issue could not have pertained to any official duty; it was a matter of personal interest. In 2011, when Mr. Reismeier was serving as a mentor to the prosecutor in the al Nashiri case, discussing and “shar[ing] things colleagues would normally share, such as information about where she was going and what she was doing,” Mr. Reismeier was the Chief Judge for the Navy-Marine Corps Court of Criminal Appeals. (Attach. E at 4). This prosecutor was not the colleague of the Chief Judge for the Navy-Marine Corps Court of Criminal Appeals. It was not within the official duties of the Chief Judge for the Navy-Marine Corps Court of Criminal Appeals to “share things colleagues would normally share” with the prosecutor in BG Martins’ office. Mr. Reismeier was acting outside any official duties and role.

Moreover, Mr. Reismeier has spent a considerable portion of his professional career establishing and legitimizing the military commissions. He was the sole military officer “personally tasked with rewriting the MCA entirely.” (Attach. E at 2). He “assisted the Judge Advocate General of the Navy in preparing for his testimony before the Senate and House Armed Services Committees regarding his views on military commissions.” (Attach. E at 2). He “was involved in the interagency rewrite of both the rules of procedure and evidence for military commissions” (Attach. E at 2). Mr. bin ‘Atash must now come before this Convening Authority and seek funding and resources to demonstrate that the system that this Convening Authority established is illegal, illegitimate, and unconstitutional. That is a matter that would affect the Convening Authority’s “ego.” Vorhees, 50 M.J. at 499. He has a personal interest in that issue.

Mr. Reismeier clearly meets the definition of a “type three accuser.” From the very beginning, Mr. Reismeier has taken an interest in these proceedings and advised and advocated on a wide range of issues pending before the Commission: hostilities, jurisdiction, and conspiracy as a “law of war” crime. Mr. Reismeier’s interest was not limited to the particularities of the al Nashiri or Bahlul cases, but addressed matters that touches Mr. bin ‘Atash and the other defendants before the Military Commissions. His interest was not a function of his official role and capacity; indeed, it was personal. He must be disqualified.

D. Conclusion

From at least 2010 until 2016, Mr. Reismeier has consulted, advised and mentored the Chief Prosecutor and members of his team. He has assisted them in crafting their legal arguments; he has placed his name and his rank before the D.C. Circuit on their behalf. None of that would have been a problem until the day he accepted the position of Convening Authority in Mr. bin ‘Atash’s case. But once he accepted the position, it is a problem. He has recused himself from other cases—al Nashiri and Bahlul. Mr. bin ‘Atash’s case is no different. For the reasons detailed above, this Military Judge must order his disqualification and recusal.

7. Oral Argument:

Defense Counsel for Mr. bin ‘Atash request oral argument, as it would benefit the Military Judge in the resolution of this matter.

8. Witnesses:

A. Christian L. Reismeier, Convening Authority

B. BG Mark Martins

9. Conference with Opposing Counsel: The Prosecution opposes the Motion.

10. Attachments:

- A. Certificate of Service (1 page).
- B. Charge Sheet, United States v. Khalid Shaikh Mohammad, et. al., Referral dated 4 April 2012 (35 pages).
- C. Charge Sheet, United States v. al Nashiri, Referral dated 28 September 2011 (24 pages).
- D. Memorandum of Acting Secretary of Defense Shanahan, dated 23 May 2019 (1 page).
- E. Memorandum of Convening Authority Reismeier, Recusal from the Role of Convening Authority in United States v. al Nashiri, dated 14 June 2019 (5 pages).
- F. Memorandum of Convening Authority Reismeier, Recusal from the Role of Convening Authority in United States v. Bahlul (Corrected), dated 14 June 2019 (5 pages).
- G. Amicus Brief of John D. Altenburg, et. al., Bahlul v. United States, No. 11-1324, filed 2 November 2015 (42 pages).
- H. Request for Discovery—Selection and Recusal Process of Convening Authority Reismeier, DR-394-WBA, dated 19 June 2019 (2 pages).
- I. Request for Discovery—Convening Authority Christian Reismeier Ties to Prosecution, DR-395-WBA, dated 19 June 2019 (9 pages).
- J. Prosecution Response to Requests for Discovery (DR-394-WBA) and (DR-395-WBA), dated 24 June 2019 (2 pages).
- K. United States v. al Nashiri, Trial Counsel Detailing Memorandum, AE 004, dated 5 October 2011 (1 page).
- L. Joint Report of Lawrence J. Fox and Eugene R. Fidell, dated 4 July 2019 (14 pages).

11. Signatures:

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
WILLIAM R. MONTROSS, JR.
Detailed Defense Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
SIMON M. CAINE
Captain, USAF
Detailed Military Counsel

Attachment A

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
Page 37 of 189

CERTIFICATE OF SERVICE

I certify that on 9 July 2019, I electronically filed, with the Trial Judiciary the attached AE 643(WBA), Mr. bin 'Atash's Motion to Disqualify the Convening Authority, and served copies on all counsel of record.

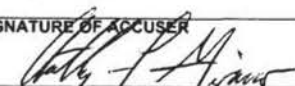

/s/

CHERYL T. BORMANN
Learned Counsel

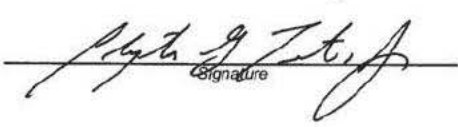
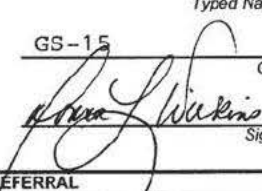
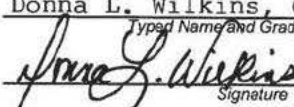
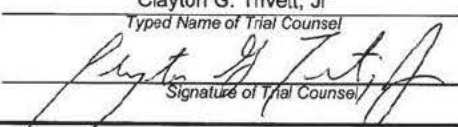
Attachment B

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
Page 39 of 189

CHARGE SHEET			
I. PERSONAL DATA			
<p>1. NAME OF ACCUSED: KHALID SHEIKH MOHAMMED Walid Muhammad Salih Mubarak Bin 'Attash Ramzi Binalshibh Ali Abdul Aziz Ali Mustafa Ahmed Adam al Hawsawi</p>			CBT 9 Apr 12
<p>2. ALIASES OF ACCUSED: Khalid Sheikh Mohammed (aliases Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi) Walid Muhammad Salih Mubarak Bin 'Attash (aliases Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq) Ramzi Binalshibh (aliases Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami) Ali Abdul Aziz Ali (aliases Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam Mansour; Ali; Aliosh; Hani) Mustafa Ahmed Adam al Hawsawi (aliases Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa)</p>			CBT 9 Apr 12
<p>3. ISN NUMBER OF ACCUSED (LAST FOUR): Khalid Sheikh Mohammed (10024) Walid Muhammad Salih Mubarak Bin 'Attash (10014) Ramzi Binalshibh (10013) Ali Abdul Aziz Ali (10018) Mustafa Ahmed Adam al Hawsawi (10011)</p>			CBT 9 Apr 12
II. CHARGES AND SPECIFICATIONS			
<p>4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. SPECIFICATION: See Attached Charges and Specifications.</p>			
III. SWEARING OF CHARGES			
<p>5a. NAME OF ACCUSER (LAST, FIRST, MI) Graziano, Anthony</p>	<p>5b. GRADE CW3</p>	<p>5c. ORGANIZATION OF ACCUSER Criminal Investigation Task Force (CITF)</p>	
<p>5d. SIGNATURE OF ACCUSER </p>		<p>5e. DATE (YYYYMMDD) 20110531</p>	
<p><small>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>31st</u> day of <u>May</u>, <u>2011</u>, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</small></p>			
<p>_____ Darlene S. Simmons <small>Typed Name of Officer</small></p>	<p>_____ Office of Military Commissions <small>Organization of Officer</small></p>		
<p>_____ CDR, JAGC, USN <small>Grade</small></p>	<p>_____ Judge Advocate <small>Official Capacity to Administer Oath (See R.M.C. 307(b) must be commissioned officer)</small></p>		
<p> _____ <small>Signature</small></p>			

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED		
6. On <u>31 May</u> <u>2011</u> the accused was notified of the charges against him/her (See R.M.C. 308).		
<u>Clayton G. Trivett, Jr, GS-15</u> <small>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</small>	<u>Office of Military Commissions</u> <small>Organization of the Person Who Caused Accused to Be Notified of Charges</small>	
 <small>Signature</small>		
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1746</u> hours, on <u>1 June 2011</u> at <u>Alexandria, Virginia</u>		
<small>Location</small>		
For the Convening Authority: <u>Donna L. Wilkins</u>		
<small>Typed Name of Officer</small>		
<u>GS-15</u>		
<small>Grade</small>		
 <small>Signature</small>		
VI. REFERRAL		
8a. DESIGNATION OF CONVENING AUTHORITY Convening Authority, 10 U.S.C. § 948h, designated on 25 Mar 10	8b. PLACE Alexandria, VA	8c. DATE (YYYYMMDD) 20120404
Referred for trial to the MC capital military commission convened by military commission convening order <u>12-02</u> dated <u>4 April 2012</u>		
subject to the following instructions ¹ : <u>See continuation sheet</u>		
By <u>Direction</u> of the Convening Authority, <u>Bruce MacDonald</u> <small>Command, Order, or Direction</small>		
<u>Donna L. Wilkins, GS-15</u> <small>Typed Name and Grade of Officer</small>		<u>Title 10 U.S.C. § 948h</u> <small>Official Capacity of Officer Signing</small>
 <small>Signature</small>		
VII. SERVICE OF CHARGES		
9. On <u>6 April</u> <u>2012</u> I <u>(caused to be)</u> served a copy these charges on the above named accused.		
<u>Clayton G. Trivett, Jr</u> <small>Typed Name of Trial Counsel</small>	<u>GS-15</u> <small>Grade of Trial Counsel</small>	
 <small>Signature of Trial Counsel</small>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

MC FORM 458 JAN 2007

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

KHALID SHAIKH MOHAMMED ((aliases: Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul
Rahman Abdullah Al Ghamdi)

C6T
9 Apr 12

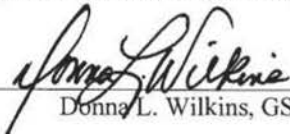
The charges against the above named accused will be tried at a joint trial with the trials of

- Walid Muhammad Salih Mubarak Bin 'Attash;
- Ramzi Binalshibh;
- Ali Abdul Aziz Ali; and
- Mustafa Ahmed Adam al Hawsawi.

These charges will be tried in conjunction with the additional charge sworn on 25 January 2012 and referred on 4 April 2012.

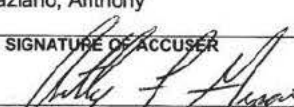
The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians, Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism. This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:


Donna L. Wilkins, GS-15

Convening Authority, Chapter 47A of
Title 10 U.S.C § 948h

Date: 4 April 2012


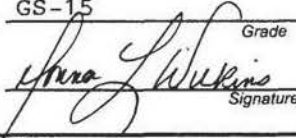
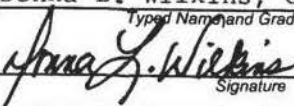
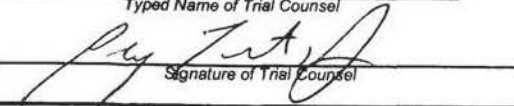
CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: Khalid Sheikh Mohammed WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH Ramzi Binalshibh Ali Abdul Aziz Ali Mustafa Ahmed Adam al Hawsawi		
2. ALIASES OF ACCUSED: Khalid Sheikh Mohammed (aliases Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi) Walid Muhammad Salih Mubarek Bin 'Attash (aliases Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq) Ramzi Binalshibh (aliases Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami) Ali Abdul Aziz Ali (aliases Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam Mansour; Ali; Aliosh; Hani) Mustafa Ahmed Adam al Hawsawi (aliases Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa)		
3. ISN NUMBER OF ACCUSED (LAST FOUR): Khalid Sheikh Mohammed (10024) Walid Muhammad Salih Mubarek Bin 'Attash (10014) Ramzi Binalshibh (10013) Ali Abdul Aziz Ali (10018) Mustafa Ahmed Adam al Hawsawi (10011)		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. SPECIFICATION: See Attached Charges and Specifications.		
III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER (LAST, FIRST, MI) Graziano, Anthony	5b. GRADE CW3	5c. ORGANIZATION OF ACCUSER Criminal Investigation Task Force (CITF)
5d. SIGNATURE OF ACCUSER 		5e. DATE (YYYYMMDD) 20110531
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>31st</u> day of <u>May</u> , <u>2011</u> , and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.		
_____ Darlene S. Simmons <i>Typed Name of Officer</i>	_____ Office of Military Commissions <i>Organization of Officer</i>	
_____ CDR, JAGC, USN <i>Grade</i>	_____ Judge Advocate <i>Official Capacity to Administer Oath</i> (See R.M.C. 307(b) must be commissioned officer)	
_____ Darlene S. Simmons <i>Signature</i>		

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9 Apr 12

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9 Apr 12

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED		
6. On <u>31 May</u> , <u>2011</u> the accused was notified of the charges against him/her (See R.M.C. 308).		
<u>Clayton G. Trivett, Jr, GS-15</u> <small>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</small>	<u>Office of Military Commissions</u> <small>Organization of the Person Who Caused Accused to Be Notified of Charges</small>	
 <small>Signature</small>		
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1746</u> hours, on <u>1 June 2011</u> at <u>Alexandria, Virginia</u>		
<small>Location</small>		
For the Convening Authority: <u>Donna L. Wilkins</u>		
<small>Typed Name of Officer</small>		
<u>GS-15</u>		
<small>Grade</small>		
 <small>Signature</small>		
VI. REFERRAL		
8a. DESIGNATION OF CONVENING AUTHORITY Convening Authority, 10 U.S.C. § 948h, designated on 25 Mar 10	8b. PLACE Alexandria, VA	8c. DATE (YYYYMMDD) 20120404
Referred for trial to the XXX capital military commission convened by military commission convening order <u>12-02</u> dated <u>4 April 2012</u>		
subject to the following instructions ¹ : <u>See continuation sheet</u>		
By <u>Direction</u> of the Convening Authority, <u>Bruce MacDonald</u> <small>Command, Order, or Direction</small>		
<u>Donna L. Wilkins, GS-15</u> <small>Typed Name and Grade of Officer</small>	<u>Convening Authority, Chapter 47A</u> <u>Title 10 U.S.C. §948h</u> <small>Official Capacity of Officer Signing</small>	
 <small>Signature</small>		
VII. SERVICE OF CHARGES		
9. On <u>6 April</u> , <u>2012</u> (caused to be) served a copy these charges on the above named accused.		
<u>Clayton G. Trivett, Jr</u> <small>Typed Name of Trial Counsel</small>	<u>GS-15</u> <small>Grade of Trial Counsel</small>	
 <small>Signature of Trial Counsel</small>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

MC FORM 458 JAN 2007

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH (aliases: Khallad; Salah Saeed
Mohammed Bin Yousaf; Silver; Tawfiq)

The charges against the above named accused will be tried at a joint trial with the trials of

Khalid Sheikh Mohammed;

Ramzi Binalshibh;

Ali Abdul Aziz Ali; and

Mustafa Ahmed Adam al Hawsawi

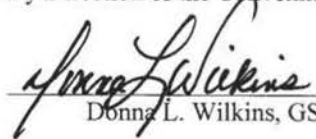
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These charges will be tried in conjunction with the additional charge sworn on 25 January 2012
and referred on 4 April 2012.

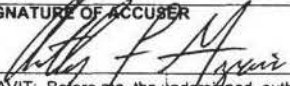
The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians,
Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.
This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:

Convening Authority, Chapter 47A of
Title 10 U.S.C § 948h


Donna L. Wilkins, GS-15

Date: 4 April 2012


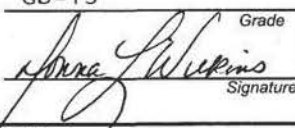
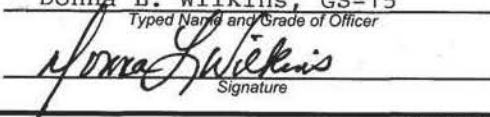
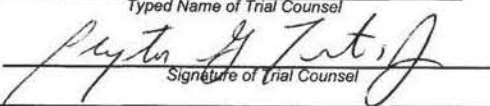
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_____ Darlene S. Simmons <i>Typed Name of Officer</i>		_____ Office of Military Commissions <i>Organization of Officer</i>
_____ CDR, JAGC, USN <i>Grade</i>		_____ Judge Advocate <i>Official Capacity to Administer Oath</i> (See R.M.C. 307(b) must be commissioned officer)
_____ Darlene S. Simmons <i>Signature</i>		

C6T
9 Apr 12

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9 Apr 12

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9 Apr 12

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED		
6. On <u>31 MAY</u> June , <u>2011</u> 2010	the accused was notified of the charges against him/her (See R.M.C. 308).	
<u>Clayton G. Trivett, Jr, GS-15</u> <small>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</small>	<u>Office of Military Commissions</u> <small>Organization of the Person Who Caused Accused to Be Notified of Charges</small>	
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For the Convening Authority: <u>Donna L. Wilkins</u>		
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VI. REFERRAL		
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Referred for trial to the XX capital military commission convened by military commission convening order <u>12-02</u> dated <u>4 April 2012</u>		
subject to the following instructions ¹ : <u>See continuation sheet</u>		
By <u>Direction</u> of the Convening Authority, <u>Bruce MacDonald</u>		
<small>Command, Order, or Direction</small>		
<u>Donna L. Wilkins, GS-15</u>	<u>Convening Authority, Chapter 47A</u>	
<small>Typed Name and Grade of Officer</small>	<small>Title 10 U.S.C. § 948h</small>	
 <small>Signature</small>		
<small>Official Capacity of Officer Signing</small>		
VII. SERVICE OF CHARGES		
9. On <u>6 April</u> , <u>2012</u> I <u>(caused to be)</u> served a copy these charges on the above named accused.		
<u>Clayton G. Trivett, Jr</u>	<u>GS-15</u>	
<small>Typed Name of Trial Counsel</small>	<small>Grade of Trial Counsel</small>	
 <small>Signature of Trial Counsel</small>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

MC FORM 458 JAN 2007

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

RAMZI BINALSHIBH (aliases: Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al
Hadrami)

The charges against the above named accused will be tried at a joint trial with the trials of

Khalid Sheikh Mohammed;

Walid Muhammad Salih Mubarak Bin 'Attash;

Ali Abdul Aziz Ali; and

Mustafa Ahmed Adam al Hawsawi

C6T
9 Apr 12

These charges will be tried in conjunction with the additional charge sworn on 25 January 2012
and referred on 4 April 2012.

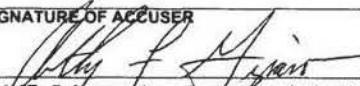
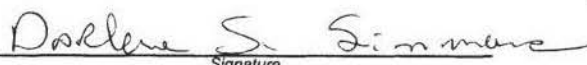
The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians,
Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.
This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:

Convening Authority, Chapter 47A of
Title 10 U.S.C § 948h


Donna L. Wilkins, GS-15

Date: 4 April 2012


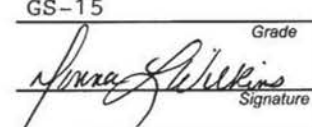
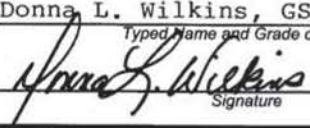
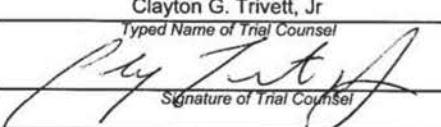
CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: Khalid Sheikh Mohammed Walid Muhammad Salih Mubarak Bin 'Attash Ramzi Binalshibh Ali Abdul Aziz Ali MUSTAFA AHMED ADAM AL HAWSAWI		
2. ALIASES OF ACCUSED: Khalid Sheikh Mohammed (aliases Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi) Walid Muhammad Salih Mubarak Bin 'Attash (aliases Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq) Ramzi Binalshibh (aliases Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami) Ali Abdul Aziz Ali (aliases Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam Mansour; Ali; Aliosh; Hani) Mustafa Ahmed Adam al Hawsawi (aliases Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa)		
3. ISN NUMBER OF ACCUSED (LAST FOUR): Khalid Sheikh Mohammed (10024) Walid Muhammad Salih Mubarak Bin 'Attash (10014) Ramzi Binalshibh (10013) Ali Abdul Aziz Ali (10018) Mustafa Ahmed Adam al Hawsawi (10011)		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. SPECIFICATION: See Attached Charges and Specifications.		
III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER (LAST, FIRST, MI) Graziano, Anthony	5b. GRADE CW3	5c. ORGANIZATION OF ACCUSER Criminal Investigation Task Force (CITF)
5d. SIGNATURE OF ACCUSER 		5e. DATE (YYYYMMDD) 20110531
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>31st</u> day of <u>May</u> , 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.		
_____ Darlene S. Simmons <i>Typed Name of Officer</i>	_____ Office of Military Commissions <i>Organization of Officer</i>	
_____ CDR, JAGC, USN <i>Grade</i>	_____ Judge Advocate <i>Official Capacity to Administer Oath</i> (See R.M.C. 307(b) must be commissioned officer)	
 _____ <i>Signature</i>		

CGT
9 Apr 12

CGT
9 Apr 12

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9 Apr 12

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED		
6. On <u>31 May</u> , <u>2011</u> the accused was notified of the charges against him/her (See R.M.C. 308).		
<u>Clayton G. Trivett, Jr, GS-15</u> <small>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</small>	<u>Office of Military Commissions</u> <small>Organization of the Person Who Caused Accused to Be Notified of Charges</small>	
 <small>Signature</small>		
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1746</u> hours, on <u>1 June 2011</u> , at <u>Alexandria, Virginia</u>		
<small>Location</small>		
For the Convening Authority: <u>Donna L. Wilkins</u>		
<small>Typed Name of Officer</small>		
<u>GS-15</u>		
<small>Grade</small>		
 <small>Signature</small>		
VI. REFERRAL		
8a. DESIGNATION OF CONVENING AUTHORITY <u>Convening Authority, 10 U.S.C. § 948h, designated on 25 Mar 10</u>	8b. PLACE <u>Alexandria, VA</u>	8c. DATE (YYYYMMDD) <u>20120404</u>
Referred for trial to the XX capital military commission convened by military commission convening order <u>12-02</u> dated <u>4 April 2012</u>		
subject to the following instructions ¹ : <u>See continuation sheet</u>		
By <u>Direction</u> of the Convening Authority, <u>Bruce MacDonald</u>		
<small>Command, Order, or Direction</small>		
<u>Donna L. Wilkins, GS-15</u> <small>Typed Name and Grade of Officer</small>	<u>Convening Authority, Chapter 47A Title 10 U.S.C. §948h</u> <small>Official Capacity of Officer Signing</small>	
 <small>Signature</small>		
VII. SERVICE OF CHARGES		
9. On <u>6 April</u> , <u>2012</u> I <u>(caused to be)</u> served a copy these charges on the above named accused.		
<u>Clayton G. Trivett, Jr</u> <small>Typed Name of Trial Counsel</small>	<u>GS-15</u> <small>Grade of Trial Counsel</small>	
 <small>Signature of Trial Counsel</small>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

MC FORM 458 JAN 2007

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

ALI ABDUL AZIZ ALI (aliases: Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam
Mansour; Ali; Aliosh; Hani)

The charges against the above named accused will be tried at a joint trial with the trials of

Khalid Sheikh Mohammed;

Walid Muhammad Salih Mubarak Bin 'Attash;

Ramzi Binalshibh; and

Mustafa Ahmed Adam al Hawsawi

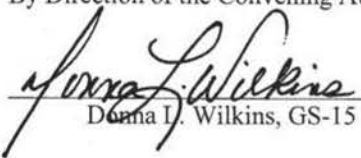
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9 Apr 12

These charges will be tried in conjunction with the additional charge sworn on 25 January 2012
and referred on 4 April 2012.

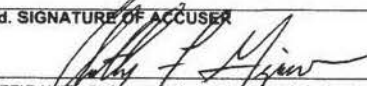
The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians,
Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.
This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:

Convening Authority, Chapter 47A of
Title 10 U.S.C § 948h


Dana L. Wilkins, GS-15

Date: 4 April 2012


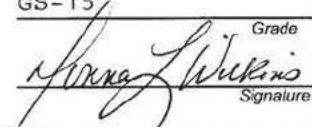
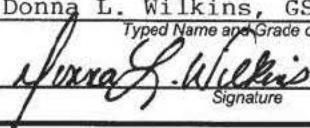
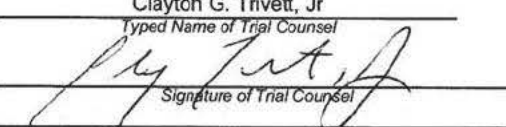
CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: Khalid Sheikh Mohammed Walid Muhammad Salih Mubarak Bin 'Attash Ramzi Binalshibh ALI ABDUL AZIZ ALI Mustafa Ahmed Adam al Hawsawi		
2. ALIASES OF ACCUSED: Khalid Sheikh Mohammed (aliases Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi) Walid Muhammad Salih Mubarak Bin 'Attash (aliases Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq) Ramzi Binalshibh (aliases Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami) Ali Abdul Aziz Ali (aliases Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam Mansour; Ali; Aliosh; Hani) Mustafa Ahmed Adam al Hawsawi (aliases Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa)		
3. ISN NUMBER OF ACCUSED (LAST FOUR): Khalid Sheikh Mohammed (10024) Walid Muhammad Salih Mubarak Bin 'Attash (10014) Ramzi Binalshibh (10013) Ali Abdul Aziz Ali (10018) Mustafa Ahmed Adam al Hawsawi (10011)		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. SPECIFICATION: See Attached Charges and Specifications.		
III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER (LAST, FIRST, MI) Graziano, Anthony	5b. GRADE CW3	5c. ORGANIZATION OF ACCUSER Criminal Investigation Task Force (CITF)
5d. SIGNATURE OF ACCUSER 		5e. DATE (YYYYMMDD) 20110531
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>31st</u> day of <u>May</u> , 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.		
_____ Darlene S. Simmons <i>Typed Name of Officer</i>	_____ Office of Military Commissions <i>Organization of Officer</i>	
_____ CDR, JAGC, USN <i>Grade</i>	_____ Judge Advocate <i>Official Capacity to Administer Oath</i> (See R.M.C. 307(b) must be commissioned officer)	
_____ Darlene S. Simmons <i>Signature</i>		

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9 Apr 12

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED		
6. On	<u>31</u> ^{CVI} June ^{MAY}	<u>2011</u> ^{CVI} 2010
the accused was notified of the charges against him/her (See R.M.C. 308).		
<u>Clayton G. Trivett, Jr, GS-15</u> <small>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</small>	<u>Office of Military Commissions</u> <small>Organization of the Person Who Caused Accused to Be Notified of Charges</small>	
 <small>Signature</small>		
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1746</u> hours, on <u>June 2011</u> at <u>Alexandria, Virginia</u>		
<small>Location</small>		
For the Convening Authority: <u>Donna L. Wilkins</u>		
<small>Typed Name of Officer</small>		
<u>GS-15</u>		
<small>Grade</small>		
 <small>Signature</small>		
VI. REFERRAL		
8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority, 10 U.S.C. § 948h, designated on 25 Mar 10	Alexandria, VA	20120404
Referred for trial to the DC capital military commission convened by military commission convening order <u>12-02</u> dated <u>4 April 2012</u>		
subject to the following instructions ¹ : <u>See continuation sheet</u>		
By <u>Direction</u> of the Convening Authority, <u>Bruce MacDonald</u>		
<small>Command, Order, or Direction</small>		
<u>Donna L. Wilkins, GS-15</u>	<u>Convening Authority, Chapter 47A</u>	
<small>Typed Name and Grade of Officer</small>	<small>Official Capacity of Officer Signing</small>	
 <small>Signature</small>		
VII. SERVICE OF CHARGES		
9. On <u>6 April</u> , <u>2012</u> I <u>(caused to be)</u> served a copy these charges on the above named accused.		
<u>Clayton G. Trivett, Jr</u> <small>Typed Name of Trial Counsel</small>	<u>GS-15</u> <small>Grade of Trial Counsel</small>	
 <small>Signature of Trial Counsel</small>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

MC FORM 458 JAN 2007

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

MUSTAFA AHMED ADAM AL HAWSAWI (aliases: Zahir; Hashem Abdollahi;
Muhammad Ahanad; Abderahman Mustafa)

The charges against the above named accused will be tried at a joint trial with the trials of

Khalid Sheikh Mohammed;

Walid Muhammad Salih Mubarak Bin 'Attash;

Ramzi Binalshibh; and

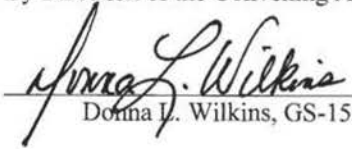
Ali Abdul Aziz Ali

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9 Apr 12

These charges will be tried in conjunction with the additional charge sworn on 25 January 2012
and referred on 4 April 2012.

The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians,
Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.
This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:



Donna L. Wilkins, GS-15

Convening Authority, Chapter 47A of
Title 10 U.S.C § 948h

Date: 4 April 2012

CHARGE I: VIOLATION OF 10 U.S.C. §950t (29), CONSPIRACY

Specification: In that **Khalid Sheikh Mohammed** (a/k/a Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi); **Walid Muhammad Salih Mubarak Bin Attash** (a/k/a Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq); **Ramzi Binalshibh** (a/k/a Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami); **Ali Abdul Aziz Ali** (a/k/a Ammar al Baluchi; Isam Mansur; Isam Mansar; Isam Mansour; Ali; Aliosh; Hani), and **Mustafa Ahmed Adam al Hawsawi** (a/k/a/ Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa), persons subject to trial by military commission as alien unprivileged enemy belligerents, did, at various locations, from in or about 1996, to in or about May 2003, in the context of and associated with hostilities, conspire and agree with Usama bin Laden, Mohammed Atef (a/k/a Abu Hafz al Masri), 19 individuals who hijacked four commercial airliners on September 11, 2001: (American Airlines Flight 11, a Boeing 767 aircraft, tail number N334AA, hereinafter AA #11) Mohamed Atta (a/k/a Abd al-Rahman), Satam al Suqami (a/k/a Azmi), Waleed al Shehri (a/k/a Abu Mis'ab), Wail al Shehri (a/k/a Abu Salman), Abdul Aziz al Omari (a/k/a Abu al-Abbas al-Janubi); (United Airlines Flight 175, a Boeing 767 aircraft, tail number N612UA, hereinafter UA #175) Marwan al Shehhi (a/k/a al-Qa'qa'), Hamza al Ghamdi (a/k/a Julaybib), Ahmed al Ghamdi (a/k/a Ikrimah), Mohand al Shehri (a/k/a Umar al-Azdi), Fayez Rashid Ahmed Hassan Al Qadi Banihammad (hereinafter Fayez Banihammad) (a/k/a Abu Ahmad); (United Airlines Flight 93, a Boeing 757 aircraft, tail number N591UA, hereinafter UA #93) Ziad Samir Jarrah (a/k/a Abu Tariq), Ahmad Ibrahim A. al Haznawi (a/k/a al-Jarrah al-Ghamdi), Ahmed al Nami (a/k/a Abu Hashim), Saeed al Ghamdi (a/k/a Mu'tazz); (American Airlines Flight 77, a Boeing 757 aircraft, tail number N644AA, hereinafter AA #77) Hani Hanjour (a/k/a Urwah al-Ta'ifi), Khalid al Mihdhar (a/k/a Sinan), Nawaf al Hazmi (a/k/a Rabi'ah al-Makki), Majed Moqed (a/k/a al-Ahnaf), Salem al Hazmi (a/k/a Bilal al-Makki); and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission, to wit: attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism. Each of the five accused, knowing the unlawful purpose of the agreement, and with the intent to further the unlawful purpose, willfully joined the conspiracy and did knowingly and intentionally commit at least one of the following overt acts, in order to accomplish some objective or purpose of the agreement, with said conspiracy resulting in the deaths of 2,976 persons (see Charge Sheet Appendix A for a list of victims killed in the attacks):

1. In August 1996, Usama bin Laden (al Qaeda's "emir" or leader) issued a public "Declaration of Jihad Against the Americans," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
2. In 1996, **Khalid Sheikh Mohammed** met with Usama bin Laden in Afghanistan and discussed the operational concept of hijacking commercial airliners and crashing them into buildings in the United States and elsewhere. This plan was ultimately approved by Usama bin Laden.

3. Between 1996 and 2001, **Khalid Sheikh Mohammed**, Usama bin Laden, and Mohammed Atef (a/k/a Abu Hafs al Masri, the military commander of al Qaeda), proposed and discussed potential targets for attack by hijacked commercial airliners and decided to target economic, political, and military buildings in the United States and Western Pacific.

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4. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

5. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

6. In early 1999, Usama bin Laden directed **Walid Muhammad Salih Mubarak Bin `Attash (a/k/a Khallad, hereinafter Khallad Bin `Attash)** to obtain a United States visa so that he could travel to the United States and obtain pilot training in order to participate in what **Khallad Bin `Attash** termed the "Planes Operation."

7. On or about April 3, 1999, **Khallad Bin `Attash** traveled to San `a, Yemen, and applied for a visa to travel to the United States using the alias "Salah Saeed Mohammed Bin Yousaf." This application was denied.

8. On or about April 3, 1999, and April 7, 1999, respectively, Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) received visas in Jeddah, Saudi Arabia, in order to travel to the United States.

9. In or about September 1999, **Khallad Bin `Attash** administered a forty-five day special course in hand-to-hand combat training at an al Qaeda camp in Logar, Afghanistan, in order to help select trainees for the "Planes Operation." Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) attended this course. After completing the course, al Mihdhar (AA #77) and al Hazmi (AA #77) were selected to be part of the "Planes Operation."

10. In or about November 1999, **Khallad Bin `Attash** and Nawaf al Hazmi (AA #77) traveled from Qandahar, Afghanistan, to Karachi, Pakistan, where they moved in with **Khalid Sheikh Mohammed**. With the assistance of **Khalid Sheikh Mohammed**, **Khallad Bin `Attash** and Nawaf al Hazmi (AA #77) studied compact discs, books, and other materials to learn about flying airplanes.

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9 Apr 12

11. While living in Karachi, **Khallad Bin `Attash**, and Nawaf al Hazmi (AA #77) used computer simulators to learn how to fly planes, and studied and researched flight timetables for United States air carriers with **Khalid Sheikh Mohammed**, in order to coordinate the simultaneous hijacking of multiple aircraft.

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12. **Khalid Sheikh Mohammed**, who was educated in the United States, taught **Khallad Bin `Attash** and Nawaf al Hazmi (AA #77) various English phrases needed for hijacking airplanes, including "get down," "don't move," "stay in your seat," and "if anyone moves, I'll kill you."

13. In or about 1999, **Khalid Sheikh Mohammed** requested and received funding for his idea of hijacking planes and crashing them into buildings from Usama bin Laden (hereinafter the "Planes Operation").

14. In or about November 1999, **Khalid Sheikh Mohammed** provided Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) with funds in order to travel to the United States to train and prepare for the "Planes Operation."

15. In or about December 1999, **Khalid Sheikh Mohammed** directed **Khallad Bin `Attash** to conduct a casing mission in support of the Planes Operation. **Khalid Sheikh Mohammed** gave **Bin `Attash** a razor knife to secrete on his person while traveling in order to assess airline security measures. **Khallad Bin `Attash** carried this razor knife on flights to Kuala Lumpur, Malaysia, Bangkok, Thailand, and Hong Kong, China. On these flights, **Khallad Bin `Attash** collected information on United States air carriers, such as the number of passengers on the flights that were in first class, business class, and economy class.

16. In or about December 1999, **Khallad Bin `Attash** devised a scheme in order to assist Nawaf al Hazmi (AA #77) in traveling to the United States. In order to hide al Hazmi's previous travel to Pakistan, **Khallad Bin `Attash** directed al Hazmi to purchase two different tickets for travel to Malaysia, one using a fraudulently-issued Yemeni passport, which masked his travel to Pakistan and Afghanistan on Hazmi's valid Saudi passport.

17. On or about December 30, 1999, **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed BinYousaf), traveled from Kuala Lumpur, Malaysia, to Bangkok, Thailand, via Malaysia Airlines Flight #782 and stayed at the JW Marriott, a five star hotel in Bangkok.

18. On or about December 31, 1999, **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed Yusuf) traveled as a first-class passenger from Bangkok, Thailand, to Hong Kong, China, via United Airlines Flight #2 to conduct surveillance on airline security and collect information regarding air carriers for flights in Southeast Asia.

19. On or about January 1, 2000, **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed Yusuf), traveled as a first-class passenger from Hong Kong, China, to Bangkok, Thailand, via United Airlines Flight #1 to conduct surveillance on airline security and collect information regarding air carriers for flights in Southeast Asia.

20. On or about January 2, 2000, **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed BinYousaf), traveled from Bangkok, Thailand, to Kuala Lumpur, Malaysia,

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via Thai Airways Flight #415 in order to facilitate onward travel for Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) from Kuala Lumpur to the United States.

21. On or about January 5, 2000, Khalid al Mihdhar (AA # 77) traveled to Kuala Lumpur, Malaysia, via Malaysian Airlines Flight #91.

22. Between, on, or about January 5, 2000 and on or about January 8, 2000, while in Malaysia, on various occasions, **Khallad Bin `Attash** briefed Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) regarding **Khallad Bin `Attash's** surveillance during casing flights, to include the security on the flights, secreting the razor knife onboard the aircraft, and other flight information for use in the "Planes Operation."

23. On or about January 8, 2000, Nawaf al Hazmi (AA #77), Khalid al Mihdhar (AA # 77), and **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed) flew together, seated in the same row, from Kuala Lumpur, Malaysia, to Bangkok, Thailand, on Malaysia Airlines Flight #782.

24. On or about January 15, 2000, Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77), the first two hijackers to reach the United States, traveled from Bangkok, Thailand, to Los Angeles, California, on United Airlines Flight # 2, with orders from **Khalid Sheikh Mohammed** to undergo flight training, learn English, and affiliate with a mosque to help them assimilate in the United States.

25. On or about January 20, 2000, **Khallad Bin `Attash** (using the alias Salah Saeed Mohammed Bin Yousaf), traveled from Bangkok, Thailand, to Karachi, Pakistan, via Thai Airways Flight #507.

26. Upon his return to Karachi, Pakistan, **Khallad Bin `Attash** prepared a written report and briefed **Khalid Sheikh Mohammed** and Mohammed Atef (a/k/a Abu Hafs al Masri, the military commander of al Qaeda) on airline security and **Khallad Bin `Attash's** ability to get the razor knife on board the flights.

27. Between November 1999 and February 2000, **Ramzi Binalshibh**, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) traveled from Hamburg, Germany, to Qandahar, Afghanistan to attend an al Qaeda training camp.

28. In or about January 2000, Usama bin Laden chose **Ramzi Binalshibh**, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) to participate in the "Planes Operation" in the United States.

29. In or about January 2000, Usama bin Laden and Mohammed Atef (a/k/a Abu Hafs al Masri, the military commander of al Qaeda) tasked **Ramzi Binalshibh**, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) to obtain flight training for a martyrdom operation and report to **Khalid Sheikh Mohammed** on their progress.

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30. In or about January 2000, **Ramzi Binalshibh**, Mohamed Atta (AA #11), and Ziad Jarrah (UA #93) filmed videos to serve as their "martyr wills" in anticipation of dying in an attack against the United States.

31. In or about January 2000, Mohammed Atef (a/k/a Abu Hafs al Masri, the military commander of al Qaeda) sent **Ramzi Binalshibh** and Mohamed Atta (AA #11) to Karachi, Pakistan, to meet with **Khalid Sheikh Mohammed** for the first time to discuss future communication protocols between **Khalid Sheikh Mohammed** and the hijackers.

32. As part of the operational security for the "Planes Operation," **Khalid Sheikh Mohammed** instructed both Mohamed Atta (AA #11) and Nawaf al Hazmi (AA #77) to meet in places in the United States where tourists frequent so they would not stand out.

33. In or about January 2000, **Khalid Sheikh Mohammed** told **Ali Abdul Aziz Ali** that "Marwan" (identified by **Ali** as Marwan al Shehhi (UA #175)) would be traveling to meet **Ali** in Dubai, United Arab Emirates. **Khalid Sheikh Mohammed** directed **Ali** and al Shehhi (UA#175) to use the internet to order a video entitled "CityBird," depicting cockpit operations in a Boeing 767-300 while flying throughout the world.

34. On or about January 3, 2000, Marwan al Shehhi (UA #175) and **Ali Abdul Aziz Ali** ordered the "CityBird" video online and had it shipped to **Ali** at Post Office Box (P.O. Box) 16958, Dubai, United Arab Emirates. After receiving the video, **Ali** delivered the video to **Khalid Sheikh Mohammed** in Pakistan.

35. On or about January 3, 2000, Marwan Al-Shehhi (UA #175) and **Ali Abdul Aziz Ali** also purchased Boeing 747 flight simulator computer software.

36. In or about March 2000, upon returning to Hamburg, Germany, **Ramzi Binalshibh** and Mohamed Atta (AA #11) researched flight schools via the internet in support of the "Planes Operation."

37. On or about March 22, 2000, Mohamed Atta (AA #11) sent an email from Germany to several flight schools in the United States stating, "we are a small group (2-3) of young [sic] men from different arab countries... We would like to start training for the career of airline professional pilots."

38. On or about March 26, 2000, Ziad Jarrah (UA #93) submitted an application to the Florida Flight Training Center (FFTC) in Venice, Florida, and later enrolled.

39. In or about April 2000, **Khalid Sheikh Mohammed** provided **Ali Abdul Aziz Ali** with over \$100,000 to be utilized for "operational purposes."

40. In or about April 2000, at the direction of **Khalid Sheikh Mohammed**, **Ali Abdul Aziz Ali** spoke over the telephone with Nawaf al Hazmi (AA #77) (who was in the United States), who requested **Ali Abdul Aziz Ali** send funds.

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41. On or about April 16, 2000, **Ali Abdul Aziz Ali** transferred approximately \$5,000 to Nawaf al Hazmi (AA #77), through a third party, in San Diego, California.
42. On or about May 17, 2000, in Berlin, Germany, **Ramzi Binalshibh** applied for a visa to travel to the United States, which was denied.
43. On or about May 18, 2000, in Berlin, Germany, Mohamed Atta (AA #11) received a visa to travel to the United States.
44. On or about May 25, 2000, in Berlin, Germany, Ziad Jarrah (UA #93) received a visa to travel to the United States.
45. On or about May 29, 2000, Marwan al Shehhi (UA #175) traveled from Brussels, Belgium, to Newark, New Jersey.
46. On or about June 3, 2000, Mohamed Atta (AA #11) traveled from Prague, Czech Republic, to Newark, New Jersey.
47. On or about June 13, 2000, **Ramzi Binalshibh** sent a Moneygram wire transfer from Hamburg, Germany, in the amount of 5,789.26 German Deutschmarks (U.S. \$2,708.33) to Marwan al Shehhi (UA #175) in New York, New York.
48. On or about June 15, 2000, in Berlin, Germany, **Ramzi Binalshibh** applied for the second time for a visa to travel to the United States, which was denied.
49. On or about June 21, 2000, **Ramzi Binalshibh** sent a Moneygram wire transfer from Hamburg, Germany, in the amount of 3,862.76 German Deutschmarks (U.S. \$1,803.19) to Marwan al Shehhi (UA #175) in New York, New York.
50. On or about June 27, 2000, Ziad Jarrah (UA #93) traveled from Munich, Germany, to Atlanta, Georgia.
51. On or about June 29, 2000, **Ali Abdul Aziz Ali** (using the alias "Isam Mansar") transferred approximately \$5,000 from Dubai, United Arab Emirates, to Marwan al Shehhi (UA #175) in New York, New York.
52. On or about July 7, 2000, Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) opened a joint checking account at SunTrust Bank in Venice, Florida, with a \$7,000 cash deposit.
53. On or about July 18, 2000, **Ali Abdul Aziz Ali** (using the alias "Isam Mansur") transferred approximately \$10,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

54. Between, in, or about July 2000 and in or about December 2000, Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) attended flight training classes at Huffman Aviation in Venice, Florida.

55. On or about July 26, 2000, in Germany, **Ramzi Binalshibh** wired 3,853 German Deutschmarks (U.S. \$1,760.61) from Hamburg, Germany, to Marwan al Shehhi (UA #175) in Sarasota, Florida.

56. On or about August 5, 2000, **Ali Abdul Aziz Ali** (using the alias "Isam Mansour") transferred approximately \$9,500 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

57. In or about August 2000, Ziad Jarrah (UA #93), while attending flight training at Florida Flight Training Center, assisted **Ramzi Binalshibh** in his attempt to enroll in flight training with him.

58. On or about August 14, 2000, **Ramzi Binalshibh** wired 4,739.32 German Deutschmarks (approximately U.S. \$2,200) from his account in Germany to the Florida Flight Training Center, in Venice, Florida.

59. On or about August 29, 2000, **Ali Abdul Aziz Ali** (using the name "Mr. Ali") transferred approximately \$20,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

60. Beginning in September 2000, **Ramzi Binalshibh** attempted to enroll in the Aviation Language School in Miami, Florida.

61. On or about September 15, 2000, in San'a, Yemen, **Ramzi Binalshibh** applied for the third time for a visa to travel to the United States, which was denied.

62. On or about September 17, 2000, **Ali Abdul Aziz Ali** (using the alias "Hani (Fawaz TRDNG)") transferred approximately \$70,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

63. On or about September 25, 2000, **Ramzi Binalshibh** wired \$4,118.13 from Hamburg, Germany, to Marwan al Shehhi (UA #175) in Nokomis, Florida, via Western Union.

64. On or about October 25, 2000, in Berlin, Germany, **Ramzi Binalshibh** applied for the fourth and final time for a visa to travel to the United States, which was denied.

65. When **Ramzi Binalshibh** was unable to obtain a visa to travel to the United States, **Khalid Sheikh Mohammed** named **Binalshibh** as his main assistant in the "Planes

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Operation" due to his knowledge of the details of the plot. **Khalid Sheikh Mohammed** selected Mohamed Atta (AA #11) as the "emir," or leader, of the group and Nawaf al Hazmi (AA #77) as Atta's "deputy." **Khalid Sheikh Mohammed** gave Mohamed Atta (AA #11) full authority to make operational decisions in the United States.

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66. On or about November 5, 2000, Mohamed Atta (AA #11) ordered flight deck videos for the Boeing 747 Model 200 and the Boeing 757 Model 200, as well as other items from Sporty's Pilot Shop in Batavia, Ohio.

67. In or about December 2000, **Khalid Bin Attash** provided Hani Hanjour (AA #77) with an email address in order to contact Nawaf al Hazmi (AA #77) in the United States.

68. On December 2, 2000, Hani Hanjour (AA #77) traveled to Dubai, United Arab Emirates.

69. On or about December 5, 2000, **Ali Abdul Aziz Ali** helped Hani Hanjour (AA #77) open a banking account at the Deira, Dubai, United Arab Emirates, Citibank (hereinafter Hanjour Citibank account), and provided approximately \$3,000 to Hani Hanjour to deposit in the account.

70. In or about December 2000, **Ali Abdul Aziz Ali** reserved a plane ticket for Hani Hanjour (AA #77) to travel to the United States to join the other operatives already there.

71. On or about December 8, 2000, Hani Hanjour (AA #77) traveled from Dubai, United Arab Emirates, to San Diego, California.

72. Upon Hani Hanjour's (AA #77) arrival in San Diego, Nawaf al Hazmi (AA #77) contacted **Ali Abdul Aziz Ali** to advise him that Hanjour had arrived safely.

73. On or about December 11, 2000, Mohamed Atta (AA #11) ordered flight deck videos for the Boeing 767 Model 300ER and the Airbus A320-200 from Sporty's Pilot Shop in Batavia, Ohio.

74. On or about December 26, 2000, **Ali Abdul Aziz Ali** traveled from Dubai, United Arab Emirates, to Karachi, Pakistan, and returned to Dubai on or about January 5, 2001.

75. On or about January 28, 2001, in Dubai, United Arab Emirates, **Ali Abdul Aziz Ali** deposited \$5,000 in Hani Hanjour's (AA #77) Citibank account.

76. In or about late January 2001, **Ramzi Binalshibh** traveled from Germany to Afghanistan to notify Usama bin Laden, Mohammed Atef (a/k/a Abu Hafs al Masri, the military commander of al Qaeda), and **Khalid Sheikh Mohammed** that Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) had completed their initial flight training in the United States.

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77. In or about March 2001, having already earned his pilot's license in 1999, Hani Hanjour (AA #77) attended flight simulator training in Phoenix, Arizona, at Pan Am International Flight Academy, Jet Tech International.

78. On or about January 30, 2001, Hani Hanjour (AA #77) paid the balance of his simulator training with a Bank of America cashier's check in the amount of \$5,745.00.

79. Between on or about January 31, 2001, and on or about February 6, 2001, Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) took flight "check rides" around Decatur, Georgia.

80. On or about March 19, 2001, Nawaf al Hazmi (AA #77) ordered flight deck videos for the Boeing 747 Model 400, the Boeing 747 Model 200, and the Boeing 777 Model 200, and another video from Sporty's Pilot Shop in Batavia, Ohio.

81. In or about April 2001, **Mustafa al Hawsawi** traveled to Dubai, United Arab Emirates, from Karachi, Pakistan, at the direction of al Qaeda's Media Committee.

82. Between in or about September 2000 and in or about July 2001, **Khalid Sheikh Mohammed** instructed the non-pilot hijackers to travel to their home countries to obtain "clean" passports (a passport not reflecting travel to Pakistan or Afghanistan), visas from other Western countries, and visas to the United States, then return to Pakistan. Following the hijackers' return to Pakistan, **Khalid Sheikh Mohammed** sent them to Dubai, United Arab Emirates, to await final travel to the United States. On several occasions, **Khalid Sheikh Mohammed** provided the non-pilot hijackers with chemicals in an eye dropper to remove any Pakistani stamps from their passports.

83. **Khalid Sheikh Mohammed** personally trained the hijackers and informed them that they were going on a martyrdom operation involving airplanes, but at the time of their training they were not made aware of the specific targets.

84. **Khalid Sheikh Mohammed** and others trained the non-pilot hijackers by providing instructions on how to pack their bags to best secrete knives onto a plane, and on how to slit passengers' throats by making the hijackers practice on sheep, goats, and camels in preparation for the "Planes Operation."

85. **Khalid Sheikh Mohammed** directed al Qaeda members to film martyr videos of some of the hijackers, several of which were later released publicly through al Qaeda's media wing, As Sahab Productions.

86. Beginning on or about April 19, 2001, **Khalid Sheikh Mohammed** ordered that the non-pilot hijackers be sent to the United States and gave the hijackers operational guidance on how to avoid detection during their travel to the United States.

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87. On or about April 23, 2001, Satam al Suqami (AA #11) and Waleed al Shehri (AA #11) traveled from Dubai, United Arab Emirates, via Emirates Flight #7 to London-Gatwick, England, and Virgin Atlantic Flight #27 from London to Orlando, Florida.
88. On or about May 1, 2001, Satam al Suqami (AA #11) and Waleed al Shehri (AA #11) opened a joint bank account at SunTrust Bank in Florida with a cash deposit of \$9,000.
89. On or about May 2, 2001, Ahmad al Ghamdi (UA #175) and Majed Moqed (AA# 77) traveled from Dubai, United Arab Emirates, via Emirates Flight #1 to London-Heathrow, England, and United Airlines Flight #925 from London to Washington-Dulles, Virginia.
90. Beginning in or about May 2001, while in Florida, Ziad Jarrah (UA #93) joined a gym and took martial arts lessons which included instruction in knife fighting.
91. On or about May 26, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) purchased plane tickets to travel from Dubai, United Arab Emirates, to Miami, Florida, via London, England. They all listed 050 7696327 as their contact number, a phone number associated with **Ali Abdul Aziz Ali**.
92. On or about May 28, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) traveled from Dubai, United Arab Emirates, via Emirates Flight #7 to London-Gatwick, England, and Virginia Atlantic Flight #5 from London to Miami, Florida.
93. On or about June 1, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) opened bank accounts at SunTrust Bank in Florida with cash deposits of \$4,700, \$4,800, and \$3,000, respectively.
94. On or about June 6, 2001, Ahmad al Haznawi (UA #93) and Wail al Shehri (AA #11) purchased plane tickets to travel from Dubai, United Arab Emirates, to Miami, Florida via London, England. They both listed 050 7696327 as their contact number, a phone number associated with **Ali Abdul Aziz Ali**.
95. On or about June 8, 2001, Ahmed al Haznawi (UA #93) and Wail al Shehri (AA #11) traveled from Dubai, United Arab Emirates via Emirates Flight #7 to London-Gatwick, England, and Virgin Atlantic Flight #5 from London to Miami, Florida.
96. On or about June 18, 2001, Wail al Shehri (AA #11) opened a bank account at SunTrust Bank in Florida with a deposit of \$8,000.
97. On or about June 23, 2001, **Mustafa al Hawsawi** opened a bank account at the Standard Chartered Bank in Sharjah, United Arab Emirates, and obtained an ATM card in connection with the checking account.

98. On or about June 24, 2001, **Mustafa al Hawsawi** opened P.O. Box 19738 in Sharjah, United Arab Emirates.

99. On or about June 25, 2001, Fayeز Banihammad (UA #175), accompanied by **Mustafa al Hawsawi**, opened a current account, fixed deposit account, and VISA card account at the same Standard Chartered Bank branch used by **al Hawsawi** two days earlier. Fayeز Banihammad (UA #175) provided **al Hawsawi** with a power of attorney letter to grant him the authority to pick up Banihammad's ATM and credit card.

100. On or about June 25, 2001, **Mustafa al Hawsawi** opened a fixed deposit account and applied for a VISA card at the Standard Chartered Bank in Sharjah, United Arab Emirates.

101. On or about June 25, 2001, **Mustafa al Hawsawi** purchased plane tickets for Fayeز Banihammad (UA #175) and Saeed al Ghamdi (UA #93) to travel from Dubai, United Arab Emirates, to Orlando, Florida, via London, England. They both listed 050 5209905 as their contact number, a phone number associated with **Mustafa al Hawsawi**.

102. On or about June 27, 2001, Fayeز Banihammad (UA #175) and Saeed al Ghamdi (UA #93) traveled from Dubai, United Arab Emirates, on Emirates Flight #7 via London-Gatwick, England, and Virgin Atlantic Flight #15 from London to Orlando, Florida.

103. While the non-pilot hijackers were in Dubai, **Ali Abdul Aziz Ali** and **Mustafa al Hawsawi** assisted them by purchasing clothing, food, lodging, rental cars, traveler's checks, and making travel arrangements.

104. Each hijacker was given between \$6,000 and \$10,000 in cash by **Khalid Sheikh Mohammed** or **Mustafa al Hawsawi** with instructions to keep a few thousand dollars for themselves and to give the remaining money to Mohamed Atta (AA #11) for operational expenses.

105. On or about June 26, 2001, **Ali Abdul Aziz Ali** traveled from Dubai, United Arab Emirates, to Karachi, Pakistan. Between, on, or about June 27, 2001, and on or about July 14, 2001, **Ali Abdul Aziz Ali** met with **Khalid Sheikh Mohammed** and advised **Mohammed** that **Ali** was willing to do anything to help the mission (referring to the "Planes Operation") which, based on past conversations between **Ali** and **Mohammed**, included being a martyr. **Mohammed** directed **Ali Abdul Aziz Ali** to apply for a United States visa to travel to the United States.

106. On or about June 28, 2001, Abdul Aziz al Omari (AA #11) and Salem al Hazmi (AA #77) purchased plane tickets to travel from Dubai, United Arab Emirates, to New York, New York, via Zurich, Switzerland. They both listed 050 5209905 as their contact number, a phone number associated with **Mustafa al Hawsawi**.

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107. On or about June 29, 2001, Salem al Hazmi (AA #77) and Abdul Aziz al Omari (AA #11) traveled from Dubai, United Arab Emirates, to New York, New York, via Zurich, Switzerland.

108. On or about July 4, 2001, Khalid al Mihdhar (AA #77) traveled to New York, New York, from Riyadh, Saudi Arabia.

109. On or about July 8, 2001, Mohamed Atta (AA #11) purchased two Victorinox Swiss Army pocket knives in Zurich, Switzerland.

110. On or about July 9, 2001, Nawaf al Hazmi (AA #77), Majed Moqed (AA #77) and Ahmed al Ghamdi (UA #175) opened bank accounts at the Dime Savings Bank in New Jersey.

111. On or about July 12, 2001, Ahmad al Haznawi (UA #93) opened a bank account at SunTrust Bank in Florida with a \$500 deposit.

112. On or about July 12, 2001, Saeed al Ghamdi (UA #93) opened a bank account at SunTrust Bank in Florida with a \$4,500 deposit.

113. On or about July 18, 2001, Fayeز Banihammad (UA #175) opened an account at SunTrust Bank in Florida with a \$1,000 deposit.

114. On or about July 18, 2001, Khalid al Mihdhar (AA #77) opened a bank account at Hudson United Bank in New Jersey with a \$300 deposit.

115. On or about July 18, 2001, **Mustafa al Hawsawi** took power of attorney over Fayeز Banihammad's (UA #175) Standard Chartered Bank accounts in the United Arab Emirates.

116. On or about July 18, 2001, using his power of attorney, **Mustafa al Hawsawi** picked up Fayeز Banihammad's (UA #175) VISA and ATM cards from Standard Chartered Bank in the United Arab Emirates.

117. On or about July 23, 2001, **Mustafa al Hawsawi** withdrew 500 Dirhams (U.S. \$136.24) from an ATM in Sharjah, United Arab Emirates, from the Standard Chartered Bank account of Fayeز Banihammad (UA #175).

118. On or about July 23, 2001, **Mustafa al Hawsawi** sent a package using the alias "Hashim" to Fayeز Banihammad (UA #175) in Delray Beach, Florida, listing the mobile phone number 5209905 and P.O. Box 19738, SHJ, UAE.

119. On or about August 1, 2001, in Florida, Fayeز Banihammad's (UA #175) Standard Chartered Bank VISA card was used for the first time in the United States to withdraw approximately \$2,804.50.

120. On or about July 21, 2001, Salem al Hazmi (AA #77) opened a bank account at Hudson United Bank in New Jersey with a \$500 deposit.

121. On or about July 26, 2001, Abdul Aziz al Omari (AA #11) opened a bank account at Hudson United Bank in New Jersey with a \$100 deposit.

122. On August 13, 2001, Marwan al Shehhi (UA #175) purchased two knives from Sports Authority, Boynton Beach, Florida.

123. On August 13, 2001, Fayez Banihammad (UA #175) purchased a Stanley two-piece knife snap set from Wal-Mart, Boynton Beach, Florida.

124. On or about August 17, 2001, Ziad Jarrah (UA #93) took a "check ride" at a flight school in Fort Lauderdale, Florida.

125. On or about August 22, 2001, Fayez Banihammad (UA #175) used his VISA card in Florida to obtain approximately \$4,800 cash, which was previously deposited into his Standard Chartered Bank account in the United Arab Emirates.

126. On or about late August 2001, **Ramzi Binalshibh** sent a message to **Khalid Sheikh Mohammed** notifying him that Mohamed Atta (AA #11) had chosen September 11, 2001, as the date of the operation. **Khalid Sheikh Mohammed** reported the date to Usama bin Laden, who began preparing al Qaeda members and their families in Afghanistan in anticipation of the expected United States military response. **Khalid Sheikh Mohammed** traveled from Afghanistan to Pakistan shortly after having been notified.

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127. On or about August 25, 2001, **Mustafa al Hawsawi** applied for a supplemental Standard Chartered Bank VISA card in the name of Abdul Rahman Abdullah al Ghamdi, and attached a photograph of **Khalid Sheikh Mohammed** as the supplemental applicant.

128. On or about August 25, 2001, Khalid al Mihdhar (AA #77) and Majed Moqed (AA #77) reserved tickets for American Airlines Flight 77, scheduled to depart Washington Dulles International Airport, Dulles, Virginia, at 8:10 a.m. and arrive at Los Angeles, California, on September 11, 2001.

129. On or about August 26, 2001, tickets were reserved for Waleed al Shehri (AA #11) and Wail al Shehri (AA #11) on American Airlines Flight 11, scheduled to depart Logan International Airport, Boston, Massachusetts, at 7:45 a.m. and arrive at Los Angeles, California, on September 11, 2001.

130. On or about August 27, 2001, tickets were reserved for Fayez Banihammad (UA #175) and Mohand al Shehri (UA #175) on United Airlines Flight 175, scheduled to depart Logan International Airport, Boston, Massachusetts, at 8:00 a.m. and arrive at Los Angeles, California, on September 11, 2001.

131. On or about August 27, 2001, tickets were reserved for Nawaf al Hazmi (AA #77) and Salem al Hazmi (AA #77) on American Airlines Flight 77 for travel on September 11, 2001.

132. On or about August 27, 2001, tickets were reserved for Saeed al Ghamdi (UA #93) and Ahmed al Nami (UA #93) on United Airlines Flight 93, scheduled to depart from Newark International Airport, Newark, New Jersey, at 8:00 a.m. and arrive at San Francisco, California, on September 11, 2001.

133. On or about August 27, 2001, Nawaf al Hazmi (AA #77) purchased a Leatherman Wave Multi-tool from Target, in Laurel, Maryland.

134. On or about August 22, 2001, and August 27, 2001, in Miami, Florida, Ziad Jarrah (UA #93) purchased a Global Positioning System ("GPS") device, other GPS-related equipment, and schematics for Boeing 757 cockpit instrument diagrams.

135. On or about August 28, 2001, tickets were reserved for Mohamed Atta (AA #11), Abdul Aziz al Omari (AA #11), and Satam al Suqami (AA#11) on American Airlines Flight 11 for travel on September 11, 2001.

136. On or about August 28, 2001, tickets were reserved for Marwan al Shehhi (UA #175) on United Airlines Flight 175 for travel on September 11, 2001.

137. On or about August 28, 2001, in Dubai, United Arab Emirates, **Ali Abdul Aziz Ali** applied for a visa to travel to the United States on September 4, 2001, for a period of one week. This application was denied.

138. On or about August 29, 2001, tickets were reserved for Ahmed al Ghamdi (UA #175) and Hamza al Ghamdi (UA #175) on United Airlines Flight 175 for travel on September 11, 2001.

139. On or about August 29, 2001, tickets were reserved for Ahmed al Haznawi (UA #93) on United Airlines Flight 93 for travel on September 11, 2001.

140. On or about August 30, 2001, tickets were reserved for Ziad Jarrah (UA #93) on United Airlines Flight 93 for travel on September 11, 2001.

141. On or about August 30, 2001, Hamza al Ghamdi (UA #175) purchased a Leatherman Wave Multi-Tool from Lowe's Home Improvement, Boynton Beach, Florida.

142. On or about August 31, 2001, tickets were reserved for Hani Hanjour (AA #77) on American Airlines Flight 77 for travel on September 11, 2001.

143. On or about September 3, 2001, **Mustafa al Hawsawi**, using the alias Hashem Abdollahi, and listing the contact phone number 050 7692590, sent \$1,500 to Ahad Abdollahi Sabet, an alias for **Ramzi Binalshibh**.

144. On or about September 4, 2001, Mohamed Atta (AA #11) sent a Federal Express package containing Fayeز Banihammad's (UA #175) ATM card and a blank check to **Mustafa al Hawsawi's** P.O. Box 19738 in Sharjah, United Arab Emirates. **Mustafa al Hawsawi** collected the package on or about September 8, 2001.

145. On or about September 5, 2001, Fayeز Banihammad (UA #175) wired approximately \$8,000 from his Florida SunTrust account to his Standard Chartered Bank account, over which **Mustafa al Hawsawi** had power of attorney.

146. On or about September 8, 2001, Mohamed Atta (AA #11) wired \$2,860 to "Mustafa Ahmed" in the United Arab Emirates. **Mustafa al Hawsawi** retrieved the funds, using a true name photo identification, at the Wall Street Exchange, Dubai, United Arab Emirates, on or about September 9, 2001.

147. On or about September 8, 2001, Mohamed Atta (AA #11) wired an additional \$5,000 to "Mustafa Ahmed" in United Arab Emirates. **Mustafa al Hawsawi** retrieved the funds, using a true name photo identification, at the Wall Street Exchange, Dubai, United Arab Emirates, on or about September 10, 2001.

148. On or about September 9, 2001, Waleed al Shehri (AA #11) wired \$5,000 to "Ahanad Mustafa" in the United Arab Emirates. **Mustafa al Hawsawi** retrieved the funds, using a true name photo identification, at the Al-Ansari Exchange, Sharjah, United Arab Emirates, on or about September 11, 2001.

149. On or about September 10, 2001, Marwan al Shehhi (UA #175) wired \$5,400 to "Mustafa Ahmad" in United Arab Emirates. **Mustafa al Hawsawi** retrieved the funds, using a true name photo identification, at the Al-Ansari Exchange, Sharjah, United Arab Emirates, on or about September 11, 2001.

150. On or about September 10, 2001, Nawaf al Hazmi (AA #77), using the alias "Rawf Al-Dog," attempted to send a package to **Mustafa al Hawsawi's** P.O. Box 19738, Al Sharjah, United Arab Emirates, containing a First Union VISA check card in the name of Khalid al Mihdhar (AA #77) and other account information.

151. On or about September 10, 2001, **Ali Abdul Aziz Ali** flew from Dubai, United Arab Emirates, to Karachi, Pakistan.

152. On or about September 11, 2001, in United Arab Emirates, **Mustafa al Hawsawi** deposited approximately 60,000 Dirhams (U.S. \$16,348) into his Standard Chartered Bank account.

153. On September 11, 2001, prior to the hijackings taking place in the United States, in Dubai, United Arab Emirates, **Mustafa al Hawsawi** transferred approximately 24,000 Dirhams (U.S. \$6,534) from Fayeز Banihammad's (UA #175) Standard Chartered Bank account into his own account, using a check dated September 10, 2001, and signed by

Fayez Banihammad (UA #175). **Mustafa al Hawsawi** then withdrew approximately 5000 Dirhams (U.S. \$1,361), nearly all the remaining balance in Banihammad's (UA #175) account, by ATM cash withdrawal.

154. On or about September 11, 2001, in United Arab Emirates, **Mustafa al Hawsawi** prepaid approximately 150,000 Dirhams (U.S. \$40,871) to a VISA card connected to his Standard Chartered Bank account.

155. On or about September 11, 2001, **Mustafa al Hawsawi** flew from Dubai, United Arab Emirates, to Karachi, Pakistan.

156. On or about September 11, 2001, Mohamed Atta (AA #11) possessed a handwritten set of final instructions for a martyrdom operation using knives on an airplane. Copies of these instructions were in the possession of at least one hijacker on United Airlines #93 and also placed in Nawaf al Hazmi's (AA #77) Toyota Corolla at Washington Dulles International Airport.

157. On September 11, 2001, Mohamed Atta (AA #11) and Abdul Aziz al Omari (AA #11) flew from Portland, Maine, to Boston, Massachusetts.

158. On or about September 11, 2001, Mohamed Atta (AA #11) possessed an operating manual for a Boeing 757/767 Simulator, pepper spray, a knife, and a German travel visa.

159. On September 11, 2001, Mohamed Atta, Abdul Aziz al Omari, Satam al Suqami, Waleed al Shehri, and Wail al Shehri hijacked American Airlines Flight 11, which had departed from Boston, Massachusetts, at approximately 7:59 a.m. They crashed Flight 11 into the North Tower of the World Trade Center in Manhattan at approximately 8:46 a.m., causing the collapse of the tower and the deaths of 87 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. (See Charge Sheet Appendix A for the list of individuals killed on Flight 11 and at the site of the World Trade Center).

160. On September 11, 2001, Marwan al Shehhi, Hamza al Ghamdi, Fayez Banihammad, Mohand al Shehri, and Ahmed al Ghamdi, hijacked United Airlines Flight 175, which had departed from Boston, Massachusetts, at approximately 8:14 a.m. They crashed Flight 175 into the South Tower of the World Trade Center in Manhattan at approximately 9:03 a.m., causing the collapse of the tower and the deaths of 60 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. (See Charge Sheet Appendix A for the list of individuals killed on Flight 175 and at the site of the World Trade Center).

161. On September 11, 2001, Hani Hanjour, Khalid al Mihdhar, Majed Moqed, Nawaf al Hazmi, and Salem al Hazmi hijacked American Airlines Flight 77, which had departed from Dulles, Virginia, at approximately 8:20 a.m. They crashed Flight 77 into the Pentagon in Arlington, Virginia, at approximately 9:37 a.m., causing the deaths of 59 passengers and

crew members on-board and 125 persons in the Pentagon. (See Charge Sheet Appendix A for the list of individuals killed on Flight 77 and at the Pentagon).

162. On September 11, 2001, Ziad Jarrah, Saeed al Ghamdi, Ahmed al Nami, and Ahmed al Haznawi hijacked United Airlines Flight 93, which had departed from Newark, New Jersey, at approximately 8:42 a.m. After resistance by several passengers, Flight 93 crashed in Somerset County, Pennsylvania, at approximately 10:03 a.m., killing all 40 passengers and crew members on-board. (See Charge Sheet Appendix A for the list of individuals killed on Flight 93).

163. Between on or about September 11, 2001, and on or about September 21, 2001, **Khalid Sheikh Mohammed** and others in his Karachi, Pakistan, guesthouse recorded many news stories of the attacks for future use in propaganda films.

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164. On or about September 13, 2001, **Khalid Sheikh Mohammed** used the supplemental VISA card connected to **Mustafa al Hawsawi's** Standard Chartered Bank VISA account to make six ATM withdrawals in Karachi, Pakistan.

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165. In late September 2001, Usama bin Laden, **Ramzi Binalshibh**, **Mustafa al Hawsawi**, and other members of al Qaeda met near Kabul, Afghanistan, to discuss the September 11th attacks; this meeting was videotaped and later released by al Qaeda for propaganda purposes.

166. On or about October 7, 2001, in Afghanistan, Usama Bin Laden praised the September 11th attacks, and vowed that the United States would not "enjoy security" before "infidel armies leave" the Arabian Peninsula.

167. On or about late 2001, **Khalid Sheikh Mohammed** attended a meeting with Usama bin Laden when Usama bin Laden confirmed al Qaeda's involvement in the September 11th attacks in a videotaped message.

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CHARGE II: VIOLATION OF 10 U.S.C. §950t (2), ATTACKING CIVILIANS

Specification: In that **Khalid Sheikh Mohammed**, **Walid Muhammad Salih Mubarak Bin Attash**, **Ramzi Binalshibh**, **Ali Abdul Aziz Ali**, and **Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally engage in attacks on civilian populations, to wit: the civilian population of New York, New York, in and around the World Trade Center, the civilian population of the Pentagon, and the passengers and crew of four civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93, by intentionally crashing said civilian aircraft into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field in Shanksville, Pennsylvania, intending the object to be,

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and the object which was, a civilian population as such, and individual civilians not taking direct or active part in hostilities; knowing the factual circumstances that established their civilian status, resulting in the deaths of 2,921 civilians. (See Charge Sheet Appendix A for a list of the names of civilians killed).

CHARGE III: VIOLATION OF 10 U.S.C. §950t (3), ATTACKING CIVILIAN OBJECTS

Specification: In that ^a **Khalid Sheikh Mohammed**, ^a **Walid Muhammad Salih Mubarak Bin Attash**, **Ramzi Binalshibh**, **Ali Abdul Aziz Ali**, and **Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally engage in attacks on civilian property, to wit: the World Trade Center (New York, New York) and four civilian aircraft, to wit: American Airlines Flight #11, a Boeing 767 aircraft, tail number N334AA; United Airlines Flight #175, a Boeing 767 aircraft, tail number N612UA; American Airlines Flight #77, a Boeing 757 aircraft, tail number N644AA; and United Airlines Flight #93, a Boeing 757 aircraft, tail number N591UA; that is, property that was not a military objective, intending the object to be, and the object which was, civilian property; knowing that such property was not a military objective, by intentionally crashing the said four civilian aircraft, into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania.

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~~**CHARGE IV: VIOLATION OF 10 U.S.C. §950t (13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY**~~

~~**Specification:** In that **Khalid Sheikh Mohammed**, **Walid Muhammad Salih Mubarak Bin Attash**, **Ramzi Binalshibh**, **Ali Abdul Aziz Ali**, and **Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York and Arlington, Virginia, while in the context of and associated with hostilities, intentionally cause and inflict serious injury to the body and health of one or more persons, with unlawful force and violence, in violation of the law of war by intentionally crashing civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, and American Airlines Flight #77, into the World Trade Center (New York, New York) and the Pentagon (Arlington, Virginia). (See Charge Sheet Appendix B for a list of some, but not all, of the victims that suffered serious bodily injury in the attacks).~~

AAW
20120404

Dismissed w/o Prejudice

IV DAW 20120404
CHARGE X: VIOLATION OF 10 U.S.C. §950t (15), MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that **Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York, Arlington, Virginia, and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally and unlawfully kill 2,976 persons in violation of the law of war by intentionally crashing four civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93 into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania. (See Charge Sheet Appendix A for a list of victims killed in the attacks).

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V DAW 20120404
CHARGE XI: VIOLATION OF 10 U.S.C. §950t (16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR

Specification: In that **Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York, Arlington, Virginia, and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally destroy property belonging to another person, without that person's consent, to wit: four civilian aircraft (American Airlines Flight 11, a Boeing 767 aircraft, tail number N334AA; United Airlines Flight #175, a Boeing 767 aircraft, tail number N612UA; American Airlines Flight #77, a Boeing 757 aircraft, tail number N644AA; and United Airlines Flight #93, a Boeing 757 aircraft, tail number N591UA); ~~the Pentagon (Arlington, Virginia);~~ and the North and South Towers of the World Trade Center (New York, New York); in violation of the law of war, by intentionally crashing said four civilian aircraft into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania.

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V1 DAW 20120404
CHARGE XII: VIOLATION OF 10 U.S.C. §950t (23), HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT

Specification: In that **Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi**, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, in the skies over the United States, on September 11, 2001, while in the context of and associated with hostilities, intentionally seize, exercise unauthorized control over, and endanger the safe navigation of aircraft that were not legitimate military objectives, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93, resulting in the deaths of 2,976 persons. (See Charge Sheet Appendix A for a list of victims killed in the attacks).

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9 Apr 12*

VII ²⁰¹²⁰⁴⁰⁴

CHARGE VII: VIOLATION OF 10 U.S.C. §950t (24), TERRORISM



Specification: In that ^a Khalid Sheikh Mohammed, ^a Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York, Arlington, Virginia, and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally kill and inflict great bodily harm on one or more protected persons and engage in an act that evinced a wanton disregard for human life, in a manner calculated to influence and affect the conduct of the United States Government and civilian population by intimidation and coercion, and to retaliate against United States Government conduct, by intentionally crashing four civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93 into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania, resulting in the deaths of 2,976 persons. (See Charge Sheet Appendix A for a list of victims killed in the attacks).

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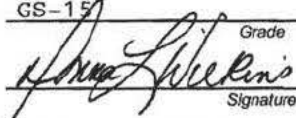
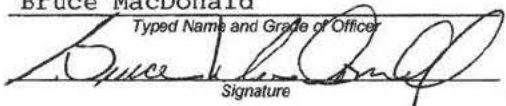
Attachment C

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: Abd Al Rahim Hussayn Muhammad Al Nashiri		
2. ALIASES OF ACCUSED: SEE ATTACHED APPENDIX A		
3. ISN NUMBER OF ACCUSED (LAST FOUR): 10015		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.		
SPECIFICATION:		
SEE ATTACHED CONTINUATION SHEET OF BLOCK II. CHARGES AND SPECIFICATIONS		
III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER (LAST, FIRST, MI) Regan, Edward J.	5b. GRADE O-6	5c. ORGANIZATION OF ACCUSER Office of Military Commissions
5d. SIGNATURE OF ACCUSER 	5e. DATE (YYYYMMDD) 20110915	
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>15th</u> day of <u>September</u> , <u>2011</u> , and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.		
_____ Nathaniel R. Gross <i>Typed Name of Officer</i>	_____ Office of Military Commissions <i>Organization of Officer</i>	
_____ O-3 <i>Grade</i>  <i>Signature</i>	_____ Judge Advocate <i>Official Capacity to Administer Oath</i> <i>(See R.M.C. 307(b) must be commissioned officer)</i>	

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IV. NOTICE TO THE ACCUSED		
6. On <u>15 September</u> , <u>2011</u> the accused was notified of the charges against him/her (See R.M.C. 308).		
<p><u>Andrea K. Lockhart/O-5</u> <i>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</i></p> <p> <i>Signature</i></p>	<p><u>Office of Military Commissions</u> <i>Organization of the Person Who Caused Accused to Be Notified of Charges</i></p>	
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1126</u> hours, on <u>16 Sept 2011</u> at <u>Alexandria, Virginia</u>		
<i>Location</i>		
For the Convening Authority: <u>Donna L. Wilkins</u>		
<i>Typed Name of Officer</i>		
<u>GS-15</u>		
<i>Grade</i>		
 <i>Signature</i>		
VI. REFERRAL		
8a. DESIGNATION OF CONVENING AUTHORITY <u>Convening Authority 10USC §948h</u> <u>Appointed on 25 March 2010</u>	8b. PLACE <u>Alexandria, VA</u>	8c. DATE (YYYYMMDD) <u>20110928</u>
Referred for trial to the (non) capital military commission convened by military commission convening order <u>11-02</u> <u>dated 28 September 2011</u>		
subject to the following instructions: <u>This case is referred capital.</u> <u>See R.M.C. 103(a)(4) and (5)</u>		
x of _____ <i>Command, Order, or Direction</i>		
<p><u>Bruce MacDonald</u> <i>Typed Name and Grade of Officer</i></p> <p> <i>Signature</i></p>	<p><u>Convening Authority 10USC §948h</u> <i>Official Capacity of Officer Signing</i></p>	
VII. SERVICE OF CHARGES		
9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.		
<i>Typed Name of Trial Counsel</i>		<i>Grade of Trial Counsel</i>
<i>Signature of Trial Counsel</i>		
FOOTNOTES		
¹See R.M.C. 601 concerning instructions. If none, so state.		

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CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

CHARGE I: VIOLATION OF 10 U.S.C. § 950t(17), USING TREACHERY OR PERFDY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, invite the confidence and belief of one or more persons onboard USS COLE (DDG 67), including but not limited to then FN Raymond Mooney, USN, that two men dressed in civilian clothing, waving at the crewmembers onboard USS COLE (DDG 67), and operating a civilian boat, were entitled to protection under the law of war, and intending to betray that confidence and belief, did thereafter make use of that confidence and belief to detonate explosives hidden on said civilian boat alongside USS COLE (DDG 67), killing 17 Sailors of the United States Navy (see Charge II for a list of deceased) and injuring one or more persons, all crewmembers onboard USS COLE (DDG 67) (See Appendix B for the list of injured).

CHARGE II: VIOLATION OF 10 U.S.C. § 950t(15), MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, in violation of the law of war, to wit: by committing an act of perfidy, said act of perfidy being two men dressing in civilian clothing, waving at the crewmembers onboard USS COLE (DDG 67), and operating and detonating an explosives-laden civilian boat alongside a United States naval vessel, intentionally and unlawfully kill the following 17 persons:

1. HT3 Kenneth E. Clodfelter, USN;
2. ETC Richard Costelow, USN;
3. MSSN Lakeina M. Francis, USN;
4. ITSN Timothy L. Gauna, USN;
5. SMSN Cherone L. Gunn, USN;
6. ITSN James R. McDaniels, USN;
7. EN2 Marc I. Nieto, USN;
8. EW3 Ronald S. Owens, USN;
9. SN Lakiba N. Palmer, USN;
10. ENFA Joshua L. Parlett, USN;
11. FN Patrick H. Roy, USN;
12. EW2 Kevin S. Rux, USN;
13. MS3 Ronchester M. Santiago, USN;
14. OS2 Timothy L. Saunders, USN;
15. FN Gary G. Swenchonis, Jr., USN;
16. ENS Andrew Triplett, USN; and
17. SN Craig B. Wibberley, USN.

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

CHARGE III: VIOLATION OF 10 U.S.C. § 950t(28), ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

Specification 1: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 3 January 2000, in the context of and associated with hostilities, with the specific intent to commit Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS THE SULLIVANS (DDG 68), in violation of the law of war, to wit: by committing an act of perfidy, and committing acts that amount to more than mere preparation, and to effect the commission of Murder in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), detonate the explosives while alongside USS THE SULLIVANS (DDG 68) so as to damage and sink USS THE SULLIVANS (DDG 68), and kill one or more persons onboard that vessel.

Specification 2: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS COLE (DDG 67), in violation of the law of war, to wit: by committing an act of perfidy, and committing acts that amount to more than mere preparation, and to effect the commission of Murder in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, to perfidiously approach USS COLE (DDG 67), detonate the explosives while alongside USS COLE (DDG 67) so as to damage and sink USS COLE (DDG 67), and kill one or more persons onboard that vessel.

CHARGE IV: VIOLATION OF 10 U.S.C. § 950t(24), TERRORISM

Specification 1: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, and in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government, engage in an act that evinced a wanton disregard for human life, to wit: intentionally detonating an explosives-laden boat alongside USS COLE (DDG 67), resulting in the deaths of seventeen persons (see Charge II for a list of deceased) onboard USS COLE (DDG 67).

Specification 2: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission,

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, and in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government, intentionally kill and inflict great bodily harm on one or more protected persons and engage in an act that evinced a wanton disregard for human life, to wit: detonating an explosives-laden boat alongside *MV Limburg*, resulting in the death of one civilian person, Atanas Atanasov, serving onboard *MV Limburg*.

CHARGE V: VIOLATION OF 10 U.S.C. § 950t(29), CONSPIRACY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, at multiple locations in and around Yemen, Afghanistan, Pakistan, Saudi Arabia, the United Arab Emirates (hereinafter "UAE"), ~~Qatar, Bosnia~~, the Middle East, the Arabian Peninsula, and other locations, in the context of and associated with hostilities, ~~from an unknown date prior to~~ approximately August 1996, through approximately October 2002, willfully conspire, agree, and join with at least one of the following (see Appendix C for the list of aliases for each co-conspirator):

- a. Usama bin Laden;
- b. Ayman Al Zawahiri;
- c. Mohammed Atef;
- d. Mushin Musa Matwalli Atwah;
- e. Walid Muhammad Salih Mubarak bin 'Attash;
- f. Jamal Ahmed Mohammed Ali Al-Badawi;
- g. Fahd Mohammed Ahmed Al-Quso;
- h. Hassan Sa'id Awad Al Khamri;
- i. Ibrahim Al-Thawar;
- j. Taha Ibrahim Hussein Al-Ahdal;
- k. Hadi Muhammad Salih Al-Wirsh;
- l. Nasser Ahmad Nasser Al-Bahri;
- m. Khalid Ibn Muhammad Al Juhani;
- n. Fawzi Muhammad 'Abd-Al-Qawi Al-Wajih;
- o. Fawzi Yahya Qaim Al-Hababi;
- p. Muncer Al Sharabi;
- q. Walid Al-Shaybah;
- r. Mohammad Rashed Daoud Al-Owhali;
- s. Jihad Muhammad Abdah Ali Abdullah Al-Harazi;
- t. Ali Hamza Ahmed Suliman Al-Bahlul;
- u. Nasir 'Awad;
- v. Husayn Al-Badawi;
- w. Ahmed Mohammed al Darbi;

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AP 9/28/11

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

- x. 'Umar Sa'id Hassan Jarullah;
- y. Muhammed Sa'id Ali Hasan Al-Amari;
- z. and others, both known and unknown;

to commit Terrorism and Murder in Violation of the Law of War, both offenses triable by military commission, with the conspiracy resulting in the death of one or more victims (See Charge II and IX for a list of deceased) and, knowing that Terrorism and Murder in Violation of the Law of War were the unlawful purpose of the conspiracy, and intending his actions to further the unlawful purpose of the conspiracy, the said NASHIRI did knowingly commit at least one of the following overt acts:

- ~~1. Between approximately 1994 and 1999, NASHIRI and co-conspirators joined a call to jihad against the enemies of Islam by Usama bin Laden ("bin Laden"). NASHIRI and the co-conspirators traveled to locations such as Bosnia, Tajikistan, and Afghanistan. In these locations NASHIRI and co-conspirators attended training camps either run by or associated with al Qaeda. NASHIRI trained in or gave training in military tactics, including but not limited to, training on combat, weapons, bomb-making, and assassination. NASHIRI and the co-conspirators then participated in, or attempted to participate in, jihad by fighting in brigades of mujahideen.~~ A 9/23/11
1. ~~2.~~ Between approximately 1996 and 1999, NASHIRI and co-conspirators met personally with bin Laden and other high-ranking members of al Qaeda and some of the co-conspirators swore an oath of allegiance to bin Laden. During this time period, NASHIRI developed relationships with individuals who would later assist him in what would become known as the "boats operation." A 9/23/11
2. ~~3.~~ In approximately late 1997 to 1998, NASHIRI discussed with bin Laden plans for a boats operation to attack ships in the Arabian Peninsula, a plan which previously had been discussed by bin Laden and Walid Muhammad Salih Mubarak bin 'Attash ("Khallad"). A 9/23/11
3. ~~4.~~ NASHIRI, bin Laden and Khallad ultimately planned al Qaeda's boats operation, which came to encompass at least three separate terrorist attacks: an attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000; a completed attack on USS COLE (DDG 67) on 12 October 2000; and a completed attack on a French supertanker, *MV Limburg*, on 6 October 2002. A 9/23/11
4. ~~5.~~ In approximately 1998, at the direction of bin Laden, NASHIRI and Khallad traveled to Yemen, at the southern tip of the Arabian Peninsula, to prepare for the boats operation. NASHIRI scouted the Al-Hudaydah area of Yemen and conducted surveillance of ship traffic in the region. As NASHIRI and Khallad collected A 9/23/11

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information, they and bin Laden began to focus their attention on mounting an attack in Aden Harbor.

5. ~~5.~~ In approximately the summer of 1998, in response to direction by bin Laden, NASHIRI and Khallad assisted in another al Qaeda plot, simultaneous attacks on United States embassies in Kenya and Tanzania in East Africa, where NASHIRI provided a fraudulent Yemeni passport used by one of the suicide bombers to enter Kenya immediately before the attack on the Embassy of the United States in Nairobi, Kenya, and where Khallad provided that same suicide bomber with details of the attack plan. *AP/9/28/11*
6. ~~6.~~ In approximately early 1999, at the direction of bin Laden, NASHIRI and Khallad continued preparing for the boats operation, including (but not limited to) obtaining and storing explosives for use in the boats operation. NASHIRI then left Yemen because Khallad had been arrested by Yemeni authorities. *AP/9/28/11*
7. ~~7.~~ After Khallad's arrest and subsequent release from jail in May 1999, NASHIRI returned to Yemen with instructions from bin Laden. NASHIRI took control of the boats operation, at the direction of bin Laden, due to unwanted attention Khallad received as a result of his arrest. NASHIRI took over preparations for the boats operation, and Khallad returned to Afghanistan. *AP/9/28/11*
8. ~~8.~~ During late 1999 and early 2000, NASHIRI spoke with Khallad on the phone several times to relay information about the boats operation, and on at least one occasion Khallad relayed this information to bin Laden. *AP/9/28/11*
9. ~~9.~~ Between approximately the summer of 1999 and the winter of 1999, NASHIRI continued making preparations to implement al Qaeda's boats operation, some of which he accomplished personally and some of which he directed others to accomplish. These preparations included, but were not limited to, enlisting the assistance of additional co-conspirators, purchasing vehicles, purchasing a boat and materials, renting houses to store the boat and materials and to assemble the attack boat, and obtaining false identification documents. *AP/9/28/11*
10. ~~10.~~ On or about 3 January 2000, the first boats operation attack commenced when, at NASHIRI's direction, at least two of the co-conspirators launched a boat packed with explosives from the Madinat Al-Shaab beach area into Aden Harbor, intending to steer it toward a United States warship, USS THE SULLIVANS (DDG 68), which was refueling nearby. The attack ultimately failed when the explosives-laden boat ~~beached~~ *FOUNDED* in the surf of Aden Harbor. *AP/9/28/11*

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11. ~~12.~~ On or about 4-6 January 2000, NASHIRI and other co-conspirators recovered the attack boat from the beach at Madinat Al-Shaab, on the edge of Aden Harbor. NASHIRI and other co-conspirators recovered the boat, its motor, its cargo of explosives, and other materials used in the attempted attack. During these recovery efforts, NASHIRI claimed ownership of the attack boat and the motor. NASHIRI and the other co-conspirators ultimately used a front-end loader, crane, and flatbed truck to recover and take physical possession of the attack boat and return it to its storage location in Aden. *Ad 9/28/11*
12. ~~13.~~ After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI returned to Afghanistan, where he and Khallad met with bin Laden and other high-ranking members of al Qaeda at bin Laden's compound in Qandahar. *Ad 9/28/11*
13. ~~14.~~ After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI received additional training in Afghanistan from an al Qaeda explosives expert. *Ad 9/28/11*
14. ~~15.~~ After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI tested the explosives he recovered from the failed attack to make certain they were still usable for future attacks. *Ad 9/28/11*
15. ~~16.~~ Later in 2000, after returning from Afghanistan, NASHIRI continued preparations -- some of which he accomplished personally and some of which he directed others to accomplish -- for a second boats operation attack. These preparations included, but were not limited to, renting another house from which to conduct surveillance of Aden Harbor, repairing and re-fitting the attack boat, transferring ownership of and registering the attack boat, purchasing another vehicle, securing another location at which to store the attack boat, testing the attack boat on the waters of Aden Harbor, making arrangements for the attack to be videotaped, and hiring a crane operator to launch the attack boat. *Ad 9/28/11*
16. ~~17.~~ During approximately the summer of 2000, NASHIRI informed Khallad that the boats operation was nearly ready and that bin Laden should send the suicide bombers. *Ad 9/28/11*
17. ~~18.~~ In or about September 2000, NASHIRI informed Khallad that the boats operation was ready to execute and further informed Khallad that he had already chosen the suicide bombers for the attack. *Ad 9/28/11*
18. ~~19.~~ In or about September 2000, NASHIRI spoke again with Khallad, who relayed to NASHIRI a directive from bin Laden that NASHIRI leave Yemen before the attack and return to Afghanistan. *Ad 9/28/11*

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19. ~~20~~. At some point after January 2000, but prior to 12 October 2000, NASHIRI filled the attack boat with explosives in preparation for the attack. *AP 9/28/11*
20. ~~21~~. In approximately September or October 2000, prior to the attack, NASHIRI left Yemen, as instructed by bin Laden. NASHIRI met Khallad, and the two traveled together to Qandahar, Afghanistan, to meet with bin Laden. NASHIRI informed bin Laden that an attack on a United States warship in Aden was imminent. *AP 9/28/11*
21. ~~22~~. On or about 12 October 2000, pursuant to NASHIRI's instructions, the co-conspirators removed the attack boat from its storage location, drove the attack boat to the launch site and, using a crane, lowered it into the water. *AP 9/28/11*
22. ~~23~~. On or about 12 October 2000, as a result of planning and preparation by NASHIRI and others, the suicide bombers, at the direction of NASHIRI, dressed in civilian clothes, piloted the explosives-laden boat to where USS COLE (DDG 67) was refueling, offered friendly gestures to several crew members, and brought their boat alongside USS COLE (DDG 67), roughly amidships. Once alongside at approximately 11:18 a.m. (local), the suicide bombers detonated the explosives, blasting a hole in the side of USS COLE (DDG 67) approximately 30 feet in diameter, killing 17 crewmembers and injuring at least 37 crewmembers. The suicide bombers died in the attack. *AP 9/28/11*
23. ~~24~~. In approximately May 2001, NASHIRI met with bin Laden and another high-ranking member of al Qaeda at bin Laden's compound in Qandahar. *AP 9/28/11*
24. ~~25~~. In approximately 2001 and 2002, NASHIRI continued al Qaeda's boats operation by directing acts which included, but were not limited to, acquiring a boat for use in the attack, acquiring explosives for use in the attack, transferring ownership and registration of the boat, and obtaining a global positioning system (GPS) device for use in planning the attack. NASHIRI supplied the necessary resources, planned the attack, and directed the transfer of money for use an upcoming attack. *AP 9/28/11*
25. ~~26~~. In approximately 2001 and 2002, NASHIRI and other co-conspirators implemented operational security measures to avoid detection. *AP 9/28/11*
26. ~~27~~. On or about 6 October 2002, near the port of Al Mukallah, Yemen, as a result of planning by NASHIRI and others, suicide bombers, at the direction of NASHIRI, used an explosives-laden boat to attack the French supertanker *MV Limburg*. The explosion blasted a hole through the hull of the ship, resulting in the death of a crewmember, injury to approximately 12 crewmembers, and spillage of approximately 90,000 barrels of oil into the Gulf of Aden. *AP 9/28/11*

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CHARGE VI: VIOLATION OF 10 U.S.C. § 950t(13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, in the context of and associated with hostilities, on or about 12 October 2000, intentionally cause serious injury to the body of:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]
13. [REDACTED]
14. [REDACTED]
15. [REDACTED]

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

16. [REDACTED]

17. [REDACTED]

[REDACTED]

all crewmembers onboard USS COLE (DDG 67), with unlawful force and violence, in violation of the law of war, to wit: perfidiously operating and detonating an explosives-laden vessel alongside USS COLE (DDG 67).

~~CHARGE VII: VIOLATION OF 10 U.S.C. § 950(16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR~~ *AP 9/28/11*

~~Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, intentionally destroy property belonging to another person, without that person's consent, in violation of the law of war, to wit: two men perfidiously approaching USS COLE (DDG 67), and detonating concealed explosives, resulting in the destruction of USS COLE (DDG 67), property of the U.S. government, destruction of supplies and rations located onboard USS COLE (DDG 67), property of the U.S. government, and destruction of personal effects located onboard USS COLE (DDG 67), property of the crewmembers onboard USS COLE (DDG 67).~~ *AP 9/28/11*

~~CHARGE VIII: VIOLATION OF 10 U.S.C. § 950(28), ATTEMPTED DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR~~ *AP 9/28/11*

~~Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 3 January 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Destruction of Property in Violation of the Law of War, attempt to intentionally destroy property on board USS THE SULLIVANS (DDG 68), belonging to another, without the lawful owner's consent, in violation of the law of war, to wit: by committing certain acts that amount to more than mere preparation and to effect the commission of Destruction of Property in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), detonate the explosives while alongside USS THE SULLIVANS (DDG 68), so as to damage and sink USS THE SULLIVANS (DDG 68), and destroy USS THE SULLIVANS (DDG 68), property of the U.S. government,~~ *AP 9/28/11*

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

~~destroy supplies and rations located onboard USS THE SULLIVANS (DDG 68), property of the U.S. government, and destroy personal effects located onboard USS THE SULLIVANS (DDG 68), property of the crewmembers onboard USS THE SULLIVANS (DDG 68).~~ *AP/9/28/11*

~~Y//~~
CHARGE ~~X~~: VIOLATION OF 10 U.S.C. § 950t(2), ATTACKING CIVILIANS *AP/9/28/11*

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally attack civilian persons onboard *MV Limburg*, a civilian oil tanker crewed by civilian personnel, not taking direct or active part in hostilities, and that resulted in the death of one person, Atanas Atanasov, and the said NASHIRI knew that such targets were in a civilian status.

~~Y//~~
CHARGE ~~X~~: VIOLATION OF 10 U.S.C. § 950t(3), ATTACKING CIVILIAN OBJECTS *AP/9/28/11*

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally attack *MV Limburg*, a civilian oil tanker owned by a civilian entity and crewed by civilian personnel, not a military objective, and the said NASHIRI knew that such target was not a military objective.

~~IX~~
CHARGE ~~XI~~: VIOLATION OF 10 U.S.C. § 950t(23), HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT *AP/9/28/11*

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally endanger the safe navigation of a vessel, *MV Limburg*, not a legitimate military objective, to wit: by causing an explosives-laden civilian boat to detonate and explode alongside *MV Limburg*, causing damage to the operational ability and navigation of *MV Limburg*, and resulting in the death of one crewmember, Atanas Atanasov.

Appendix A

List of al Nashiri aliases:

Abd Al-Rahim Husayn Muhammad Abda Al-Nashiri
(Variants: Abd Al-Rahman,
Abda Hussein Mohammed,
Abdu Hussein Mohamed,
Abdu Hussein Muhammad,
Abdul Rahim Abdu Al-Nashiri,
Abd Al Rahim Al Nashiri,
Abdul Rahim Al-Nashiri,
Abdul-Raheem al-Nasheri,
Abed Al Rahim al Nashir,
Abed Al Rahim Al Nashiri,
Abdul Rahman Hassan Mohammad,
Abdhi Hussein Mohamed Nasher,
Abdu Husayn Muhammad Nashir,
Abd Al-Rahim Hussein Abdah Al-Nashiri,
Abd Al Rahim Hussein Mohammed Abdoh al Nashiri,
Abd al Rashim Hussein Mohammed Abdah Al Nashiri,
Abd al Rahim Husayn Muhammad Abda Nashir,
Abd Al-Rahman Hussein Mohammed Abdah Al-Nashiri,
Abdul Rahim Hussein Mohammed Abdah Al Nashiri,
Nashiri, Al Nashiri)

Abda
(Variants: Abdo, Abdoh)

Abdella
Abdo Hussein
(Variant: Abdoh Hussein)

Abdoh Mohammed
Abdul Rahim Hussein Muhammad Abdah Nashir al Safani
(Variants: Al-S'afani,
Abd al Rahman Hussein Muhammad al Saa'fani,
Abdel Rahman Hussein Mohammed Saffani,
Abdul Raheem Hussein Mohammad Nashir Al-Sa'fani)

Abu Al-Miqdad
Al Farouq al Hijazi
Al Farouq al Maki
(Variant: Farouq Al Maki)

Bilal al Harazi
(Variant: Al Harazi)

Bulbul
Eid Al Harbi
Eid Muabadi
The Engineer
Mayoub
Mohammad Abdullah

Appendix A

Mohammad Omar Al-Harazi

(Variant: Muhammad Umar Al-Harazi)

Mullah Bilal al Makki

(Variants: Bilal, Abu Bilal, Bilal al Maki, Abu Bilal Al-Makki,

Mullah Bilal, Mula Bilal, Al Mulla Bilal, Al Mullah)

Mullah Mohammed Omar

Saeed Abdallah Qasem Al-Mansouri

(Variant: Said 'Abdullah Qasim Al-Mansuri)

Appendix B

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Appendix B

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Appendix C

List of co-conspirator aliases:

Usama bin Laden

Sheikh Abu Abdullah

(Variant: Abu Abdullah)

Usama bin Muhammed bin Laden

(Variants: Sheikh Usama bin Laden, Usama bin Laden, Sheikh Usama, Sheikh bin Laden)

The Sheikh

Ayman Al Zawahiri

Dr. Ayman Al-Zawahiri

(Variant: Ayman Al Zawahiri)

Mohammed Atef

Abu Hafs Al Masri

(Variant: Sheikh Abu Hafs, Abu Hafs)

Abu Hafs Al-Kabir

Al-Komandat

Mohammed Atef

The Commandant

Mushin Musa Matwalli Atwah

Abu Abdul Rahman Al-Muhajir

(Variant: Abu Abed Al-Rahman Al-Muhajir, Abdul Rahman Al-Muhajir, Abu Muhajir)

Al-Nimr

Muhammad

Muhsin Musa Matwalli Atwah

(Variant: Mushin Musa Matwali Atwah)

Walid Muhammad Salih Mubarak bin 'Attash

Khallad Al Hijazi

Khallad Al Jadawi

Khallad Bin Attash

(Variants: Abu Khallad, Khallad)

Salah Sa'eed Mohammad Bin Yousuf

(Variant: Salah Saeed Mohammed Bin Yousaf, Salih Bin Yusif)

Tawfiq Abu Khallad

Tawfiq Mohammed Saleh Bin Attash

Tawfiq Muhammad Salih Bin Rashid

(Variant: Tawfiq Bin Rashid)

Walid Muhammad Salih Mubarak Bin 'Attash

(Variant: Walid Bin 'Attash)

Appendix C

Jamal Ahmed Mohammed Ali Al-Badawi

Abu Abdul Rahman Al-Badawi
(Variants: Abu Abed Al-Rahman Al-Badawi,
Abu 'Abd Al-Rahman,
Abu Abdul Rahman)
Jamal Mohammed Ahmad Ali Al-Badawi
(Variants: Jamal Muhammad Ahmad 'Ali Al-Badawi,
Jamal Ahmed Mohammed Ali Al-Badawi,
Jamal Mohamed Ahmed Ali,
Jamal Mohamed Ahmed,
Jamal Al-Badawi)
Jamal Muhsin Hamid Al-T'ali
(Variant: Jamal Muhsin Hamid Al Talli)

Fahd Mohammed Ahmed Al-Quso

Abu Huthayfa Al-'Adini
Fahd Mohammed Ahmed Al-Awlaqi
Fahd Mohammed Ahmed Al-Quso
(Variants: Fahd Mohammed Al-Quso, Fahd Al-Quso, Fahd)

Hassan Sa'id Awad Al Khamri

Abdallah Ahmed Khalid Saeed Misawi
(Variants: Abdulah Ahmed Khaled Said Masawa,
Abdullah Ahmad Khalid Sa'id Msawa,
Abdallah Ahmed Khalid,
Abdallah Ahmed Khalid Misawi,
Abdullah Ahmad Said Msawa,
Abdallah Ahmed Khalid Saeed,
Abdullah Ahmad Khalid Al-Sa'ed,
Abdullah Khallid Musawa,
Abdullah Mohammed Khaled Said,
Abdullah Mohammed Khalid,
Abdullah Msawa,
Abdullah Sa'eed Musawa,
Abdallah, Abdullah)
Abdo
Abu Ali
Abu Hassan Al-Ta'efi
(Variant: Hassan Al-Ta'efi, Abu Yousef Al-Ta'efi)
Hassan Al-Yemeni
Hassan Sa'id Awad Al-Khamri
(Variants: Hassan Awadh Al-Khamiri, Hassan Al Khamiri,
Hassan Al-Khamari, Hassan Al-Khameri, Hasan, Hassan, Hussein)
The Hadrami

Ibrahim Al-Thawar

Appendix C

Ibrahim Al-Nibrass
(Variants: Ibrahim Abu Nibras, Abu Nibras, Abu Nibrass, Nibras)
Ibrahim Al-Thawar
(Variant: Ibrahim Al-Thawr)

Taha Ibrahim Hussein Al-Ahdal

Mahyub
Rabe'i Al Ahdal
Rabe'i Al Maki
(Variant: Raba'i)
Taha Hassan Ibrahim Al-Ahdal
TaHER Hussein Ibrahim Al-Tahami
(Variants: Tahir Hussein Ibrahim Al-Tuhami,
TaHER Hussein Al-Tuhami,
TaHER Hussein Tuhami,
Taha Hussein Al Nahami, Taha Hussein, Taha)

Hadi Muhammad Salih Al-Wirsh

Abu Usama Al-Wa'ili
Hadi Dilkum
(Variant: Hadi Dilqum)
Hadi Muhammad Salah Al-Wa'ili
(Variant: Hadi Al-Wa'ili)
Hadi Muhammad Salah 'Ibadah
Hadi Muhammad Salih al-Wirsh
(Variant: Hadi Muhammad Salih)

Nasser Ahmed Nasser Al Bahri

Abu Habib
Abu Jandal
Abu Jandal Al Gharbi
Abu Jandal Al Jadawi
Abu Jandal Al Yemeni
Nasser Ahmad Nasser Al-Bahri
(Variant: Al-Bahri)

Khalid Ibn Muhammad Al Juhani

Abu Muawiya Al-Madani
(Variants: Mou'awiya Al-Madani, Muawiyah Al-Madani,
Mu'awiya, Mu'awiyah)
Khalid Ibn Muhammad Al-Juhani
(Variant: Khalid Al-Juhani)
Saif Al Shahrani
Salman

Appendix C

Fawzi Muhammad 'Abd-al-Qawi Al-Wajih

Basam Waji

(Variant: Basam Wajee)

Fawzi Muhammad 'Abd-al-Qawi Al-Wajih

(Variant: Fawiz Al Wajih)

Mus'ab Al-Ta'zi

Fawzi Yahya Qaim Al-Hababi

Abu-al-Shahid Al-San'ani

(Variant: Abu Shahid)

Fayiz Husayn Ali al Najar

(Variant: Fayiz Al-Najjar)

Fawzi Yahya Yahya Qasim Al-Hababi

(Variants: Fawzi Yahya Qasim Al-Hababi, Fawzi Al Hababi)

Muneer Al-Sharabi

Bashir Nu'man Sa'id al Safari

(Variant: Bashir Al-Safari)

Muneer Ali Saeed Al-Sharabi

(Variant: Muneer Sharabi, Muneer al Shra'bi, Muneer)

Nashir Al Safari Al Muqtari

Salman Al Tazi

(Variants: Salman Al-Ta'zi, Abu Salman, Salman)

Walid Al-Shaybah

Abd Al Raziq Muhammed Nasir Al Uthmali

Ahmad Qa'id

(Variant: Ahmad Qayid)

Al Jabiri

Muhammed Abd Al Khaliq Saeed Al Garibi

Rahman Hadi Hamoud Al-Ruda'ai

Walid Al-Shaybah

(Variants: Walid Al-Sheba, Abu Walid, Walid)

Mohammad Rashed Daoud Al-Owhali

Abdel-Jabbar Al-Baloushi

(Variants: 'Abd Al-Jabbar, Al-Baloushi)

Abdul Jabbar Ali Abdul Latif

Al-Mutaw'a

Khaled Salem Saleh Bin Rashed

(Variant: Khalid Salim Saleh Bin Rashid)

M'aad

Mis'ab Al-Faqeer

Mo'ath Al-Balushi (Al-Awhali)

(Variant: Moath)

Mohammad Al Qatari

Appendix C

Mohammad Rashed Daoud Al-'Owhali
(Variants: Muhammad Rashid Al-Owhali, Muhammad Al-Owhali)
Mulla Burjan
Saif
Shibab

Jihad Muhammad Abdah Ali Abdullah Al-Harazi
Abu Obeydah Al-Maki
(Variants: Abu 'Ubaydah, Abu-Obaida)
Azzam
(Variants: Jihad Muhammad Ali, Jihad Ali)

Ali Hamza Ahmed Suliman Al-Bahlul
Abu Malek
Ali Hamza Ahmed Suliman Al-Bahlul
Anas
Ismail
Muhammad Anis Abdullah Khalidi

Nasir 'Awad
Abu Khaithama Al-Hadrami
(Variants: Abu Khaythama al-Hadrami,
Khaythamah Al-Hadrami, Khaythamah)
Nasir 'Awad Tahis
Nasir 'Awad Yakani
Nasir 'Awad
Nasir 'Awad Nasir Faraj Duman Al-Kindi
(Variant: Nasser Awad Nasser Faraj Douman al-Kendi)

Husayn Al-Badawi
Hussein Badawi
Abu-al-Harith Al-Badawi

Ahmed Mohammed Al Darbi
Abdel Aziz Al-Makki
(Variants: 'Abd Al-'Aziz, Abdel Aziz, Abdul Aziz, Abed Al-Aziz , Abdul Aziz Al-Maki, Abed Al-Aziz Al-Maki)
Abdel Rahim Al-Janoubi
(Variant: Abed Al-Rahim Al-Janoubi, 'Abd al-Rahman Al-Janoubi)
Abu Hudaifa Al-Makki
Ahmed Mohammed Ahmed Haza Al-Darbi
(Variants: Ahmad Muhammed Al-Darbi, Ahmad Al-Darbi,
Ahmad Muhammad Ahmad Hiza', Mohammad Haza)

'Umar Sa'id Hassan Jarullah
'Umar Sa'id Hassan Jarullah

Appendix C

(Variant: 'Umar Sa'id Hasan Jarullah)
Ibn-Hafiz
(Variant: Ebn Hafeedh)
'Abdullah Gharib
(Variant: Abdullah Ghareeb)

Muhammad Sa'id Ali Hasan Al-Amari

Abu-Ghareeb Al-Ta'ezi
(Variants: Ghareeb al-Ta'ezi, Gharib Al-Ta'zi, Gharib Al-Ta'izzi)
Al-Omdah
Mohammed Saeed Ali Hasan al-Ammari
(Variants: Muhammad Sa'id 'Ali Hasan Al-'Amari , Muhammad Sa'id Al-'Amari,
Muhammad Al-'Amari)

Attachment D

Filed with TJ
9 July 2019

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 23 2019

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF THE MILITARY SERVICES
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS

SUBJECT: Designation of Rear Admiral Christian L. Reismeier, USN (Ret) as Convening
Authority for Military Commissions

Pursuant to chapter 47A of title 10, U.S.C., section 948h, Christian L. Reismeier is designated as Convening Authority for Military Commissions. This designation is effective as of May 22, 2019, and will continue until a new convening authority is designated. In his role as Convening Authority, and in accordance with the applicable Rules for Military Commission, provisions of the Regulation for Trial by Military Commission, and applicable judicial orders, Mr. Reismeier is to receive legal advice relating to military commissions solely from an appropriately designated Legal Advisor to the Convening Authority and members of the appropriately designated Legal Advisor's staff as necessary.

The memorandum, subject: Designation of Melinda L. Perritano as the Convening Authority for Military Commissions, dated August 9, 2018 is rescinded.

A handwritten signature in black ink, reading "Patrick M. Shanahan", is centered on the page.

Patrick M. Shanahan
Acting

cc:
Acting Legal Advisors to the Convening Authority for Military Commissions
Chief Prosecutor, Office of the Chief Prosecutor
Chief Defense Counsel, Office of the Chief Defense Counsel
Chief Judge, Military Commissions Trial Judiciary



Attachment E

Filed with TJ
9 July 2019

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DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

JUN 14 2019

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: Recusal from the Role of Convening Authority in *United States v. al Nashiri*

For the reasons outlined below and discussed in further detail in the attached memorandum, I am recusing myself from serving as the Convening Authority in *United States v. al Nashiri*.

I made this decision based on my previous contacts with the prosecution team in *United States v. al Nashiri*. Specifically, as discussed in the attachment, I provided assistance on certain legal issues on two separate occasions in 2014 and 2016. The prosecution sought my opinion as a subject matter expert in military justice. Additionally, in my role as a mentor, I had several conversations with a prior member of the prosecution team concerning general aspects of the case. In my opinion, these conversations alone would not require recusal since they did not address any substantive issues. However, in considering these additional contacts, along with my advice on the aforementioned legal issues, I find that it may create an appearance of partiality and further necessitates recusal.

While I do not have a personal interest in the outcome of this case and believe that I am impartial, recusal is appropriate in order to avoid even the appearance of partiality. In making this decision, I have consulted with no one outside the Office of the Convening Authority.

A handwritten signature in black ink, appearing to read "Christian L. Reismeier", is written over a horizontal line.

Christian L. Reismeier
Convening Authority
for Military Commissions

cc:
DoD General Counsel
Chief Prosecutor for Military Commissions
Chief Defense Counsel for Military Commissions
Military Commissions Trial Judiciary

Attachment:
As stated

14 June 2019

Memorandum for File

In order to ensure full transparency regarding my past involvement with military commissions, I am providing the following disclosure.

Involvement in Military Commissions**1. 2006 – Working Group for Commissions Rules**

From October 2006 to February 2007, I served as the Navy representative to the interagency group composed of attorneys and staff from the Departments of Defense and Justice tasked with developing procedural and evidentiary rules for military commissions practice under the Military Commissions Act (MCA) of 2006. During the interservice and interagency process, I worked with other group members in drafting proposed rules. I advised the Judge Advocate General of the Navy concerning the Department of the Navy's position regarding the draft rules, including options for rule formulation. My role was that of a staff officer developing options for my principal and representing the Department's position in the interagency.

2. 2008-2009 – Detention Policy Task Force and Sub-Working Group on Commissions

Following the elections in 2008, I again participated as part of a working group considering (1) rule/regulatory changes that could be made swiftly to the MCA without statutory change and (2) changes to the MCA itself. My role remained as a staff officer advising my principal on options for the formulation of rules, and representing my department's position in the interagency. Following those 2008 and 2009 interagency consultations, I was assigned as the Chair of the Military Commissions Sub-Working Group for the Detention Policy Task Force (DPTF) in 2009, and as a staff member of the DPTF.

A. Sub-Working Group on Military Commissions. The mission of the Sub-Working Group on commissions was to provide the Task Force with potential statutory or regulatory revisions to the existing military commissions. That task gave rise to my involvement in drafting legislative proposals. The role of the Sub-Working Group was limited to articulating options that would allow the Administration to promulgate desired changes to the commissions' rules and consider potential statutory changes to the MCA. Our goal was to consider commissions as a potential tool for the Administration, but not in the context of any particular case. We were directed to consult with both the defense and the prosecution bar regarding the potential impact of rules under discussion, but the options considered in the interagency process were not centered on then-existing cases.

The Working Group offered changes to the commissions' rules, and noted that additional statutory changes could be considered. Ultimately, I and an attorney from the Office of the Counsel for the President were personally tasked with rewriting the MCA entirely, working from the 2006 MCA as a baseline. While we completed the draft rewrite, Congress began its own rewrite of the Act, culminating in the Military Commissions Act of 2009. Working up to the passage of the 2009 MCA, I also assisted the Judge Advocate General of the Navy in preparing for his testimony before the Senate and House Armed Services Committees regarding his views on military commissions.

Again in 2009, I was involved in the interagency rewrite of both the rules of procedure and evidence for military commissions, but by then, I had been assigned as the Co-Chair of the DPTF. My direct

involvement in the rule drafting was more limited than in 2006. I consulted on a limited number of specific rules, but did not review the entire manual.

In my capacity as a member of the DPTF, I attended, and at times chaired, interagency meetings regarding military commissions' rules, processes and procedures. I attended meetings that included academics, defense counsel, and non-federal entity representatives. I met separately with defense counsel as I solicited input during our consideration of a military commissions system, and I sought input from both sides regarding the potential impact of rule changes on existing cases, but did not receive any input from either side regarding particular cases.

The Task Force staff assessed a broad range of potential options for continuing, staying, dismissing, or proceeding with any case that might have been then-pending in 2009, as the Task Force conducted its policy assessment of the detention and commissions processes. However, I provided no recommendations either regarding the cases as a category, or in specific cases. The purpose was on elucidating policy considerations and options, not providing legal advice.

B. Co-Chair, Detention Policy Task Force. In September 2009, I was assigned to serve as the Co-Chair of the DPTF. I shared the responsibility with a DOJ representative for the day-to-day operations of the Task Force staff. By September, the staff was no longer focusing on commissions. We had begun focusing on broader issues regarding detention policy. Extensive time was also spent responding to various Congressional inquiries regarding policy options. None of that work related to any particular case or cases.

I was not a member of the Guantanamo Review Task Force, the Task Force that reviewed detainee cases for potential prosecution, and I played no part in that process. That was a separate Task Force. I had very little contact with that other Task Force. My working group provided them comparative information of disposition fora, such as federal courts, commissions and international tribunals.

3. Manpower Assignments. From 2006 to 2009, and again from 2012 to 2015, I was involved in assigning people, subject to whatever processes OMC Prosecution and the Military Commissions Defense Organization (MCDO) had in place to vet/accept people we were considering for assignment. The particular billet someone was going to fill – prosecution or defense – was generally not a consideration, except if someone's experience made him or her a better fill on one side or the other, or if someone expressed a preference in assignment that matched experience and need.

4. 2010-2015 – Ad Hoc Consultation/Communications

After my service to the Task Force, I was requested to provide background information regarding the 2006 rule drafting and the subsequent Task Force's process for use on the OMC website. I also reviewed materials OMC was considering placing on the website for accuracy. I would describe my contacts with the Convening Authority's staff as centered on historical recapitulation of the work done from 2006 to 2010.

I did have case specific conversations with regard to Mr. al Nashiri when I left the Task Force. Back in the 2010-2011 time frame, one of the prosecutors was a mentee, and from time to time she would call me to discuss her professional work. Because she was assigned to a billet outside of a traditional Navy duty station, with limited contact with her parent community (the Navy JAG Corps), I maintained contact with her to keep her directly involved with the Navy JAGC. I was one of her mentors, and I took a strong

professional interest in her development as an officer and attorney. While most of the talk addressed professional development, leadership and management, she would share things colleagues would normally share, such as information about where she was going and what she was doing. Included in those discussions were references she made to traveling to various places and interviewing witnesses/family members/alleged victims. My impression was that she traveled extensively to interview witnesses, and I know that she expressed her admiration for some of the potential witnesses/alleged victims, but I have no idea who specifically she was talking about, even if she did mention it to me. At some point, she also sent me a copy of the charge sheet, so that I could see the complexity of what she was working on. She is no longer on the case, and has not been for a few years.

I also had contact with General Martins at OMC - Prosecution sometime in 2014 regarding a jurisdictional matter that arose in *United States v. al Nashiri*. I knew General Martins from the DPTF, where we served together in 2009. Although I had no role in military commissions in 2014, he contacted me to discuss the timing of offering proof of jurisdiction, as there was an issue regarding whether that proof was to be offered pretrial or during the case-in-chief.

While I was the Chief Judge, Navy-Marine Corps Court of Criminal Appeals (NMCCA) (2010-2012), I believe that one or more of the NMCCA judges were also assigned as Court of Military Commission Review (CMCR) judges during that time frame, but I had no supervision of them in those CMCR duties, no input in their CMCR case assignments, and no input on their review as either a CMCR or an NMCCA judge. By law, the Chief Judge of a CCA provides no evaluation input on judges serving on his or her court.

Additionally, when I was the Assistant Judge Advocate General, Chief Judge, Department of the Navy (2012-2015), there would have been judges assigned to NMCCA who were also assigned to the CMCR. Again, I had no authority over the CMCR judges in their capacity as CMCR judges, as they were assigned/detailed and supervised by the Chief Judge of that Court. I provided no oversight of them in their CMCR role.

Since retiring in 2015, I was contacted by General Martins again in 2016 and asked to sit on a moot involving Mr. al Nashiri. The issue involved the scope of evidence admissible on the issue of damage allegedly caused by explosions in the harbor. I did in fact participate in that moot argument as a subject matter expert.

I was also asked to sign onto an amicus brief in November 2015, after I had retired from the Navy, which I believe was sponsored by the Washington Legal Foundation, in Mr. al Bahlul's case before the D.C. Circuit. The issue was Congressional authority in defining conspiracy as a violation of the law of war. General Martins also contacted me about the issue, and I attended a briefing regarding the matter in his spaces. After reading the brief, I agreed to join the brief, but I did not provide any edits.

B. Conclusions

I served with General Martins for less than one year, and most of that year was on a part-time basis on the DPTF. I have had professional contact with him since retiring, as noted above. I believe my last contact with him before arriving at OMC was in 2016. I have never socialized with him, except to attend a fairly large dinner he hosted at a restaurant in late 2009 or early 2010 when he was promoted to Brigadier General. I do not know his family, but I met his wife once at his promotion dinner.

I also know Brigadier General Baker, having worked with him in various assignments over the years while he and I were filling our respective Marine Corps/Navy military justice billets. Those assignments brought us into repeated professional contact. I have never met his family. Any socialization I would have done with him would have been in the context of command-related social gatherings.

I do not have a personal bias or prejudice concerning any parties to prior, existing or prospective military commissions. I do not have any personal interest in the outcome in any litigation. I remain impartial in all aspects of military commissions. However, this disclosure is appropriate to ensure the parties and the public are aware of my previous contacts.



Christian L. Reismeier

Attachment F

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

JUN 14 2019

MEMORANDUM FOR SECRETARY OF DEFENSE

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(Corrected)

For the reasons outlined below and discussed in further detail in the attached memorandum, I am recusing myself from serving as the Convening Authority in *United States v. Bahlul*.

I made this decision based on that fact that in November 2015 I joined several retired military flag officers with professional experience in national security and law of war related matters in signing an *amicus* brief in *Ali Hamza Ahmad Suliman Al Bahlul v. United States* when that case was before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). I also attended a prosecution sponsored briefing on the appeal. The *amicus* was filed in support of the respondent on the issue of whether Congress had the constitutional authority to define conspiracy as a violation of the law of war.

While I do not have a personal interest in the outcome of the case and believe that I am impartial, recusal is appropriate in order to avoid even the appearance of partiality. In making this decision, I have consulted with no one outside the Office of the Convening Authority.

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Christian L. Reismeier

Attachment G

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
Page 114 of 189

EN BANC ORAL ARGUMENT SCHEDULED FOR DECEMBER 1, 2015
Case No. 11-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Review from the United States Court
of Military Commission Review

BRIEF OF JOHN D. ALTENBURG, Maj. Gen., U.S. Army (Ret.),
STEVEN B. KANTROWITZ, Rear Adm., JAGC, U.S. Navy (Ret.),
MICHAEL J. NARDOTTI, Jr., Maj. Gen., U.S. Army (Ret.),
MICHAEL J. MARCHAND, Maj. Gen., U.S. Army (Ret.),
THOMAS L. HEMINGWAY, Brig. Gen., U.S. Air Force (Ret.),
CHRISTIAN L. REISMEIER, Rear Adm. (Lower Half), JAGC, U.S. Navy (Ret.),
WASHINGTON LEGAL FOUNDATION, and
ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT, SUPPORTING AFFIRMANCE

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Dated: November 2, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. PARTIES AND *AMICI*

In addition to the parties and *amici curiae* listed in the brief for Petitioners as appearing before the Court of Military Commission Review and/or in this Court, counsel is aware of the following individuals and organizations who have appeared before this Court, all of whom are included on this brief: John D. Altenburg, Steven B. Kantrowitz, Michael J. Marchand, Michael J. Nardotti, Jr., Thomas L. Hemingway, Christian Reismeier, and the Allied Educational Foundation.

B. RULINGS UNDER REVIEW

The ruling under review in this case is the decision of the U.S. Court of Military Commission Review, affirming Petitioner's conviction.

C. RELATED CASES

Counsel for *amici curiae* is unaware of any related cases before this Court or any other court, other than those cited by the parties.

/s/ Richard A. Samp
Richard A. Samp

Counsel for *amici curiae*

November 2, 2015

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation and Allied Educational Foundation are nonprofit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest in either of them.

/s/ Richard A. Samp
Richard A. Samp

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* Authorities on which we chiefly rely are marked with asterisks

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GLOSSARY

AEF	Allied Educational Foundation
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)
UCMJ	Uniform Code of Military Justice, 10 U.S.C. § 801, <i>et seq.</i>
WLF	Washington Legal Foundation

INTERESTS OF *AMICI CURIAE*¹

Amici curiae are six retired generals and admirals in the U.S. armed forces, and two organizations with an interest in national security issues. Each of the retired generals/admirals is a former Judge Advocate with extensive experience in addressing law-of-war issues.

Major General John D. Altenburg, U.S. Army (Retired), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from 2004 to 2006.

Rear Admiral Steven B. Kantrowitz, JAGC, U.S. Navy (Retired), served on active duty and in the Reserve of the U.S. Navy from 1974 through 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of

¹ Pursuant to Fed.R.App.P. 29(c)(5), *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

military law practice. This includes service for three years as Special Assistant and Aide to the Judge Advocate General of the Navy. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command.

Major General Michael J. Marchand, U.S. Army (Retired), served as the Assistant Judge Advocate General of the Army at the time of his retirement in 2005. As the Number 2 uniformed lawyer in the Army, General Marchand was intimately involved in detainee matters at the Army, Department of Defense, and congressional levels.

Major General Michael J. Nardotti, Jr., U.S. Army (Retired), served 28 years on active duty as a soldier and lawyer. A decorated combat veteran, he served in Vietnam as an Infantry platoon leader and was wounded in action. General Nardotti later earned his law degree and performed duties as a Judge Advocate in worldwide assignments for two decades. His service culminated as The Judge Advocate General, the senior military lawyer in the Army, from 1993 to 1997.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Retired), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965

after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He was also an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

Rear Admiral (Lower Half) Christian L. Reismeier, JAGC, U.S. Navy (Retired), served for 31 years on active duty, five as a Naval Intelligence officer and 26 as a judge advocate. He retired in September 2015 after serving as the Assistant Judge Advocate General for the Navy from 2014 to 2015, and Chief Judge, Department of the Navy from 2012-2015. His previous tours included assignments as a trial judge, Director of the Navy's Criminal Law Division, Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, and Executive Secretary of the President's Detention Policy Task Force.

Washington Legal Foundation is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's security and defending separation of powers as a bulwark of liberty. To that end, WLF has appeared before this Court and other federal courts on numerous occasions to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush*, 553 U.S. 723

(2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on national security-related issues on a number of occasions.

Amici are concerned that the panel decision in this case would impose unwarranted restrictions on the authority of the elected branches of government to convene military commissions to conduct trials of law-of-war offenses. *Amici* deem it inappropriate for the courts to second-guess the considered judgments of the political branches regarding how best to conduct an armed conflict.

STATEMENT OF THE CASE

The United States has been at war with militant Islamists at least since September 11, 2001, when al Qaeda's murderous attacks on American civilians caused nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support for the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224

(2001). President Bush determined that al Qaeda and the Taliban are such organizations; he directed the use of force against al Qaeda, the Taliban, and their operatives in Afghanistan and throughout the world. President Obama has carried forward that policy. The military campaign against al Qaeda and the Taliban continues, and they continue to pose a substantial threat to national security.

A cornerstone of American policy has been to bring criminal charges before military commissions against al Qaeda leaders responsible for the September 11 attacks. One such leader was Petitioner Bahlul. Before his capture by allied forces in December 2001, Bahlul was a senior officer in al Qaeda; he served as head of media relations for the organization and played a major role in events leading up to the September 11 attacks. He admitted virtually all of the allegations made against him by prosecutors, but denied that his conduct was criminal and that the charges come within the jurisdiction of military commissions.

The Supreme Court ruled in 2006 that military commissions established to try cases arising from the September 11 attacks lacked “power to proceed” because they had not been established in compliance with procedural rules established by the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.* *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). In response, Congress adopted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006),

which *inter alia* established procedural rules for the conduct of trials by military commissions. *See, e.g.*, 10 U.S.C. § 949a-949o (2006).²

Bahlul was subsequently charged with three crimes pursuant to the MCA: conspiracy, solicitation of terrorist acts, and providing material support for terrorism. As his *en banc* brief concedes, Bahlul “admitted most of the allegations against him, but nonetheless pleaded not guilty, stating ‘I’m not guilty, and what I did was not a crime.’” Pet. Br. 5. In 2008, a military commission convicted Bahlul on all charges and sentenced him to life imprisonment. The *en banc* U.S. Court of Military Commission Review affirmed. *United States v. al Bahlul*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011).

In 2014, this Court (sitting *en banc*) overturned Bahlul’s conviction on two of the three charges, finding that the solicitation and material support convictions violated his rights under Art. I, § 9, cl. 3 of the U.S. Constitution (the *Ex Post*

² In *Hamdan*, four justices expressed the view (contrary to arguments made by the United States) that conspiracy to commit offenses triable by military commissions—the charge filed against Salim Hamdan, the defendant—was not a charge triable by military commission, because conspiracy is not an offense against the international law of war and because the UCMJ does not authorize military commissions to try conspiracy charges. *Hamdan*, 548 U.S. at 595-613 (Stevens, J., joined by Breyer, Ginsburg, and Souter, JJ.). Likely in response to the views expressed by the four justices, the MCA set out a lengthy list of offenses that Congress determined should be triable by military commission, including conspiracy. 10 U.S.C. § 950v(b) (2006).

Facto Clause). *al Bahlul v. United States*, 767 F.3d 1, 27-31 (D.C. Cir. 2014) (*en banc*). The Court rejected Bahlul’s *Ex Post Facto* Clause challenge to the conspiracy conviction, however, holding *inter alia* that “it is not ‘plain’ that conspiracy was not already triable by law-of-war military commission under [the UCMJ] when Bahlul’s conduct occurred.” *Id.* at 18. The Court remanded the case to the three-judge panel to consider Bahlul’s alternative challenges to the conspiracy conviction. *Id.* at 31.

On June 12, 2015, a divided panel overturned the conspiracy conviction, holding that trying conspiracy charges before a military commission “violated the separation of powers enshrined in Article III, § 1” of the Constitution. *al Bahlul v. United States*, 792 F.3d 1, 22 (D.C. Cir. 2015). The panel majority recognized that Article I of the Constitution authorizes Congress to “define and punish . . . Offences against the Law of Nations,”³ and that Congress may provide that trials of enemy combatants for law-of-war offenses may be conducted by military commissions. *Id.* at 14-15.⁴ The panel nonetheless held that Congress exceeded its constitutional authority when it purported to authorize military commissions to

³ U.S. Const., Art. I, § 8, cl. 10 (the Define and Punish Clause).

⁴ Congress relied on its powers under the Define and Punish Clause when determining (in the MCA) that conspiracy charges should be triable by military commission. H.R. Rep. No. 109-664, Pt. 1, at 24 (2006).

try conspiracy charges, declaring, “Congress cannot, pursuant to the Define and Punish Clause, declare an offense to be an international war crime when the international law of war concededly does not.” *Id.* at 15.

Judge Henderson dissented. *Id.* at 27-72. First, she disputed the majority’s premise that the law of nations does not condemn Bahlul’s conduct:

The international community *does* recognize that Bahlul violated “the principles of the law of nations, as they resulted from usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience,” [*Ex parte*] *Quirin*, 317 U.S. [1,] 35 [(1942)], and the Congress has done nothing more than provide for the limits or precise meaning of those principles in authorizing the trial and sentencing by military commission for the violation thereof.

Id. at 43. Second, she argued that Article I of the Constitution broadly empowers Congress to conduct war—including the capture, detention, and trial of unlawful combatants—and that those Article I war powers are not constrained by international law. *Id.* at 44. She would also have held that Article III does not constrain Congress’s authority to provide for trial of unlawful enemy combatants before military commissions because such trials are a well-recognized exception to the Judicial Power Clause. *Id.* at 63-69.

SUMMARY OF ARGUMENT

In adopting the MCA, Congress expressly authorized the President to establish military commissions with jurisdiction “to try any offense made

punishable by [the MCA] or the law of war when committed by an alien unlawful enemy combatant.” 10 U.S.C. § 948d (2006). Among the crimes made punishable by the MCA is “conspiracy . . . to commit one or more substantive offenses triable by military commission,” if the defendant “knowingly does an overt act to effect the object of the conspiracy.” 10 U.S.C. § 950t(29).

Bahlul asks this Court to overrule the collective decision of Congress and the President that the charges against Bahlul—that he conspired to commit war crimes that caused thousands of American deaths—should be heard by a military commission. The Court should decline that request, not least of all because the Constitution entrusts the conduct of war to the elected branches of government; and the punishment of enemy combatants has long been viewed as “[a]n important incident to the conduct of war” and is sanctioned by Congress “without qualification . . . so long as a state of war exists.” *Application of Yamashita*, 327 U.S. 1, 11-12 (1946). When the President and Congress act in concert, “the United States is invested with all the attributes of sovereignty,” and the courts “should hesitate long before limiting or embarrassing such powers.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 & n.2 (1952) (Jackson, J., concurring).

Bahlul can point to *no* court decision that has overturned the verdict of a military commission on the ground that the Constitution deprived the commission

of jurisdiction over the charges presented. The Supreme Court has repeatedly rejected such jurisdictional challenges, even in instances in which (unlike here) Congress has not expressly authorized commission jurisdiction over the specific charge at issue. Instead, in the absence of express authorization, the Court has looked to the American common law of war in determining whether charges against an enemy combatant may properly be tried before a military commission. As the United States has well documented, American history is replete with examples of conspiracy charges being tried by military commissions.

Bahlul nonetheless argues that the Constitution bars Congress from authorizing the trial of conspiracy charges by military commissions because international criminal tribunals generally have not recognized conspiracy as a triable offense against international law. He asserts that Article I's Define and Punish Clause restrains congressional power, such that Congress may declare conduct a violation of the law of war only if the international community agrees that that precise conduct may be prosecuted as an "Offence[] against the Law of Nations."

Neither the language nor the history of the Define and Punish Clause supports Bahlul's assertion. The Founders gave *Congress*, not the courts or the international community, the authority to "define" such offenses. The Supreme

Court has made clear that it will defer to the judgment of Congress regarding the definition of “the law of nations” and the charges that may properly be lodged against an enemy combatant in military commission proceedings.

Bahlul’s contention that the Define and Punish Clause “establishes a closed set of offenses,” Pet. Br. 57, fundamentally misconstrues the nature of “the law of nations,” which has never been well defined and which most assuredly is not static in nature. In light of those characteristics, it defies reason to suggest that the Founders intended to give precedence to the views of the international community over those of Congress regarding the precise, current definition of the law of nations.

Moreover, there is every reason to believe that the international community condemns the conduct for which Bahlul was convicted: not only conspiring to commit war crimes (including murder of protected persons) but also performing numerous overt acts to further the conspiracy (including undergoing military training, protecting Osama bin Laden with weapons, and providing direct assistance to the 9/11 hijackers). Congress acted well within its constitutional authority when it determined that this type of misconduct, universally condemned by societies throughout the world, could be prosecuted by means of a conspiracy trial before a military commission.

Furthermore, the Define and Punish Clause is but one of numerous provisions of Articles I and II that grant the elected branches broad authority to wage war. Thus, even if it were true that the power conferred by the Define and Punish Clause were somehow limited by reference to international law (and it is not), those other war-power grants are not similarly tempered and provide Congress and the President ample authority to specify war crimes triable by military commission.

Nor does Article III support Bahlul's efforts to invalidate the MCA. Bahlul contends that the separation-of-powers concerns that animate Article III require that if the United States wishes to charge him with conspiracy, it must initiate criminal proceedings in a civilian court. But the courts have long understood that Article III is inapplicable to military proceedings involving enemy combatants or members of our own armed forces. Just as Article III does not prevent Congress from expanding the scope of service-connected infractions that may be lodged against members of our armed forces in court-martial proceedings, so too may Congress expand the scope of infractions that may be lodged against enemy combatants before military commissions.

ARGUMENT**I. ARTICLES I AND II BROADLY EMPOWER THE ELECTED BRANCHES TO CONDUCT WAR, INCLUDING THE POWER TO PUNISH ENEMY COMBATANTS**

The United States charged Bahlul with playing a central role in the activities of al Qaeda, an organization it has determined planned and committed the September 11, 2001 attacks on the United States. Bahlul has “admitted most of the allegations against him.” Pet. Br. 5. Although he contends that his admitted activities were not criminal, a military commission (following trial) determined otherwise and convicted him of conspiracy to commit war crimes. The overt acts the commission found that Bahlul performed to further the conspiracy included: undergoing military-type training at an al Qaeda camp; pledging “bayat” to Osama bin Laden and performing personal services for him; preparing an al Qaeda recruitment video that highlighted al Qaeda’s October 2000 attack on the *U.S.S. Cole* (which killed 17 American sailors) and that called on viewers to carry out terrorist attacks against the United States; carrying weapons and a suicide belt to protect bin Laden; arranging for two of the 9/11 hijackers to pledge “bayat” to bin Laden; and preparing propaganda declarations (styled as “martyr wills”) for those two hijackers.

In challenging his conviction, Bahlul does not contest that prosecutors could have brought the same conspiracy charges against him in a civilian, Article III court. Nor does he contest that Congress adopted a statute (the MCA) that expressly granted military commissions jurisdiction to try the conspiracy charges and that the military acted pursuant to that authorization . Rather, he asks this Court to overrule the political branches of government and declare that Congress and the Executive Branch lacked constitutional authority to take those steps.

A. The Collective Decision of Congress and the President to Try Bahlul Before a Military Commission Is Entitled to Deference

Bahlul’s request is extraordinary. No federal court has ever overturned the verdict of a military commission on the ground that the Constitution deprived the commission of jurisdiction over the charges presented. The absence of such precedent is unsurprising given the considerable deference the judiciary owes to the national security-related decisions of the federal government. As the Supreme Court has repeatedly stated, “Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention. . . . [M]atters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’” *Haig v. Agee*, 453 U.S. 280, 292 (1981) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). *See also Loving v. United States*, 517

U.S. 748, 768 (1996) (stating that “we give Congress the highest deference in ordering military affairs.”); *Meshal v. Higgenbotham*, __ F.3d __, 2015 WL 6405207 at *8 (D.C. Cir., Oct. 23, 2015) (“Matters touching on national security and foreign policy fall within an area of executive action where courts hesitate to intrude absent congressional authorization.”).

Deference is particularly warranted given that the President initiated commission proceedings against Bahlul with the express authorization of Congress. “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).⁵

Indeed, in previous challenges to the jurisdiction of military commissions, the Supreme Court has upheld jurisdiction even though Congress had not *expressly* granted the commission jurisdiction over the charge at issue and even though the charge had an uncertain pedigree under international law. Thus, for example, in

⁵ See also, *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (courts “should indulge the widest latitude of interpretation to sustain” the President’s command of “the instruments of national force, at least when turned against the outside world for the security of our society.”).

Yamashita the Court upheld the jurisdiction of a military commission over charges that the defendant failed to control the operation of troops under his command, despite the absence of any statute expressly authorizing such charges and despite the absence of international-law precedent for the charges. 327 U.S. at 13-18. In lieu of express congressional approval and an international law pedigree, the Court has stated that military commission jurisdiction is appropriate when the American military has a history of having employed military commissions to try the charges in question. *See, e.g., Quirin*, 317 U.S. at 31. In light of Congress's adoption of the MCA, which expressly grants military commissions jurisdiction over conspiracy charges, the case for judicial deference to the decision to try Bahlul before a military commission is even stronger.

B. The Define and Punish Clause Grants Responsibility for Defining Offenses Against the Law of Nations to Congress, Not the Courts

Bahlul nonetheless argues that the Constitution bars Congress from authorizing the trial of conspiracy charges by military commissions because international criminal tribunals generally have not recognized conspiracy as a triable offense against international law. He asserts that Article I's Define and Punish Clause restrains congressional power, such that Congress may declare that conduct violates the law of war only if the international community agrees that that precise conduct may be prosecuted as an "Offence[] against the Law of Nations."

Neither the language nor the history of the Define and Punish Clause supports Bahlul's assertion. Rather than constraining congressional power by requiring Congress to conform to international norms, the clause states explicitly that Congress is entitled not only to adopt statutes punishing violations of the law of nations, but also to "define" the content of that law. To "define" is "to fix or mark the limits of" a term, or "to discover or set forth the meaning of (as a word)." *Webster's New Collegiate Dictionary* (G. & C. Merriam Co., 1981). In adopting the MCA, Congress defined "Offences against the Law of Nations" as including conspiring to commit war crimes and then engaging in an overt act to effect the object of the conspiracy. It does not matter that a federal judge might have adopted a different definition; the Constitution assigns the task of defining what constitutes "Offences against the Law of Nations" to Congress, not the courts.

The history of the Constitutional Convention confirms that the Founders made Congress the ultimate arbiter regarding what should constitute "Offences against the Law of Nations." As Judge Henderson has noted, the initial draft of the clause authorized Congress only to "punish" such offenses. *Bahlul II*, 792 F.3d at 44 (Henderson, J., dissenting) (citing Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 876 (1988)). The Convention amended the

clause—to grant Congress authority to “define” such offenses as well—at the suggestion of Gouverneur Morris, who argued that “passive reliance on the international community [to define offenses against the law of nations] was unworkable because the law of nations is often too vague and deficient to be a rule.” *Ibid.* See *United States v. Smith*, 18 U.S. 153, 159 (1820) (the Constitution granted Congress “the power to define” because “[o]ffences . . . against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations.”).

1. Congress’s Decision to Define Conspiracy to Commit War Crimes as an Offense Against the Law of Nations Serves the Purposes of the Law of War

Bahlul was convicted of conspiracy to commit war crimes, and he does not contest that the objects of his conspiracy (including murder of protected persons and terrorism) were, indeed, war crimes. As the United States has conceded, however, international criminal tribunals do not recognize conspiracy as a triable offense under international law. Although Anglo-American law has long regarded conspiracy to commit a criminal act as a chargeable offense, legal systems based on civil law have been reluctant to accept inchoate conspiracy as a stand-alone crime—and that reluctance has led international criminal tribunals to refrain from entertaining conspiracy charges.

But none of the American case law on which Bahlul relies suggests that federal courts may challenge the jurisdiction of a military commission to try an alleged violation of the law of nations on the ground that international criminal tribunals have not previously entertained charges containing precisely the same elements. Indeed, the Supreme Court rejected a challenge of that exact nature in *Yamashita*.

The defendant, the commander of Japanese forces in the Philippines at the conclusion of World War II, was convicted by a military commission of “breach of a duty . . . as an army commander to control the members of his command,” thereby allowing them to commit atrocities against civilian populations.

Yamashita, 327 U.S. at 14. The majority did not dispute the assertion of Justice Murphy (in dissent) that “the charge made against [the Japanese commander] is clearly without precedent in international law or in the annals of recorded military history.” *Id.* at 40 (Murphy, J., dissenting). The majority upheld the military commission’s jurisdiction over the failure-to-control charge based not on an assertion that the charge had ever been accepted by the international community as a violation of international law, but rather on a finding that the charge was consistent with “the purpose of the law of war”:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander

would almost certainly result in violations *which it is the purpose of the law of war to prevent*. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.

Id. at 15 (emphasis added). *Yamashita* strongly supports Congress's authority under the Define and Punish Clause to authorize the military-commission trial of enemy combatants on conspiracy charges. As in *Yamashita*, it is self-evident that charging enemy combatants who conspire to commit war crimes serves "the purpose of the law of war," which is to prevent the commission of war crimes, such as the attack on civilian populations on September 11, 2001.

2. Bahlul Has Misconstrued the Nature of "The Law of Nations" as a Closed Set of Offenses

Bahlul contends that the Define and Punish Clause "establishes a closed set of offenses," Pet. Br. 57, thereby indicating that Congress may punish only those offenses that are universally accepted by the international community at any given moment in time. That contention fundamentally misconstrues the nature of "the law of nations," which has never been well defined and which most assuredly is not static in nature. In light of those characteristics, it defies reason to suggest that the Constitution provides that the views of the international community be given precedence over those of Congress regarding the precise, current definition of the law of nations.

In 1789, “the law of nations” referred principally to “the general norms governing the behavior of national states with each other” as well as to a small number of rules governing individual conduct that had the potential to affect international affairs. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-15 (2004).⁶ The 18th-century international community did not accept modern-day human rights law (e.g., prohibitions against genocide and state-sponsored slavery) as part of “the law of nations.”

At the same time, the Founders recognized that the law of nations was not static, but rather would evolve over time. That recognition is evidenced by the Alien Tort Statute (ATS), 28 U.S.C. § 1350, a 1789 statute that grants district courts original jurisdiction over civil actions “by an alien for a tort only, committed in violation of the law of nations.” As the Supreme Court explained in *Sosa*, the 1789 Congress expected federal courts to recognize ATS tort actions not only for the three offenses recognized by the law of nations in 1789 (and incorporated into federal law as part of the federal common law) but also for a “narrow class” of offenses that might be incorporated into the law of nations during later generations. *Sosa*, 542 U.S. at 729.

⁶ *Sosa* identified three offenses against the law of nations that in 1789 were applicable to individuals: violation of safe conducts, infringements of the rights of ambassadors, and piracy. *Id.* at 715.

Sosa nonetheless held that federal courts must exercise “great caution” in recognizing any new federal-common-law causes of action under the ATS. *Id.* at 728. Among the reasons for requiring caution was the inherently undefined and adaptable nature of the law of nations. *Id.* at 732. Instead, the Court concluded that courts should generally await guidance from Congress regarding what conduct constitutes a “violation of the law of nations” and is redressable by aliens in federal court under the ATS. *Id.* at 726.

Similar considerations mandate that federal courts should look to Congress, not to the international community, in determining the scope of the evolving “Offences against the Law of Nations” that Congress and the President are entitled to punish. As noted above, the Founders assigned Congress the role of “defin[ing]” offenses against the law of nations precisely because the law of nations is too vague to be easily applied by the courts.

Moreover, there is no plausible basis to conclude that the Founders hamstrung Congress by making it subservient to evolving legal standards emanating from overseas. It is one thing to claim that the Founders wanted to limit congressional power by tying it for all time to a fixed body of legal principles that were accepted by the international community in 1789 (a claim Bahlul does not make). It is quite another thing to claim that the Constitution grants the

international community the authority to decide whether to expand or contract congressional power under the Define and Punish Clause. Significantly, Bahlul would cede this power to the international community not in connection with the issue of concern to that community (the recognition of inchoate conspiracy prosecutions) but in connection with a separation-of-powers issue (whether conspiracy charges against enemy combatants should be tried before military commissions or civilian courts) regarding which international law takes no position.

3. Supreme Court Law-of-War Precedent Requires this Court to Look to Congress for Guidance in Determining the Jurisdiction of Military Commissions

All of the Supreme Court's military commission decisions have concluded that courts should look principally to Congress for guidance in determining whether a military commission may exercise jurisdiction over a charged offense. For example, the petitioner in *Hamdan* claimed, *inter alia*, that a military commission lacked jurisdiction under the law of war to try him on conspiracy charges. Although the Court ended up not reaching the conspiracy issue, four members of the court would have held that federal law at the time (early 2006) did not permit military commissions to hear conspiracy charges. *Hamdan*, 548 U.S. at 595-613 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.).

The three justices who joined Justice Stevens's opinion (Justices Souter, Ginsburg, and Breyer) signed their names to a separate concurring opinion, which explained that whether the military possesses authority to try enemy combatants is a decision that should generally be left up to Congress, and that Congress had not authorized the conspiracy trials proposed by the Executive Branch:

The Court's conclusion [that the Executive Branch had not established the challenged military commission in compliance with procedural rules established by the UCMJ] ultimately rests on a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . [I]nsistence [on consultation with Congress] strengthens the Nation's ability to determine—through democratic means—how best to do so. *The Constitution places its faith in those democratic means.* Our Court today simply does the same.

Id. at 636 (Breyer, J., concurring, joined by Kennedy, Souter, and Ginsburg, JJ.) (emphasis added). Congress responded by adopting the MCA later in 2006, and federal law now explicitly authorizes military commissions to try conspiracy charges. 10 U.S.C. § 950t(29). As Justice Breyer indicated, federal courts should "place [their] faith" in the democratic process and accede to Congress's determination.

Other decisions from the Court are similar. In *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950), the Court held unequivocally that "the Constitution does not

confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” Once it determined that the elected branches of government had conferred jurisdiction on the military commission whose judgment was being challenged, the Court ceased its analysis, concluding, “it was for [the commission] to determine *whether the laws of war applied* and whether an offense against them had been committed.” *Id.* at 788 (emphasis added).

In neither *Quirin* nor *Yamashita* had Congress adopted legislation expressly granting military commissions jurisdiction over the offenses charged. Only after noting the absence of such express authorization⁷ did the Court seek other indicia that the commissions possessed the requisite jurisdiction—*e.g.*, recognition of the charges under the international law of war or the historical practice of the American military. *Quirin*, 317 U.S. at 28-38; *Yamashita*, 327 U.S. at 13-18. The Court made clear in *Yamashita* that it was relying on the international law of war (as its basis for upholding the commission’s verdict) only in the absence of an express directive from Congress. *Id.* at 16 (“We do not make the laws of war but

⁷ During World War II, federal law authorized trial of offenses against the law of war before military commissions, Article 15 of the Articles of War, but did not specify which offenses met that definition.

we respect them *so far as they do not conflict with the commands of Congress* or the Constitution.”) (emphasis added).

In sum, Congress has determined that conspiracy to commit war crimes is an offense against the law of nations and is triable before military commissions.

Congress acted within the powers granted to it under the Define and Punish Clause in making that determination. That determination is entitled to deference from the courts, particularly because it advances the purposes of the law of war.

C. Congress’s Other Article I Powers Reinforce the Founders’ Intent that International Law Not Constrain Congress’s Power to Authorize Punishment of Enemy Combatants

The Define and Punish Clause is but one of numerous provisions of Articles I and II that grant the elected branches broad authority to wage war. Thus, even if it were true that the power conferred by the Define and Punish Clause were limited by reference to international law (and it is not), those other grants of the war powers are not similarly tempered and provide Congress and the President with ample authority to specify war crimes triable by military commission.

In addition to the powers conferred by the Define and Punish Clause, Article I grants Congress numerous defense-related powers, including to “provide for the common Defence,” Art. I, § 8, cl. 1; to “raise and support Armies” and to “provide and maintain a Navy,” Art. I, § 8, cl. 12, 13; to “make Rules for the Government

and Regulation of the land and naval Forces,” Art. I, § 8, cl. 14; and to “declare War, grant Letters of Marque and Reprisal, and Make Rules concerning Captures on Land and Water,” Art. I, § 8, cl. 11. The Constitution also authorizes Congress to “make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Article II, § 2 provides, *inter alia*, that “The President shall be Commander in Chief of the Army and Navy of the United States.”

Collectively, these provisions grant enormous power to the United States in national security matters. The Define and Punish Clause is the only one of these enumerated powers that is even arguably tempered by a requirement that it be exercised in conformity with international law norms.

The Supreme Court has repeatedly recognized that the elected branches’ authority to wage war includes the power to punish captured enemy combatants for violating legal norms. *Quirin*, 317 U.S. at 28-29 (“An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military have violated the law of war.”); *Yamashita*, 327 U.S. at 12 (“The war power, from which the [military] commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the

conflict, and to remedy, *at least in ways Congress has recognized*, the evils which the military operations have produced.”) (emphasis added).

Quirin explicitly cited each of the war-making powers of Article I and II in upholding the authority of the military to try enemy combatants before military commissions. *See, e.g.*, 317 U.S. at 25 (“But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of great public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.”) Those citations render implausible Bahlul’s contention that the authority of the elected branches to convene military commissions derives solely from the Define and Punish Clause.

II. ARTICLE III HAS NEVER BEEN UNDERSTOOD TO CONSTRAIN THE POWER OF THE ELECTED BRANCHES TO TRY ENEMY COMBATANTS BEFORE MILITARY COMMISSIONS

Under Article III, § 1, the judicial power of the United States is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The Judicial Power Clause, Article III, § 2, provides that the “judicial Power shall extend to all Cases” and “Controversies.” Bahlul

argues that the United States violated Article III, §§ 1 and 2 by trying him before an Article I court. That argument is without merit.

The Supreme Court has long explained that the commands of Article III “must be interpreted in light of the historical context in which the Constitution was written.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U.S. 50, 64 (1982) (plurality opinion). The “historical context” with respect both to members of the U.S. armed forces and to enemy combatants is that—since the time of ratification of the Constitution—they have been subject to trials before special military tribunals. In light of that history, it is well accepted that the Judicial Power Clause generally does not apply to such proceedings. *See, e.g., Quirin*, 317 U.S. at 41 (citing an 1806 federal statute, which was derived from a 1776 Resolution of the Continental Congress, authorizing trial of alleged spies before military tribunals; the Court viewed that statute as evidence that early Congresses accepted that the Judicial Power Clause did not foreclose trial by Article I military tribunals).

The panel interpreted *Quirin* as creating a narrow “exception” to Article III, limited to the trial of enemy combatants charged with “international law of war offenses”; it concluded that the “exception” was inapplicable here because conspiracy does not qualify as such an offense. *Bahlul II*, 792 F.3d at 8-10. But

the inapplicability of Article III to law-of-war military commissions and courts-martial is largely unrelated to the specific charges being tried. Rather, it arises in recognition of the unique status of the military within our society and its unique needs: “The military is ‘a specialized society separate from civilian society’ with ‘laws and traditions of its own [developed] during its long history.’” *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Just as Article III does not prevent Congress from expanding the scope of service-connected infractions that may be lodged against members of our armed forces in court-martial proceedings, so too may Congress expand the scope of infractions that may be lodged against enemy combatants before military commissions.

Finally, the separation-of-powers concerns raised by Bahlul in connection with his Article III claim are more imagined than real. Such concerns can arise when the Executive is operating in an unchecked fashion. The Framers viewed Congress as an important check against Executive Branch military adventurism. Threats to the separation of powers are reduced considerably when, as here, the Executive Branch is operating with the full knowledge and express concurrence of Congress. *The Federalist No. 26*, at 168 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (“The idea of restraining the legislative authority in the means of

providing for the national defense is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened.”).

The more serious threat to separation of powers arises when the judiciary seeks to wrest control of the war-making powers from the elected branches of government. The Constitution assigns responsibility for national security matters—including the punishment of unlawful enemy combatants—to Congress and the President, and the federal courts almost surely are abusing their powers when they interfere with national-security operations undertaken by the military with the full support of Congress.

CONCLUSION

Amici curiae request that the Court affirm the judgment of the U.S. Court of Military Commission Review.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: November 2, 2015

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* John D. Altenburg, *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,955, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2015, I electronically filed the brief of *amici curiae* John D. Altenburg, *et al.*, with the Clerk of the Court of the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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Attachment H

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

19 June 2019

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

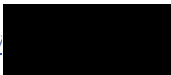
SUBJECT: Request for Discovery – Selection and Recusal Process of Convening Authority Reismeier

1. Pursuant to RMC 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.
2. Effective 22 May 2019, Mr. Christian Reismeier was appointed as Convening Authority for Military Commissions. On June 14, 2019, Mr. Reismeier issued letters of recusal from deciding issues related to *United States v. Al Bahlul* and *United States v. Al Nashiri*.
3. The recusal letters were received by undersigned defense counsel on 17 June 2019.
4. The recusal letters detail some of Mr. Reismeier’s numerous relationships with members of the Office of the Chief Prosecutor (OCP), including Chief Prosecutor BG Mark Martins.
5. The recusal letters detail some of Mr. Reismeier’s assistance to the Office of the Chief Prosecutor, including his participation in the formulation of arguments made by the Office of the Chief Prosecutor in the matter of *U.S. v. Al Nashiri* related to the scope of the United States’ subject matter jurisdiction.
6. The recusal letters detail some of Mr. Reismeier’s assistance in advancing the litigation of and advocating positions taken by the OCP. Mr. Reismeier’s advocacy on behalf of the prosecution and against the interests of Mr. bin ‘Atash include matters related to the jurisdiction of the Commission over Mr. al Nashiri and, necessarily, his named but uncharged co-conspirator, Mr. bin ‘Atash. Mr. Reismeier’s advocacy on behalf of the prosecution and against the interests of Mr. bin ‘Atash include advocating on matters related to the viability of charges of conspiracy in Mr. Al Bahlul’s case – an issue affecting the instant charges against Mr. bin ‘Atash.
7. Mr. Reismeier’s work, over many years, with members of OCP on matters opposed to the interests of Mr. Al Bahlul and Mr. al Nashiri caused Mr. Reismeier’s eventual recusal from decision-making in Mr. al Bahlul’s and Mr. al Nashiri’s cases.

DR-394-WBA

SUBJECT: Request for Discovery – Selection and Recusal Process of Convening Authority Reismeier

8. Mr. Reismeier’s work, over many years, with Mr. bin ‘Atash’s prosecutors has assisted OCP in taking positions adverse to the legal interests of Mr. bin ‘Atash.
9. The extent of Mr. Reismeier’s assistance to and advocacy for the positions of OCP is germane to the question of whether Mr. Reismeier should be disqualified from making decisions affecting *U.S. v. Walid bin ‘Atash*.
10. The extent of Mr. Reismeier’s relationships to members of OCP, including BG Martins, is germane to whether Mr. Reismeier should be disqualified from making decisions affecting *U.S. v. Walid bin ‘Atash*.
11. Therefore, Mr. bin ‘Atash requests the prosecution provide to Mr. bin ‘Atash the following:
 - a. All records, documentation, and audio or video related to the consideration, nomination, and selection of Mr. Reismeier as Convening Authority.
 - b. All reports and memoranda of recommendation submitted in support of Mr. Reismeier’s selection as Convening Authority.
 - c. All records, documentation, and audio or video related to the recusal of Mr. Reismeier as Convening Authority in *United States v. Al Bahlul* and *United States v. Al Nashiri*.

12. POC: Mr. Michael Garber, michael.j.garber7.civ 

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
WILLIAM R. MONTROSS
Detailed Defense Counsel

/s/
SIMON M. CAINE
Captain, USAF
Assistant Defense Counsel

Attachment I

Filed with TJ
9 July 2019

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

19 June 2019

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Request for Discovery – Convening Authority Christian Reismeier Ties to Prosecution

1. Pursuant to RMC 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.
2. Effective 22 May 2019, Mr. Christian Reismeier was appointed as Convening Authority for Military Commissions. On June 14, 2019, Mr. Reismeier issued letters of recusal from deciding issues related to *United States v. Al Bahlul* and *United States v. Al Nashiri*.
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5. The recusal letters detail some of Mr. Reismeier’s assistance to the Office of the Chief Prosecutor, including his participation in the formulation of arguments made by the Office of the Chief Prosecutor in the matter of *U.S. v. Al Nashiri* related to the scope of the United States’ subject matter jurisdiction.
6. The recusal letters detail some of Mr. Reismeier’s assistance in advancing the litigation of and advocating positions taken by the OCP. Mr. Reismeier’s advocacy on behalf of the prosecution and against the interests of Mr. bin ‘Atash include matters related to the jurisdiction of the Commission over Mr. al Nashiri and, necessarily, his named but uncharged co-conspirator, Mr. bin ‘Atash. Mr. Reismeier’s advocacy on behalf of the prosecution and against the interests of Mr. bin ‘Atash include advocating on matters related to the viability of charges of conspiracy in Mr. Al Bahlul’s case – an issue affecting the instant charges against Mr. bin ‘Atash.
7. Mr. Reismeier’s work, over many years, with members of OCP on matters opposed to the interests of Mr. Al Bahlul and Mr. al Nashiri caused Mr. Reismeier’s eventual recusal from decision-making in Mr. al Bahlul’s and Mr. al Nashiri’s cases.

DR-395-WBA

SUBJECT: Request for Discovery – Convening Authority Christian Reismeier Ties to Prosecution

8. Mr. Reismeier’s work, over many years, with Mr. bin ‘Atash’s prosecutors has assisted OCP in taking positions adverse to the legal interests of Mr. bin ‘Atash.
9. The extent of Mr. Reismeier’s assistance to and advocacy for the positions of OCP is germane to the question of whether Mr. Reismeier should be disqualified from making decisions affecting *U.S. v. Walid bin ‘Atash*.
10. The extent of Mr. Reismeier’s relationships to members of OCP, including BG Martins, is germane to whether Mr. Reismeier should be disqualified from making decisions affecting *U.S. v. Walid bin ‘Atash*.
11. Therefore, Mr. bin ‘Atash requests the prosecution provide to Mr. bin ‘Atash the following:
 - a. All communications between/among members, current and former, of Office of the Chief Prosecutor and Mr. Reismeier.
 - b. Any communications between BG Martins and any other person(s) including Mr. Reismeier regarding the consideration, nomination, and/or selection of Mr. Reismeier as Convening Authority.
 - c. All communications, records, and documentation related to the Convening Authority’s contact and/or consultation “sometime in 2014” with General Martins “regarding a jurisdictional matter that arose in *United States v. al Nashiri*” and concerned “an issue regarding whether that proof was to be offered pretrial or during the case-in-chief.” (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).
 - d. All records and documentation related to Office of the Chief Prosecutor’s work with and cooperation with the Amici Curiae listed on the 2 November, 2015, Amicus Brief filed in support of the prosecution in *Al Bahlul v. United States*, Case No. 11-1324. (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).
 - e. Any recordings of or notes of the “mooting” of OCP’s argument in *United States v. Al Nashiri*, session(s) where BG Martins requested the advice and assistance of Mr. Reismeier. (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).

SUBJECT: Request for Discovery – Convening Authority Christian Reismeier Ties to Prosecution

12. POC: Mr. Michael Garber, michael.j.garber7.civ 

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
WILLIAM R. MONTROSS
Detailed Defense Counsel

/s/
SIMON M. CAINE
Captain, USAF
Assistant Defense Counsel

Enclosures:

Memorandum to File, Convening Authority Reismeier, dated 14 June 2019

Enclosure

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

JUN 14 2019

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: Recusal from the Role of Convening Authority in *United States v. al Nashiri*

For the reasons outlined below and discussed in further detail in the attached memorandum, I am recusing myself from serving as the Convening Authority in *United States v. al Nashiri*.

I made this decision based on my previous contacts with the prosecution team in *United States v. al Nashiri*. Specifically, as discussed in the attachment, I provided assistance on certain legal issues on two separate occasions in 2014 and 2016. The prosecution sought my opinion as a subject matter expert in military justice. Additionally, in my role as a mentor, I had several conversations with a prior member of the prosecution team concerning general aspects of the case. In my opinion, these conversations alone would not require recusal since they did not address any substantive issues. However, in considering these additional contacts, along with my advice on the aforementioned legal issues, I find that it may create an appearance of partiality and further necessitates recusal.

While I do not have a personal interest in the outcome of this case and believe that I am impartial, recusal is appropriate in order to avoid even the appearance of partiality. In making this decision, I have consulted with no one outside the Office of the Convening Authority.

A handwritten signature in black ink, appearing to read "Christian L. Reismeier", is positioned above the typed name.

Christian L. Reismeier
Convening Authority
for Military Commissions

cc:
DoD General Counsel
Chief Prosecutor for Military Commissions
Chief Defense Counsel for Military Commissions
Military Commissions Trial Judiciary

Attachment:
As stated

14 June 2019

Memorandum for File

In order to ensure full transparency regarding my past involvement with military commissions, I am providing the following disclosure.

Involvement in Military Commissions**1. 2006 – Working Group for Commissions Rules**

From October 2006 to February 2007, I served as the Navy representative to the interagency group composed of attorneys and staff from the Departments of Defense and Justice tasked with developing procedural and evidentiary rules for military commissions practice under the Military Commissions Act (MCA) of 2006. During the interservice and interagency process, I worked with other group members in drafting proposed rules. I advised the Judge Advocate General of the Navy concerning the Department of the Navy's position regarding the draft rules, including options for rule formulation. My role was that of a staff officer developing options for my principal and representing the Department's position in the interagency.

2. 2008-2009 – Detention Policy Task Force and Sub-Working Group on Commissions

Following the elections in 2008, I again participated as part of a working group considering (1) rule/regulatory changes that could be made swiftly to the MCA without statutory change and (2) changes to the MCA itself. My role remained as a staff officer advising my principal on options for the formulation of rules, and representing my department's position in the interagency. Following those 2008 and 2009 interagency consultations, I was assigned as the Chair of the Military Commissions Sub-Working Group for the Detention Policy Task Force (DPTF) in 2009, and as a staff member of the DPTF.

A. Sub-Working Group on Military Commissions. The mission of the Sub-Working Group on commissions was to provide the Task Force with potential statutory or regulatory revisions to the existing military commissions. That task gave rise to my involvement in drafting legislative proposals. The role of the Sub-Working Group was limited to articulating options that would allow the Administration to promulgate desired changes to the commissions' rules and consider potential statutory changes to the MCA. Our goal was to consider commissions as a potential tool for the Administration, but not in the context of any particular case. We were directed to consult with both the defense and the prosecution bar regarding the potential impact of rules under discussion, but the options considered in the interagency process were not centered on then-existing cases.

The Working Group offered changes to the commissions' rules, and noted that additional statutory changes could be considered. Ultimately, I and an attorney from the Office of the Counsel for the President were personally tasked with rewriting the MCA entirely, working from the 2006 MCA as a baseline. While we completed the draft rewrite, Congress began its own rewrite of the Act, culminating in the Military Commissions Act of 2009. Working up to the passage of the 2009 MCA, I also assisted the Judge Advocate General of the Navy in preparing for his testimony before the Senate and House Armed Services Committees regarding his views on military commissions.

Again in 2009, I was involved in the interagency rewrite of both the rules of procedure and evidence for military commissions, but by then, I had been assigned as the Co-Chair of the DPTF. My direct

involvement in the rule drafting was more limited than in 2006. I consulted on a limited number of specific rules, but did not review the entire manual.

In my capacity as a member of the DPTF, I attended, and at times chaired, interagency meetings regarding military commissions' rules, processes and procedures. I attended meetings that included academics, defense counsel, and non-federal entity representatives. I met separately with defense counsel as I solicited input during our consideration of a military commissions system, and I sought input from both sides regarding the potential impact of rule changes on existing cases, but did not receive any input from either side regarding particular cases.

The Task Force staff assessed a broad range of potential options for continuing, staying, dismissing, or proceeding with any case that might have been then-pending in 2009, as the Task Force conducted its policy assessment of the detention and commissions processes. However, I provided no recommendations either regarding the cases as a category, or in specific cases. The purpose was on elucidating policy considerations and options, not providing legal advice.

B. Co-Chair, Detention Policy Task Force. In September 2009, I was assigned to serve as the Co-Chair of the DPTF. I shared the responsibility with a DOJ representative for the day-to-day operations of the Task Force staff. By September, the staff was no longer focusing on commissions. We had begun focusing on broader issues regarding detention policy. Extensive time was also spent responding to various Congressional inquiries regarding policy options. None of that work related to any particular case or cases.

I was not a member of the Guantanamo Review Task Force, the Task Force that reviewed detainee cases for potential prosecution, and I played no part in that process. That was a separate Task Force. I had very little contact with that other Task Force. My working group provided them comparative information of disposition fora, such as federal courts, commissions and international tribunals.

3. Manpower Assignments. From 2006 to 2009, and again from 2012 to 2015, I was involved in assigning people, subject to whatever processes OMC Prosecution and the Military Commissions Defense Organization (MCDO) had in place to vet/accept people we were considering for assignment. The particular billet someone was going to fill – prosecution or defense – was generally not a consideration, except if someone's experience made him or her a better fill on one side or the other, or if someone expressed a preference in assignment that matched experience and need.

4. 2010-2015 – Ad Hoc Consultation/Communications

After my service to the Task Force, I was requested to provide background information regarding the 2006 rule drafting and the subsequent Task Force's process for use on the OMC website. I also reviewed materials OMC was considering placing on the website for accuracy. I would describe my contacts with the Convening Authority's staff as centered on historical recapitulation of the work done from 2006 to 2010.

I did have case specific conversations with regard to Mr. al Nashiri when I left the Task Force. Back in the 2010-2011 time frame, one of the prosecutors was a mentee, and from time to time she would call me to discuss her professional work. Because she was assigned to a billet outside of a traditional Navy duty station, with limited contact with her parent community (the Navy JAG Corps), I maintained contact with her to keep her directly involved with the Navy JAGC. I was one of her mentors, and I took a strong

professional interest in her development as an officer and attorney. While most of the talk addressed professional development, leadership and management, she would share things colleagues would normally share, such as information about where she was going and what she was doing. Included in those discussions were references she made to traveling to various places and interviewing witnesses/family members/alleged victims. My impression was that she traveled extensively to interview witnesses, and I know that she expressed her admiration for some of the potential witnesses/alleged victims, but I have no idea who specifically she was talking about, even if she did mention it to me. At some point, she also sent me a copy of the charge sheet, so that I could see the complexity of what she was working on. She is no longer on the case, and has not been for a few years.

I also had contact with General Martins at OMC - Prosecution sometime in 2014 regarding a jurisdictional matter that arose in *United States v. al Nashiri*. I knew General Martins from the DPTF, where we served together in 2009. Although I had no role in military commissions in 2014, he contacted me to discuss the timing of offering proof of jurisdiction, as there was an issue regarding whether that proof was to be offered pretrial or during the case-in-chief.

While I was the Chief Judge, Navy-Marine Corps Court of Criminal Appeals (NMCCA) (2010-2012), I believe that one or more of the NMCCA judges were also assigned as Court of Military Commission Review (CMCR) judges during that time frame, but I had no supervision of them in those CMCR duties, no input in their CMCR case assignments, and no input on their review as either a CMCR or an NMCCA judge. By law, the Chief Judge of a CCA provides no evaluation input on judges serving on his or her court.

Additionally, when I was the Assistant Judge Advocate General, Chief Judge, Department of the Navy (2012-2015), there would have been judges assigned to NMCCA who were also assigned to the CMCR. Again, I had no authority over the CMCR judges in their capacity as CMCR judges, as they were assigned/detailed and supervised by the Chief Judge of that Court. I provided no oversight of them in their CMCR role.

Since retiring in 2015, I was contacted by General Martins again in 2016 and asked to sit on a moot involving Mr. al Nashiri. The issue involved the scope of evidence admissible on the issue of damage allegedly caused by explosions in the harbor. I did in fact participate in that moot argument as a subject matter expert.

I was also asked to sign onto an amicus brief in November 2015, after I had retired from the Navy, which I believe was sponsored by the Washington Legal Foundation, in Mr. al Bahlul's case before the D.C. Circuit. The issue was Congressional authority in defining conspiracy as a violation of the law of war. General Martins also contacted me about the issue, and I attended a briefing regarding the matter in his spaces. After reading the brief, I agreed to join the brief, but I did not provide any edits.

B. Conclusions

I served with General Martins for less than one year, and most of that year was on a part-time basis on the DPTF. I have had professional contact with him since retiring, as noted above. I believe my last contact with him before arriving at OMC was in 2016. I have never socialized with him, except to attend a fairly large dinner he hosted at a restaurant in late 2009 or early 2010 when he was promoted to Brigadier General. I do not know his family, but I met his wife once at his promotion dinner.

I also know Brigadier General Baker, having worked with him in various assignments over the years while he and I were filling our respective Marine Corps/Navy military justice billets. Those assignments brought us into repeated professional contact. I have never met his family. Any socialization I would have done with him would have been in the context of command-related social gatherings.

I do not have a personal bias or prejudice concerning any parties to prior, existing or prospective military commissions. I do not have any personal interest in the outcome in any litigation. I remain impartial in all aspects of military commissions. However, this disclosure is appropriate to ensure the parties and the public are aware of my previous contacts.



Christian L. Reismeier

Attachment J

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

24 June 2019

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Response to Requests for Discovery (DR-394-WBA) and (DR-395-WBA)
dated 19 June 2019

1. The Prosecution received the Defense requests for discovery on 19 June 2019. The Prosecution hereby responds to the Defense requests, below, in bold.
2. The Defense requests the Prosecution produce:
 - a) All records, documentation, and audio or video related to the consideration, nomination, and selection of Mr. Reismeier as Convening Authority.
 - b) All reports and memoranda of recommendation submitted in support of Mr. Reismeier's selection as Convening Authority.
 - c) All records, documentation, and audio or video related to the recusal of Mr. Reismeier as Convening Authority in *United States v. Al Bahlul* and *United States v. Al Nashiri*.
 - d) All communications between/among members, current and former, of Office of the Chief Prosecutor and Mr. Reismeier.
 - e) Any communications between BG Martins and any other person(s) including Mr. Reismeier regarding the consideration, nomination, and/or selection of Mr. Reismeier as Convening Authority.
 - f) All communications, records, and documentation related to the Convening Authority's contact and/or consultation "sometime in 2014" with General Martins "regarding a jurisdictional matter that arose in *United States v. al Nashiri*" and concerned "an issue regarding whether that proof was to be offered pretrial or during the case-in-chief." (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).
 - g) All records and documentation related to Office of the Chief Prosecutor's work with and cooperation with the *Amici Curiae* listed on the 2 November, 2015, *Amicus Brief* filed in support of the prosecution in *Al Bahlul v. United States*, Case No. 11-1324. (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).

- h) Any recordings of or notes of the “mooting” of OCP’s argument in United States v. Al Nashiri, session(s) where BG Martins requested the advice and assistance of Mr. Reismeier. (Memorandum to File, Convening Authority Reismeier, dated 14 June 2019, at 3).

The requests for discovery, DR-394-WBA and DR-395-WBA, are respectfully denied. No one currently or formerly assigned to the Office of the Chief Prosecutor was involved in any way in the consideration, nomination, and/or selection of Mr. Reismeier as Convening Authority. Nor was any current or former member of the Office of the Chief Prosecutor involved with the Amicus brief filed in support of the respondent in Al Bahlul v. United States, Case No. 11-1324. In light of Mr. Reismeier’s disclosures and analysis in his recusal memoranda of 14 June 2019 regarding limited and enumerated contacts with prosecutors concerning the Nashiri and Bahlul cases and no others, his stated lack of personal bias or prejudice concerning any parties to military commissions, his confidence in his ability to remain impartial, his lack of personal interest in the outcome of any litigation, and his clear compliance with the R.M.C. 601(c) prohibition on accusers serving as convening authorities, the Government has no discoverable information to provide.

Regards,

//s//
Clay Trivett
Managing Trial Counsel

Attachment K

Filed with TJ
9 July 2019

Appellate Exhibit 643 (WBA)
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UNITED STATES OF AMERICA

v.

**ABD AL-RAHIM HUSSAYN
MUHAMMAD ABDU AL-NASHIRI**

**TRIAL COUNSEL DETAILING
MEMORANDUM**

5 October 2011

Consistent with my authority and responsibilities under the Military Commissions Act of 2009, 10 U.S.C. § 948k (2009), and applicable rules prescribing how trial counsel shall prosecute cases on behalf of the United States, I hereby detail the following certified and qualified persons to the military commission of *United States v. Abd al-Rahim Hussayn Muhammad Abdu Al-Nashiri*:

Mark Martins	Judge Advocate	Dep't of Defense	Chief Prosecutor
Anthony Mattivi	Civilian	Dep't of Justice	Trial Counsel
CDR Andrea Lockhart	Judge Advocate	Dep't of Defense	Assistant Trial Counsel



MARK MARTINS
Brigadier General, U.S. Army
Chief Prosecutor

Attachment L

Filed with TJ
9 July 2019

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BEFORE THE
UNITED STATES DEPARTMENT OF DEFENSE

JOINT REPORT OF LAWRENCE J. FOX AND EUGENE R. FIDELL

State of Connecticut)
) *ss.:*
City of New Haven)

Introduction

Lawrence J. Fox and Eugene R. Fidell (“declarants”) make this joint report for consideration by the Convening Authority for Military Commissions, the Secretary of Defense, the Military Judges of the military commissions at Guantánamo Bay, and any reviewing court. No party has compensated declarants for the preparation of this report. Declarants are not counsel in any commission case. Declarants are full-time lecturers at the Yale Law School. The views expressed in this report are those of the declarants only and should not be attributed to Yale Law School or Yale University.

Background and Expertise

Declarant Fox is a graduate of the University of Pennsylvania and its Law School. He is admitted to practice in Pennsylvania, New York, Connecticut, and numerous federal courts. Since 2009, he has been the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School, teaching legal ethics and professional responsibility. He is also the Supervising Lawyer of the Ethics Bureau at Yale (“EBaY”), a student clinic that provides ethics advice, counseling, and support to those who cannot afford such services. A student in the clinic assisted in the preparation of this report. From 1972 to 2017, declarant Fox was a partner and former managing partner of the Philadelphia law firm of Drinker Biddle & Reath LLP. He is now a partner at Schoeman Updike Kaufman & Gerber LLP in New York City.

Declarant Fox has regularly been consulted and has testified about the ethics and professional responsibility of lawyers and judges in proceedings in state and federal courts throughout the United States. He was a lecturer in law at Harvard Law School, teaching legal ethics and professional responsibility from 2007 to 2010. As the I. Grant Irej, Jr. Adjunct Professor of Law, he taught the same topic at the University of Pennsylvania Law School from 2000 to 2008. He has also been a visiting professor at Cornell University Law School and was the Robert Anderson Fellow at Yale Law School in 1997. He has lectured on legal ethics at more than 35 law schools across the country. He is the co-author of *The Law Governing Lawyers: Model Rules, Standards, Statutes, and State Lawyer Rules of Professional Conduct* (WoltersKluwer 2018-19 ed.), *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility* (WoltersKluwer 4th ed. 2018), and *The Law of the Lawyer: Judicial Ethics: Disqualification and Recusal*, 53 Practical Law. No. 6 (Dec. 2008).

Declarant Fidell is a graduate of Queens College, Harvard Law School, and the Naval Justice School. He is admitted to practice in Connecticut, the District of Columbia, New York, and before numerous federal courts. He served on active duty as a judge advocate in the U.S. Coast Guard and has practiced military law for 50 years. He co-founded the National Institute of Military Justice, of which he is president emeritus, and for several years headed the Committee on Military Justice of the International Society for Military Law and the Law of War. He has taught courses on both Military Commissions and Military Justice, among other subjects, at Yale Law School, where he is Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar. He has also taught Military Justice at Harvard Law School and the Washington College of Law.

Declarant Fidell is the author of *Military Justice: A Very Short Introduction* (2016) and co-author of *Military Justice Cases and Materials* (Carolina Academic Press 3d ed. 2019) (forthcoming), and has written, edited or co-edited other works in the field, including the *Annotated Guide to Procedures for Trials by Military Commissions* (Lexis-Nexis/Matthew Bender 2002); *Military Commission Instructions Sourcebook*; *Military Commission Law*, 391 Army Law. 47 (2005); and *Charm Offensive in Lilliput: Military Commissions 3.1*, 56 St. Louis U. L.J. 1177 (2012). He is co-editor of *Military Court Rules of the United States: Procedure, Citation, Professional Responsibility, Civility and Judicial Conduct* (LexisNexis 5th ed. 2019) (forthcoming). He testified before the Senate Armed Services Committee in connection with the Military Commissions Act of 2006. In addition, declarant Fidell edits the Global Military Justice Reform blog, globalmjreform.blogspot.com, and is of counsel at Feldesman Tucker Leifer Fidell LLP, a Washington, DC law firm.

Declarants filed a brief *amicus curiae* on behalf of EBaY in the U.S. Court of Appeals for the District of Columbia Circuit in *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), a case that concerned judicial disqualification.

Question Presented

IN LIGHT OF THE FACTS SET FORTH IN THE CONVENING AUTHORITY'S RECUSAL MEMORANDA IN *BAHLUL* AND *AL NASHIRI*, MUST HE RECUSE HIMSELF FROM ALL COMMISSION CASES?

Expert Opinion

In our opinion, Rear Admiral Reismeier cannot serve as Convening Authority for any commission case. This is so because a number of the important functions he will be required to perform are judicial. His prior activities raise a substantial question about his impartiality and independence.

The Role of the Convening Authority for Military Commissions

The Convening Authority plays a pervasive role in the administration of justice under the Military Commissions Act of 2009. This is in keeping, for better or worse, with the commander-centric architecture of the military justice system that the United States inherited from the Articles of War issued by George III in 1774. Unlike most court-martial convening authorities, however, the Convening Authority for Military Commissions is not a commander; he or she has no operational responsibilities other than management of the military commissions system.

Nonetheless, the Convening Authority has an arsenal of important powers under the Military Commissions Act, the Regulation for Trial by Military Commission (2011), and the Rules for Military Commissions. A few of these powers are purely administrative or even ministerial and, therefore, less likely to reflect undue influence. An example is submitting the record of trial to the U.S. Court of Military Commission Review.

Other Convening Authority powers have significant consequences for the administration of justice and the public's confidence in the military commission system. These include the power to convene commissions, 10 U.S.C. § 948h; detail members, 10 U.S.C. § 948i(b); R.M.C. 503; pick the situs of the trial, R.M.C. 504; enter into pretrial agreements, R.M.C. 705; and grant immunity to witnesses. R.M.C. 704(c).

Yet other powers are prosecutorial in character. These include the critical decisions to refer charges for trial, R.M.C. 407, and to authorize imposition of the death penalty.

Finally, and most importantly, the Convening Authority has powers that can only be described as judicial. Examples include enforcing the rules of professional responsibility, R.M.C. 109; approving expert witnesses, R.M.C. 703(d); and reviewing cases that have been tried, as to

both the findings and the sentence. 10 U.S.C. § 950b(c); R.C.M. 1107. The post-trial review powers in particular are broad, important, and entirely discretionary. The Convening Authority has the power to suspend the sentence, 10 U.S.C. § 950b(c)(3)(C); R.M.C. 1108, or grant a new trial. R.M.C. 1201.

The Military Commissions Act explicitly recognizes that the Convening Authority's responsibilities include judicial functions. Section 949b(a)(2)(B) provides: "No person may attempt to coerce or, by any unauthorized means, influence — . . . (B) the action of any convening, approving, or reviewing authority with respect to *their judicial acts* . . ." (emphasis added). *See also* R.M.C. 104(a)(2)(B).

Given these broad powers, it is obvious why every person who has served as Appointing or Convening Authority for Military Commissions has been a lawyer. Two—Admiral Reismeier and Ms. Crawford—also had judicial experience: the former was Chief Judge of the U.S. Navy-Marine Corps Court of Criminal Appeals and the latter was Judge and, in time, Chief Judge of the U.S. Court of Appeals for the Armed Forces.

Facts

Before he became Convening Authority, Admiral Reismeier assisted the prosecution in connection with a moot court for one of the handful of interconnected military commission cases. Additionally, he was afforded a briefing by the Office of the Chief Prosecutor with a view toward persuading him to join in a pro-prosecution *amicus* brief on an issue of law that affects most if not all commission cases. He thereafter became one of the *amici* on that brief.

The precise details of both of these involvements are known to Admiral Reismeier and the prosecution. The facts he has set forth and the *amicus* brief itself are sufficient for the proper

resolution of the Question Presented. If there were any doubt, discovery should be allowed and an evidentiary hearing conducted if necessary.

Analysis

The Convening Authority's pre-appointment participation in a moot court for the prosecution as well as his joining in an *amicus* brief in support of a position taken by prosecutorial personnel are disqualifying and require recusal. For him to exercise any functions is, in our opinion, intolerable given the multiple matters he is required to address neutrally. Certainly, moot courts in preparation for a judicial proceeding are to be encouraged as standard operating procedure. Declarants themselves have participated in such events, and that experience which informs our response. In fact, it is hard to imagine another activity that, by assisting one party to a controversy, is better calculated to destroy any semblance of impartiality downstream.

There are those who are going to be speaking and rehearse their presentation. They critique every argument; they challenge every principle; they rehearse anticipated weaknesses. In short, the entire process is designed to prepare one side for what is a multiple-sided event that will be adjudicated by judicial officers. One could not imagine a more efficient way for an outsider to learn the innermost concerns of the side conducting the moot court and then helping that side to shape its responses to any weaknesses. What Admiral Reismeier did here was such that the law would afford it full protection from the view of the other side as attorney work-product. The record does not reveal whether the military commission prosecutors played any role, however slight, in suggesting Admiral Reismeier as a candidate for appointment as Convening Authority or commenting on his fitness for the position. But even if his appointment came as a total surprise, "out of left field," he was far too closely allied with the prosecutors.

The situation involving the Convening Authority's service as an *amicus* in support of a government legal position is similarly tainted and created a conflict of interest. Here again, Admiral Reismeier chose a side (or permitted himself to be drafted, which amounts to the same thing) and contributed to the development of a brief that was filed for the express purpose of supporting the government's position. Precisely how involved he was in the development of that brief – did he draft, edit or object to any part of it, for example – is immaterial. There is no “I didn't inhale” defense in the circumstances so long as he authorized the lawyers who filed it to use his name.

The fact that these events took place in different cases from the present one is of no moment. The issues addressed in those two matters are just as important to this proceeding as they were to the earlier ones. The issues were and remain central to the work of the military commissions and Admiral Reismeier chose to give aid to the prosecution side in what Congress intended to be an adversary system.

There was nothing wrong with Admiral Reismeier's conduct at the time. It only became wrong when he became Convening Authority. Whether and to what extent he disclosed his alliance with the prosecution before the Secretary appointed him, and regardless of whether he harbored ambitions to one day become Convening Authority and saw some or all of these actions as desirable from that perspective, need not be established in order to decide whether he must recuse himself. Neither motive nor intent are relevant. His conduct alone renders it an ethical violation if he remains as Convening Authority.

The Circumstances Require Recusal

A person exercising judicial functions must be neutral. A judge cannot be a member of either the prosecution or the defense team. Admiral Reismeier is disqualified because he functioned either in fact or in appearance as a member of the prosecution.

1. *Mentoring.* We begin with Admiral Reismeier's mentoring of an officer junior to him. If that were all that had happened, there would be no reason for him to recuse. Mentoring is an appropriate and desirable practice and in no way problematic, even if, thereafter, the mentor winds up in a position to exercise judicial functions in connection with a case in which the lawyer who was mentored is counsel. Here, however, Admiral Reismeier's interaction with one of the *al-Nashiri* prosecutors included conversations about the junior officer's trial preparation for a commission case, including her interactions with witnesses and victims. Since the charge sheet in that case mentions Mr. bin 'Atash many times, it is clear that those two cases are intimately related. They cannot be treated as distinct for recusal purposes.

2. *Legislative drafting.* Similarly, Admiral Reismeier's earlier participation in a range of official activities relating to the military commissions, including most notably his extensive work drafting military commission legislation, requires his recusal. Experience over the years since President George W. Bush revived military commissions in the aftermath of the 9/11 attacks teaches that fundamental issues relating to the commissions' constitutionality and conformity with international law will come before him. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Given the investment of time, energy and thought that Admiral Reismeier made in connection with what became the Military Commissions Act before assuming his present position, an objective observer would reasonably harbor a substantial doubt as to whether, in exercising his various functions, he "had a horse in the race."

In suggesting that his prior legislative involvement requires recusal we have taken into account Judge Effron's recusal in *United States v. Gorski*, 48 M.J. 315 (C.A.A.F. 1997). This is an *a fortiori* case for recusal because, unlike Judge Effron, who had the protection of a 15-year fixed term of office, Admiral Reismeier has no term of office at all: he serves at the pleasure of the

Secretary of Defense. That this at-will arrangement is not a Due Process Clause violation under current unfortunate case law, *see Weiss v. United States*, 510 U.S. 163 (1994), does not relieve him of the separate duty to recuse.

3. *Moot court*. Like mentoring juniors, moot courts are to be encouraged. They serve the public interest and the judicial process generally by making it more likely that the ensuing trial or oral argument will be productive and efficient. They also serve the client's interests. Professor Harold Koh has written:

This leads me to my third point: *moot courts*. What you are told: do what feels comfortable for you, and if you don't like moot courts, then don't do them. The reality - you must do them, even if you don't like them. Most people who avoid moots do so because they don't want to look like fools in front of their clients or their partners. But you would never drive a car across country and not take it for a trial run around the block. You want to know where the brake is, the lights are, etc. In the same way, moot courts are tremendously important for getting the mechanics just right, for having everything laid out properly, and for seeing how things are going to go under real-life conditions. For that reason, I try to do at least two moot courts and to get them videotaped; then I watch the videotape afterwards. What are you looking for? Three things. First, do you have distracting ways of answering, or distracting hand motions that you want to eliminate? Second, what questions are asked most frequently and what responses are working and not working? Third, what exchanges are you having with the judges that end up at the right place but take far too long to get there? What you are trying to do is shrink down a five-minute give-and-take into a very crisp, ten-second answer that you can deliver, knock the question out of the park, then get on to the rest of your argument. I find that moot courts are invaluable for developing these "silver bullet" answers.

Whom should you get to judge your moot courts? I try to get people from three groups. First, somebody who knows the case incredibly well, because he or she can figure out what you are leaving out and where you are being evasive. Second, good lawyers who know nothing about the case at all, because they guarantee that you are getting the big picture right. Third, try to put together something close to reality, a mixed panel of some people who know the Court and some who know about various subparts of the law of the case. But nobody will know everything, like the blind men and the elephant. You want a group that will try collectively to piece together your argument. What you will find is that what works for one moot court panel won't work for another. For example, I once did a moot court before a bunch of law professors. We spent a lot of time on collateral estoppel and I was very pleased about how I handled those difficult questions. Afterwards I did the same argument before a group of the civil rights lawyers, who knew no details,

except about the larger equities of the case. They said, “If you waste seven minutes on collateral estoppel, you’ll never get to the merits, and you have blown your real opportunity for getting the equities across.” I found that perspective very useful.

Harold Hongju Koh, *Ten Lessons About Appellate Oral Argument*, 71 Conn. B.J. 218, 220-21 (1997), available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2899&context=fss_papers. A moot court yields many dividends for the oral advocate. See generally Eric J. Magnuson, *To Moot or Not to Moot: What was the Question?*, Aug. 11, 2016, available at <https://www.robinskaplan.com/resources/articles/to-moot-or-not-to-moot-what-was-the-question>. “In the real world, lawyers aren’t looking for high scores on debating points. Instead, they want to win the case for their client. A good moot court will help in that effort.” *Id.*

Moot courts are an accepted part of preparation for real-life legal proceedings. However, participation in a moot court is not without consequences. For example, when a lawyer participates in a moot court for some other lawyer, and the participant has no other relationship to the matter, it can be argued that unless the parties have otherwise agreed, the moot court judge is not bound to keep the proceedings confidential. The effect of this may be to compromise an aspect of trial preparation that otherwise would have to be kept strictly confidential.

Promises of moot court confidentiality are not merely good practice. They are required for the purpose of maintaining client confidences and the protection afforded to attorney work-product. Supreme Court Institute at Georgetown Law Center includes this disclosure on its website:

WHAT ABOUT CONFIDENTIALITY?

The SCI has an absolute confidentiality rule that covers the moot court itself, and a more limited rule of reason regarding making adverse comments about the advocate’s position in the case before it is decided. Thus, if you have attended or participated in a moot court, you should not, without the approval of the advocate, post an entry on a blog or publish an article in a newspaper, magazine, or other periodical publication while the case is pending in the Court if the entry or article could reasonably be regarded as contrary to the interests of the advocate. Every moot court participant and observer is instructed to ensure that all understand the importance

of holding these moot court proceedings in strict confidence, given the nature of the exchanges. Likewise, we guard the privacy of our Justices. We appreciate their service and in no way wish to violate their trust. Therefore, we do not identify our Justices for specific cases to outside sources.

Georgetown Law Supreme Court Institute, FAQs for Advocates, *available at* <https://www.law.georgetown.edu/supreme-court-institute/moot-court-program/faqs-for-advocates/>. Similarly, the Practitioner Moot Program at Loyola Law School of Los Angeles cautions:

To prevent any conflict or appearance of conflict of interest, only one side of a case may use the program. All work related to the moot session (including the argument session itself) will be held strictly confidential.

Loyola Law School, Practitioner Moot Program, *available at* <https://www.lls.edu/academics/experientiallearning/mootcourtrialadvocacyprograms/practitionermootprogram/>. Declarants do not know the ground rules under which the moot court here at issue was conducted, but if confidentiality was requested and agreed to, it would be a further cause for concern. Even if those conducting the moot court did not extract an agreement to keep the moot court confidential, Admiral Reismeier's participation would still be deeply problematic simply because he was aiding one side to a controversy.

In sum whether or not the moot court judge and the arguing counsel have an agreement as to confidentiality, and whether or not the moot court judge does nothing more than read the briefs and ask a few questions, participation in a moot court becomes highly problematic when, as here, he surfaces later on in a capacity that involves the exercise of quasi-judicial functions. Either in substance or appearance, such a lawyer has become a member of the team of lawyers involved in the case being mooted. That the end-state was not predicted by either the future official or those he assisted by serving as a moot court judge is immaterial; the result is intolerable because it would cause an objective disinterested observer to harbor a significant doubt as to the later-appointment official's impartiality.

4. *The amicus brief.* Admiral Reismeier's agreement to sign on to the *amicus curiae* brief is an additional and independently-sufficient basis for recusal. According to his own account, the prosecution office responsible for all military commission cases was instrumental in his becoming one of the amici, and facilitated his decision by arranging a briefing in the prosecution's work spaces – a briefing that we can only assume was private and to which no defense counsel in any of the commission cases was invited. No ethical consideration stood in Admiral Reismeier's path, and indeed, he is to be commended for being willing to spend time and effort in this way. Lawyers are, as the ABA Model Rules note, "public citizens," and should be encouraged to participate in the public sphere in this and other ways. As with the moot court, however, this otherwise laudable activity becomes highly problematic when, unexpectedly or not, the *amicus* is selected for an important public office that entails the exercise of judicial functions.

Admiral Reismeier's decision to recuse from the two cases in which he has done so was correct and in keeping with the highest tradition of the profession. He has a similar duty to recuse in any other case that presents issues that were raised in those two. Actions such as participation in a moot court or joining in an *amicus* brief where the issues at stake are generic and apply to numerous proceedings in the same jurisdiction raise significant concerns of the appearance of partiality and prejudgment. The effect of the mentoring, legislative drafting, moot court, and *amicus* brief must be gauged both independently and cumulatively. A fully-informed, objective observer would be justified in questioning Admiral Reismeier's impartiality in all pending commission cases. Should he decline to do so, the circumstances will place an intolerable strain on public confidence in the fairness of those proceedings.

The Ethical Standards that Govern the Convening Authority

The Convening Authority is not covered by the rules that govern Military Commission or Court of Military Commission Review judges. To the extent that he exercises judicial functions, however, the same standards should be deemed to apply. Indeed, to the extent that he lacks the protection of a fixed term of office, scrupulous adherence to those standards is especially critical.

The pertinent sources of law are 28 U.S.C. § 455 and the ABA Model Code of Judicial Conduct. The Model Code applies to “all full-time judges.” “A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions” ABA Model Code, *available at* <https://www.ils.edu/academics/experientiallearning/mootcourtrialadvocacyprograms/practitionermootprogram/>. The Convening Authority is a full-time federal official and, as noted above, Congress has recognized that he performs judicial functions. Both § 455 and Canon 1 require impartiality.

In *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), Judge Tatel addressed the need for unbiased, impartial adjudicators. Deference to the actions of courts is totally dependent on “the integrity and independence of judges.” Admitting that this “stringent rule” bars trial by judges who have “no actual bias,” he observed that “justice must satisfy the appearance of justice” and that it is “axiomatic that due process demands an unbiased adjudicator.” “[A]pppearance may be all there is, but that is enough.”

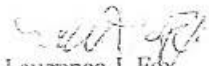
In capital cases the need for an impartial judge is especially acute. As Judge Tatel wrote:

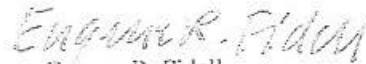
whenever and however military judges are assigned, rehired, and reviewed, they must always maintain the appearance of impartiality demanded by Rule for Military Commissions 902(a).

No less should be demanded of the Convening Authority for Military Commissions. Recusal is required.

We declare under penalty of perjury that the foregoing is true and correct. Executed on July

4, 2019.


Lawrence J. Fox


Eugene R. Fidell