MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 643C (GOV)** **Government Consolidated Response** To AE 643 (WBA), Mr. Bin 'Attash's Motion to Disqualify the Convening Authority *And* AE 643 (KSM Sup), Mr. Mohammad's Supplement to AE 643 (WBA) and Request to Abate Proceedings Pending Decision on AE 643 30 July 2019

1. **Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("RC") 3.7 and the Commission's Order (AE 643-4 (RUL)(GOV)).

2. **Relief Sought**

The Prosecution respectfully requests that the Commission deny the requested relief set forth within AE 643 (WBA), Mr. Bin 'Attash's Motion to Disqualify the Convening Authority and AE 643 (KSM Sup), Mr. Mohammad's Supplement to AE 643 (WBA) and Request to Abate Proceedings Pending Decision on AE 643.

3. **Burden of Proof**

As the moving parties, Mr. Bin 'Attash and Mr. Mohammad must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions (R.M.C.) 905(c)(1)–(2).

4. <u>Overview</u>

Counsel for Mr. Bin 'Attash and Mr. Mohammad seek to disqualify Rear Admiral ("RDML") Christian L. Reismeier, JAGC, USN (ret.), from serving as the Convening Authority on account of his voluntary, though legally unnecessary, recusal in two cases involving different alleged offenses and different accused. However, a convening authority is disqualified only if he is determined to be an "accuser." R.M.C. 504(b). As explained below, RDML (ret.) Reismeier is not an accuser because he is not an officer who has sworn charges, caused them to be sworn, nor has he taken a disqualifying "interest other than an official interest in the prosecution of the accused." 10 U.S.C. § 801(9).

In AE 643 (WBA), Counsel for Mr. Bin 'Attash make three arguments to support their position that RDML (ret.) Reismeier has a personal interest in the outcome of the Accused's case and, as a result, is disqualified under R.M.C. 504(c)(1) from serving as the Convening Authority for Military Commissions. Counsel's first argument attempts to call the impartiality of RDML (ret.) Reismeier into doubt by questioning his past consultations and contact with the Prosecution that he readily disclosed upon assuming duties. Counsel assert that "[n]o 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 or neutral." AE 643 (WBA) at 2. Counsel's second argument posits that because RDML (ret.) Reismeier has already allegedly "decided some of critical issues in this case," he will be unable to discharge his post-trial duties as Convening Authority. Specifically, the motion states that "Mr. Reismeier's 'inelastic attitude' on critical issues has been memorialized in pleadings before the D.C. Circuit." *Id.* at 3. Counsel's final argument claims that RDML (ret.) Reismeier's interest in the case qualifies him as a "type three" Accuser. R.M.C. 504(c)(1); R.M.C. 601(c); 10 U.S.C. § 801(9). The motion elaborates 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." AE 643 (WBA) at 4.

In AE 643 (KSM Sup), Counsel for Mr. Mohammad request that the Commission abate proceedings pending the resolution of AE 643 (WBA), also arguing that RDML (ret.) Reismeier's past involvement with military commissions has "compromised any appearance of neutrality and impartiality." AE 643 (KSM Sup) at 6. Counsel further argue that proceeding under this convening authority will result in "irreparable injury" to Mr. Mohammad. *Id.* at 5.

This Commission should reject both requests for three reasons. First, Counsel for Mr. Bin 'Attash and Mr. Mohammad advance the incorrect legal standard—applying, variously, the tests for unlawful command influence and judicial recusal—instead of the longstanding "accuser" test for disqualification of a convening authority. The statutory "accuser" standard properly preserves important Executive Branch and command prerogatives. Second, nothing in RDML (ret.) Reismeier's disclosures or in the defense motions indicate that RDML (ret.) Reismeier is so closely connected to Mr. Bin 'Attash or Mr. Mohammad or their alleged offenses that a reasonable person would conclude that he has a personal interest in the prosecution of the accused. Third, even if the standard that opposing Counsel are advocating here applied to the convening authority, disqualification of RDML (ret.) Reismeier is not warranted in this case because his involvement with the Prosecution in other cases involving different criminal offenses and different defendants does not reasonably call into question his impartiality in this case. If anything, RDML (ret.) Reismeier's decision to recuse himself from the other cases in an abundance of caution only confirms his commitment to impartiality and fairness.

For these reasons, the Defense's requested relief should be denied.

5. <u>Facts</u>

RDML (ret.) Reismeier served over 30 years in the United States Navy. He spent most of his career handling military justice matters, as "prosecutor, defense counsel, chief prosecutor, appellate attorney, chief defense counsel, trial judge, and appellate judge."[1] From 2006 through

[1] Biography of RDML (ret.) Christian L. Reismeier, JAGC, USN. This motion response incudes footnoted averments so as to indicate sources for recited facts, which are appropriate for judicial consideration during a pre-trial and interlocutory matter. MCRE 104(a); MCRE 201.

2009, while a Navy Captain ("CAPT"), he served as the Division Director, Office of the Judge Advocate General Corps Criminal Law Division (Code 20), where he advised The Judge Advocate General ("TJAG") of the Navy on all matters related to military justice and military commissions. From 2009 through 2010, he served as the co-chair of the Detention Policy Task Force ("DPTF"), where he and a Department of Justice ("DOJ") representative shared responsibility for day-to-day operations of the DPTF staff, which carried out duties in fulfillment of Executive Order 13493. In 2010, then-CAPT Reismeier became the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals until 2012, when he was selected as the Assistant Judge Advocate General and Chief Judge, Department of the Navy ("AJAG-CJDON"). He was AJAG-CJDON until he was placed on the rolls of retired Navy officers as a Rear Admiral (grade O-7) in 2015.[2]

As AJAG-CJDON, CAPT Reismeier was the community sponsor for the litigation career track and was responsible for ensuring the Military Justice Litigation Career Track or Military Justice Litigation Qualified ("MJLQ") officers were provided the requisite leadership, training, and duty assignments for professional development as litigators and as naval officers.[3]

Effective 22 May 2019, RDML (ret.) Reismeier was designated by Acting Secretary of Defense Patrick M. Shanahan to serve as Convening Authority for Military Commissions.[4]

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[2] Biography of RDML (ret.) Christian L. Reismeier, JAGC, USN.

[3] U.S. Dep't of the Navy, Office of The Judge Advocate General, JAG Instruction 1150.2C, subj: Military Justice Litigation Career Track (Sept. 16, 2013) [hereinafter JAGINST 1150.2C]; U.S. Dep't of the Navy, Office of The Judge Advocate General, JAG Instruction 1150.2D, subj: Military Justice Litigation Career Track—Updated Billets (Jan. 5, 2018) [hereinafter JAGINST 1150.2D].

[4] Memorandum of Acting Secretary of Defense Shanahan, subj: Designation of Rear Admiral Christian L. Reismeier, USN (Ret) as Convening Authority for Military Commissions (May 23, 2019), *reprinted in* Attach. D to AE 643 (WBA).

On 14 June 2019, RDML (ret.) Reismeier *sua sponte* recused himself from the role of convening authority in *United States v. Al Nashiri*[5] and *United States v. Al Bahlul.*[6] While stating that he had no personal interest in the outcome of either case and that he believed he was impartial, and while recusing himself in these cases was not legally required, RDML (ret.) Reismeier concluded that recusal was appropriate, in order to avoid even the appearance of partiality.

In order "to ensure the parties and the public [were] aware of [his] previous contacts," RDML (ret.) Reismeier attached to each recusal memorandum a "Memorandum for File" detailing his previous involvement with military commissions.[7]

In the Memorandum for File, RDML (ret.) Reismeier outlined his involvement with military commissions beginning in 2006, when he was a staff officer representing the Navy TJAG's position in a joint working group for drafting revised rules for the Military Commissions Act of 2006 ("2006 MCA"), and following the election of 2008, while representing the Navy TJAG's position on proposed changes to the 2006 MCA as that statute underwent review by President Obama's Administration. RDML (ret.) Reismeier further disclosed that in 2009 he was assigned as the chair of a Military Commissions Sub-Working Group ("SWG") for the DPTF, that he also served as a staff member of the DPTF, and that he eventually became the overall day-to-day co-chair of the DPTF, along with a counterpart Department of Justice co-chair. The mission of the SWG was to provide the DPTF with potential statutory or regulatory revisions to the existing military commissions. While serving in this capacity, he drafted legislative proposals. The SWG was limited to articulating options that would allow the

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[5] Memorandum for Secretary of Defense, Recusal from the Role of Convening Authority in *United States v. al Nashiri* (June 14, 2019), *reprinted in* Attach. E to AE 643 (WBA).

[6] Memorandum for Secretary of Defense, Recusal from the Role of Convening Authority in *United States v. Bahlul* (corrected) (June 14, 2019), *reprinted in* Attach. F to AE 643 (WBA).

[7] RDML (ret.) Christian Reismeier, Memorandum for File (June 14, 2019) (4 pages), *reprinted in* Attachs. E and F to AE 643 (WBA).

statutory changes to the 2006 MCA. The group never considered any particular case. The SWG was directed to consult with both the defense and prosecution bar regarding the potential impact of rules under discussion, but options considered in the interagency process were not centered on then-existing cases. The SWG offered changes to military commissions, and it noted that additional statutory changes could be considered.[8]

As part of the SWG, then-CAPT Reismeier and another attorney from the Office of the Counsel for the President were tasked to rewrite the entire 2006 MCA, working from the 2006 MCA as a baseline. At the same time, Congress drafted its own rewrite of the 2006 MCA and ultimately passed its version as the Military Commissions Act of 2009. RDML (ret.) Reismeier then assisted the Navy TJAG in preparation for his testimony before the House and Senate Armed Services Committees regarding the Department of the Navy's views on military commissions.[9]

As a member of the SWG and DPTF, CAPT Reismeier attended, and at times chaired, interagency meetings regarding military commissions rules, processes, and procedures. He also attended meetings with academics, defense counsel, and non-federal entity representatives. CAPT Reismeier never provided legal recommendations on any specific case or category of cases.[10]

CAPT Reismeier was never a member of the Guantanamo Review Task Force ("GRTF"), which reviewed detainee cases for potential prosecution. There was very little contact between the GRTF and SWG other than that the SWG provided the GRTF with comparative information of disposition fora, such as federal courts, commissions, and international tribunals.[11]

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[8] *Id*. at 1.
[9] *Id*.
[10] *Id*. at 2.
[11] *Id*.

In September 2009, the DPTF was no longer focused on commissions; instead, it was addressing broader issues regarding detention policy and responding to Congressional inquiries regarding policy options. At this time, then-CAPT Reismeier was designated to serve as the co-chair of the DPTF. He and a DOJ counterpart shared responsibility for day-to-day operations of the DPTF staff. None of the work of the DPTF related to any particular case or cases.[12]

In 2009, as the overall day-to-day co-chair of the DPTF, CAPT Reismeier was again involved with an interagency rewrite of both the rules of procedure and evidence for military commissions. His involvement in rule drafting was much more limited than it had been in 2006, and although he consulted on a limited number of specific rules, he did not review the entire Manual for Military Commissions.[13]

As the Division Director, OJAG, Criminal Law Division (Code 20) from 2006 to 2009 and as the AJAG-CJDON from 2012 to 2015, CAPT Reismeier was involved in assigning personnel to the Office of Military Commissions, Office of the Chief Prosecutor ("OCP"), and the Office of the Chief Defense Counsel ("OCDC," the predecessor to today's Military Commissions Defense Organization ("MCDO")), subject to the processes those organizations had in place to vet and accept people the Navy TJAG was considering for assignment.[14]

Between 2010 and 2015, CAPT Reismeier was involved in ad hoc consultation and communication with Office of Military Commissions ("OMC") Convening Authority staff regarding the historical recapitulation of the work done from 2006 to 2010. He also reviewed material OMC was considering placing on its website for accuracy.[15]

Once CAPT Reismeier had left the DPTF, on various occasions between 2010 and 2015 and as part of his duties as the leader of the Navy JAG MJLQ community, he was involved in ad

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

hoc consultation and communication with members of OCP. Specifically, as a mentor to one of the Navy judge advocate prosecutors on *United States v. Al Nashiri*,[16] CAPT Reismeier occasionally discussed with her aspects of professional development, leadership, and management, as well as places she was travelling in order to interview witnesses and victims. On one occasion, she forwarded CAPT Reismeier a copy of the charge sheet from that commission so he could see the complexity of the case she was working on,[17] but once he saw its size, he set it aside and did not read it.[18] This Navy judge advocate, CDR Andrea Lockhart, is no longer assigned to OCP nor detailed to the *Al Nashiri* case, having departed in 2014 as part of the normal Navy personnel reassignment process.

In 2014, as AJAG-CJDON, CAPT Reismeier had contact with Brigadier General ("BG") Mark S. Martins, the Chief Prosecutor of Military Commissions. This contact was in regard to a jurisdictional matter that arose in *United States v. Al Nashiri*. CAPT Reismeier knew BG Martins from the DPTF, where they had served together in 2009. BG Martins contacted RDML Reismeier in 2014 to discuss the proper interpretation of the Military Commissions Act and implementing rules regarding timing and offering of proof of jurisdiction, as there was an issue regarding whether proof of a so-called "jurisdictional element" should be offered pre-trial or during the trial on the merits.[19]

In 2015, BG Martins again consulted RDML (ret.) Reismeier about how the conspiracy came to be codified as an offense in the 2006 MCA, and what sources were used by the drafters to develop the language of the statute. This was a question of interest in connection with Ali Al Bahlul's appeal of his conviction before the U.S. Court of Appeals for the District of

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[16] CAPT Reismeier mentored many MJLQ officers, including Commander ("CDR") Andrea Lockhart, JAGC, USN, a member of the team prosecuting Mr. Al Nashiri, and CDR Stephen Reyes, JAGC, USN, a member of the team defending Mr. Al Nashiri.

[17] Memorandum for File, *supra* note 7, at 3.

[18] RDML (ret.) Christian Reismeier, Supplement to Memorandum for File (July 18, 2019), *reprinted in* Attachment B to this filing.

[19] Memorandum for File, *supra* note 7, at 3.

Columbia Circuit ("Court of Appeals"). BG Martins's consultation of RDML (ret.) Reismeier consisted of RDML (ret.) Reismeier attending a briefing regarding the question at OCP as a subject matter expert.

Separately, in November 2015, RDML (ret.) Reismeier was asked to sign an amicus brief that was sponsored by the Washington Legal Foundation in *Al Bahlul v. United States* before the Court of Appeals regarding the offense of conspiracy as a violation of the law of war. RDML (ret.) Reismeier read the brief and signed his name, but did not author it or provide any edits.[20] No current or former member of OCP was involved in any way with the conceiving, drafting, or filing of the amicus brief; nor was any current or former member of OCP involved in any way with requesting RDML (ret.) Reismeier join or sign the brief.

In 2016, BG Martins asked RDML (ret.) Reismeier to participate in a moot court involving oral argument for an interlocutory appeal before the U.S. Court of Military Commission Review ("U.S.C.M.C.R.") in the case of *United States v. Al Nashiri*. In the interlocutory appeal, OCP argued that the military judge committed legal error when he ruled the government could not present evidence on injuries sustained by foreign-national civilians who were injured by the blast from the alleged attack of the *U.S.S. COLE*.[21] RDML (ret.) Reismeier was asked to participate in the moot because of his subject matter expertise in military justice. The moot did not involve the conspiracy charge facing Mr. Al Nashiri, nor did it involve discussion of any other ongoing military commission prosecutions.[22]

As to his relationships with senior officers involved in military commissions, then-CAPT Reismeier served with BG Martins for eight months, as a result of the support provided by

[20] *Id*.

[21] *See generally United States v. Al-Nashiri*, 222 F. Supp. 3d 1093 (U.S.C.M.C.R. 2016) (No. 15-002) (Second Interlocutory Appeal regarding AE 248G). The moot was held in OCP spaces and took place on 29 June 2016. It lasted approximately 2 hours. On 8 July 2016, the U.S.C.M.C.R. denied oral argument. Order: Denying Motion for Oral Argument at 1, *United States v. Al-Nashiri*, No. 15-002 (U.S.C.M.C.R. July 8, 2016).

[22] Memorandum for File, *supra* note 7, at 3.

the military departments to the DPTF. From February to September 2009, then-Colonel ("COL") Martins was the first executive secretary and day-to-day co-chair (with a Department of Justice counterpart) of the DPTF.[23] COL Martins had no supervisory responsibility over CAPT Reismeier. Then in late September 2009, CAPT Reismeier—having been chair of a DPTF sub-working group as discussed *supra* at subparagraphs f, g, h, and i—became the DPTF overall executive secretary and day-to-day co-chair upon Martins's promotion to brigadier general and deployment to Afghanistan. CAPT Reismeier attended BG Martins's promotion and dinner. In addition to the dinner, which was a customary and professional contact also attended by others supporting the DPTF from their respective departments, CAPT and then RDML (ret.) Reismeier has had only professional contacts with BG Martins.[24] He has also had only professional contacts with Brigadier General John G. Baker, the Chief Defense Counsel for Military Commissions.[25]

RDML (ret.) Reismeier has stated to the Secretary of Defense, and made publicly known, that although he has had the foregoing professional assignments and contacts with military commissions during his career, he does not have a personal bias or prejudice concerning any parties to any prior, existing, or prospective military commissions. He does not have a personal interest in the outcome of any litigation, and he remains impartial in all aspects of military commissions.[26]

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[23] Under E.O. 13493, the Attorney General and Secretary of Defense were appointed by the President to be the formal co-chairs of the "Special Interagency Task Force on Detainee Disposition," which because of its focus upon policy—as opposed to individual detainee files, which were reviewed by another task force created pursuant to E.O. 13492—was known as the Detention Policy Task Force ("DPTF"). The E.O. 13492 task force was known as the Guantanamo Review Task Force ("GRTF"). *See* Attachs. C and D.

[24] Memorandum for File, *supra* note 7, at 3; Supplement to Memorandum for File, *supra* note 18, at 1.

[25] Memorandum for File, *supra* note 7, at 4.

[26] *Id.*

6. Law and Argument

Mr. Bin 'Attash and Mr. Mohammad seek to exploit RDML (ret.) Reismeier's voluntary decision to recuse himself as convening authority from two cases involving different defendants on account of his limited contacts with the prosecution in those cases. Although RDML (ret.) Reismeier was not required to recuse himself under the disqualification standard applicable to convening authorities for those two cases, his desire to avoid even the appearance of partiality in those cases only underscores why he is more than qualified to continue serving as convening authority in this case. But even if RDML (ret.) Reismeier were legally required to recuse himself in those cases, he is not required to do so in this case because he is not an accuser of either Mr. Bin 'Attash or Mr. Mohammad or, for that matter, of any other Accused in this case. As relevant here, an accuser is a person who is so closely connected to the alleged offense (e.g., a victim or witness, or relative of a victim or witness, to the alleged crime) or to the accused (e.g., a person with a direct or indirect connection to the accused) that the person has a personal interest in the prosecution of the accused. RDML (ret.) Reismeier is not connected at all to the alleged criminal offense or to the Accused in this case. Therefore, he is not an accuser.

Nevertheless, Counsel for Mr. Bin 'Attash and Mr. Mohammad's claim that RDML (ret.) Reismeier has a personal interest in the prosecution of the Accused because of his involvement in a working group that developed the statute, regulations, and rules governing military commissions in general and because of his involvement with the prosecution in other cases involving different offenses and different defendants, which prompted his voluntary recusal in those cases. There are a number of insurmountable problems with Defense Counsel's argument.

First, the Accused conflate three different recusal or disqualification standards, cherry-picking quotations from cases, statutes, and rules that address different standards applicable to different actors. Counsel attempt to blur the lines between (1) the standard for disqualification of a convening authority, (2) the standard for disqualification of a military judge, and (3) the

standard for disqualification based on unlawful command influence. These three standards are not identical. Only the standard for disqualification of a convening authority is applicable here.

Second, applying the correct legal standard for disqualification of a convening authority—the "accuser" standard—it is clear that RDML (ret.) Reismeier should not be disqualified from serving as convening authority in this case because he has no connection to the alleged offense, or to the Accused such that he has a personal interest in the prosecution of the Accused that would render him an accuser.

Third, even if the standard that opposing Counsel are advocating here applied to the convening authority, disqualification of RDML (ret.) Reismeier is not warranted in this case because his involvement with the Prosecution in other cases involving different criminal offenses and different accused does not reasonably call into question his impartiality in this case. If anything, RDML (ret.) Reismeier's decision to recuse himself from the other cases in an abundance of caution only confirms his commitment to impartiality and fairness.

I. The Correct Standard for Disqualification of a Convening Authority Is the "Accuser" Standard

A. The Standard for Disqualification of a Judge Is Inapplicable to a Convening Authority

Although a convening authority must retain the distance and professionalism from any case necessary to discharge all of his functions—judicial or otherwise—properly and without fear or favor, military commission rules draw a clear distinction between the disqualification standards for the convening authority and for the military judge based on their different roles within the military commission process. As this Commission stated during oral argument, a convening authority is "not a judge." Unofficial/Unauthenticated Transcript at 19623. Similarly, this Commission has previously held that,

> [t]he discretion exercised by the Convening Authority is executive in nature. The Convening Authority, by design, acts as an executive representative, rather than as a party advocate. His role is neither prosecutorial nor judicial in nature. Those functions are reserved to the Prosecution and the Trial Judiciary, respectively.

AE 091D at 4. Also, at least two other commissions have similarly ruled. *See* AE 078F at 7, *United States v. Hadi Al-Iraqi* (Mil. Comm'n Sept. 11, 2017); AE 117C at 4, *United States v. Al Nashiri* (Mil. Comm'n Jan. 4, 2013).

R.M.C. 504—not R.M.C. 902—contains the correct standard for disqualification of a convening authority.[27] Each military commission "is created by a convening order of the convening authority." R.M.C. 504(a). The Secretary of Defense or "any officer or official of the United States designated by the Secretary of Defense" has the authority to convene a military commission. R.M.C. 504(b). And the standard for disqualification of a convening authority is as follows:

> (c) *Disqualification*.
>
> (1) Accuser. An accuser may not convene a military commission for the trial of the person accused.

R.M.C. 504(c)(1). Consistent with this provision, R.M.C. 601(c) reiterates that "[a]n accuser may not refer charges to a military commission."

Individuals who are accusers are simultaneously disqualified both from being a military judge and from being a convening authority. R.M.C. 902(b)(3) requires a military judge to "disqualify himself or herself" if "the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition . . . ." However, the standard for disqualification of a military judge expressly diverges from that for disqualification of a convening authority. For example, R.M.C. 902(b)(2) specifically requires the military judge to "disqualify himself or herself" if "the military judge

[27] The analogous Rule for Courts-Martial provides the same standard for convening authorities within the court-martial system under the UCMJ. *Compare* R.C.M. 504, *with* R.M.C. 504. *See also United States v. Walker*, 56 M.J. 617, 618 (A.F.C.C.A. 2001) (distinguishing between two categories of cases addressing disqualification of convening authorities and noting that while the first category consists of accusers, the second "focuses on the convening authority's attitude towards his duties [under 10 U.S.C. § 860] rather than his connection to the case").

has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally."

A convening authority is not necessarily disqualified even if he has participated in the investigation of an offense. In *United States v. Conn*, the convening authority ordered the investigation of the accused, received a detailed "briefing on the investigation, read[] the witnesses' statements, conference[ed] with the staff judge advocate and trial counsel, direct[ed] the immediate arrest of [the accused], order[ed] a helicopter to effect the arrest, and purported[ly made] attempts to prevent [the accused's] release from pretrial confinement." 6 M.J. 351, 354 (C.M.A. 1979). Only where intervention has caused the convening authority to become an accuser is the disqualification standard met. *See, e.g.*, *Brookins v. Cullins*, 49 C.M.R. 5, 6, 7 (C.M.A. 1974) (holding that a convening authority was disqualified where he was not only extensively briefed on the investigation but where a "reasonable person would conclude that Captain Cullins was a participant in the material events and perhaps even a personal victim of the crime"). In *Conn*, the C.M.A. distinguished *Brookins*, stating that "our decision in *Brookins v. Cullins* . . . cannot be reasonably construed to require as a matter of law that a convening authority be disqualified to refer a case to trial whenever he performs command functions embraced or reasonably anticipated within the Uniform Code of Military Justice. . . . Such a position is untenable." 6 M.J. at 354.

Counsel for Mr. Bin 'Attash also incorrectly apply R.M.C. 902(a), which *requires* reference—as a matter of law—to whether "a military judge's impartiality might reasonably be questioned," a standard that courts have interpreted by reference to an "appearance of partiality" test.[28] AE 643 (WBA) at 1, 20, 21, 23, 24, 26, 31. Without explicitly referencing

[28] *See, e.g.*, *Liljeberg*, 486 U.S. at 850 ("[A] violation of [28 U.S.C.] § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."); *Health Servs. Acquisition Corp.*, 796 F.2d at 802 ("The goal of section 455(a) [of Title 28, United States Code] is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has

R.M.C. 902(a), Counsel for Mr. Mohammad likewise incorrectly assert an "appearance of neutrality and impartiality" standard. AE 643 (KSM Sup) at 2, 3, 6, and 7. Despite the motions' conflation of standards, the sole ground for disqualification of a convening authority is that the convening authority is "[a]n accuser." R.M.C. 504(c). There is no "appearance of partiality" component in the "accuser" standard. As Judge Baker noted in his concurring opinion in *United States v. Dinges*, "[s]ince its inception, this Court has consistently applied" the accuser standard. 55 M.J. 308, 312 (C.A.A.F. 2001) (Baker, J., concurring). Furthermore, "Congress has not chosen to legislate a different, more stringent test, such as those familiar in other contexts based on the possibility of a conflict, or the appearance of a conflict." *Id*. The correct standard for disqualification of a convening authority is thus R.M.C. 504(c), which does not incorporate an "appearance of conflict" or "possibility of a conflict" component.

Although Counsel for Mr. Bin 'Attash and Mr. Mohammad suggest that the judicial disqualification standard should apply to convening authorities because they perform "quasi-judicial" functions, *see* AE 643 (WBA) at 18, 25, 26; AE 643 (KSM Sup) at 2, 3, 6, 7, the plain text of the relevant rules prove otherwise. Notwithstanding whatever judicial functions the convening authority may be required to perform, the convening authority and judge play different roles within the military commission process. For example, not every act of a convening authority is a "judicial act," a reflection of the fact that commanders, and Executive Branch officials designated by the Secretary of Defense to convene military commissions, serve an important and unique role in maintaining good order and discipline and in seeking accountability under law for violations of the law of war. Moreover, the convening authority

knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible."); *In re Mohammad*, 866 F.3d at 477 (commenting upon Rule for Military Commissions 902(a), which requires that a "military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality *might reasonably be questioned*," R.M.C. 902(a) (emphasis added), and finding that the issue is whether a "reasonable person, knowing the relevant facts" would perceive "an appearance of partiality") (quoting *Liljeberg*, 486 U.S. at 850).

performs various administrative, organizational, and logistical functions that are beyond the purview of the judge. As this Commission has previously held, "[m]ere administrative, organizational and/or resource management decisions . . . do not rise to the level of 'judicial acts,' even if they may have some measure of practical impact on litigation of a particular case or cases." AE 555EEE (Ruling) at 26. In light of the different roles that the convening authority and judge play, it is not surprising that the military commission rules apply different disqualification standards to them.

B. The Defense Improperly Attempts to Smuggle the Disqualification Standard for Judges into the Disqualification Standard for Convening Authorities and Such Arguments Should Be Rejected

Notwithstanding that military commission rules apply only the accuser standard to convening authorities, opposing Counsel nevertheless apply the standard for recusal or disqualification of a military judge. Yet Counsel for Mr. Bin 'Attash cite only cases that interpret and apply the standard for recusal or disqualification of a judge to judges. AE 643 (WBA) at 26. Counsel rely heavily on *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), *In re Murchison*, 439 U.S. 133 (1955), and *In re Mohammad*, 866 F.3d 473 (D.C. Cir. 2017) (per curiam), *see* AE 643 (WBA) at 26–27, but all three are inapposite because they involved judges, not convening authorities.[29]

In re Murchison involved a judge in Michigan who conducted a judge-alone "one man grand jury" under Michigan state law, and then charged two witnesses with contempt and

[29] While convening authorities do perform judicial functions, and while there are twin statutory references to the "judicial acts" of convening authorities in the unlawful influence provisions of both the Uniform Code of Military Justice, *see* 10 U.S.C. § 837(a), and the MCA, *see* 10 U.S.C. § 949b(2)(B), Counsel advance an interpretation of the role of the convening authority that is unsupported by law. *See United States v. Nix*, 36 C.M.R. 76, 78–79 (C.M.A. 1965). As observed in Section 6.I.A, *supra*, not every act of a convening authority is a "judicial act," a reflection of the fact that Executive Branch officials designated to convene military commissions, serve a unique role in seeking accountability under law for violations of the law of war. This Commission's "law of the case" as to limits on what acts are "judicial" was made specifically in the context of loose claims about a convening authority's functions, virtually identical to those now being again advanced in AE 643(WBA). AE 555EEE (Ruling) at 27.

presided over their trials. *In re Murchison*, 349 U.S. at 135–36. Likewise, *Liljeberg* involved a judge who had presided over a trial in which one of the parties was negotiating a real estate deal with a university where the judge was a member of the board of trustees. *Liljeberg*, 486 U.S. at 849. And *In re Mohammad* is based on the Court of Appeals' interpretation of R.M.C. 902, which governs the standard for disqualification of a judge. In that case, a civilian serving as an additional judge on the U.S.C.M.C.R., rather than a convening authority, was the official in question. *See* 866 F.3d at 474–77; *see also* 10 U.S.C. § 950f(3) ("The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review."). Counsel for Mr. Mohammad also cite *In re Mohammad* without recognizing the different role that convening authorities and judges serve in a commission and likewise apply the incorrect standard to the instant case. AE 643 (KSM Sup) at 6–7.

C. Convening Authorities Are Presumed to Act Without Bias

It is noteworthy that both AE 643 (WBA) and AE 643 (KSM Sup) ignore the long-settled principle that convening authorities are presumed to act without bias. The Court of Appeals for the Armed Forces ("C.A.A.F.") has repeatedly held that "convening authorities are presumed to act without bias." *United States v. Argo*, 46 M.J. 454, 465 (C.A.A.F. 1997) (citing *United States v. Hagen*, 25 M.J. 78, 83–84 (C.M.A. 1987)). The C.A.A.F. has likewise repeatedly held that the accused bears "the burden of rebutting that presumption." *Id*. (citing *Hagen*, 25 M.J. at 84). The military service courts of criminal appeals have scrupulously applied this principle. *See United States v. Ashby*, No. NMCCA 200000250, 2007 CCA LEXIS 235, at *101–04 (N-M. Ct. Crim. App. June 27, 2007) ("Convening authorities are presumed to act without bias. The appellant has the burden of rebutting this presumption.") (citing *Argo*, 46 M.J. at 463; *United States v. Brown*, 40 M.J. 625, 629 (N-M.C.M.R. 1994); *United States v. Kelly*, 40 M.J. 558, 570 (N-M.C.M.R. 1994); and *Hagen,* 25 M.J. at 84)); *United States v. Boyd*, No. ACM S29916, 2002 CCA LEXIS 39, at *4 (A.F. Ct. Crim. App. Feb. 6, 2002) ("[C]onvening authorities are

presumed to act without bias. Appellant had the burden of rebutting that presumption.") (quoting *Argo*, 46 M.J. at 463); *United States v. Rockwood*, 48 M.J. 501, 509 (A. Ct. Crim. App. 1998) ("[T]he convening authority had no personal involvement in the proferral [sic] of charges and no demonstrated interest in the outcome of the case. . . . The defense had the burden of producing evidence to raise this issue.") (citing *Argo*, 46 M.J. at 457).

The Accused's motions are predicated on the false premise that the Convening Authority will not act professionally. This inverts the presumption: Counsel presume the Convening Authority is unprofessional and unfit, whereas the presumption under law is that a convening authority is presumed to act professionally and without bias.

D. The Statutory "Accuser" Standard for Disqualification of a Convening Authority Is Justified by Serious Policy Considerations Rooted in the Separation of Powers

Whether one has become an "accuser"—and not whether one has maintained an appearance of impartiality as required for the judge—is the appropriate standard for the functioning of our government. That is, the United States here opposes the suggested application of the judicial disqualification standard to convening authorities not merely because it is inconsistent with the statute and rules,[30] a factor which is dispositive in its own right. Rather, the simple rule anchoring disqualification to whether an officer has sworn charges, caused them to be sworn, or taken a personal interest in the offense is the sounder rule both for the faithful execution of the nation's laws and for the fair administration of the military justice system.

The Founders identified "[e]nergy in the executive" as "a leading character in the definition of good government." THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961). They considered it "essential" to "the steady administration of the laws . . . ." *Id.* By contrast, "[a] feeble executive implies a feeble execution of the government." *Id.*

[30] It will also best comply with applicable case law. *See, e.g.*, *Dinges*, 55 M.J. at 312 (Baker, J., concurring) ("[T]his Court has eschewed a *per se* rule, or appearance-of-conflict rule, when it comes to the meaning of the term 'accuser.'") (citation omitted).

Moreover, "[a] feeble execution is but another phrase for a bad execution[,]" and "a government ill executed, whatever it may be in theory, must be, in practice, a bad government." *Id*.

How the simpler disqualification standard can promote energy consistent with the steady administration of the laws can be discerned in this very case. Had then-CAPT Reismeier, as Assistant Judge Advocate General and the senior officer responsible for career development of 70 judge advocates in the Military Justice Litigation Career Track, deprived these officers of needed mentoring because of hesitation over appearances lawyers might later harbor regarding his judicial qualities, the effectiveness of the executive branch in this set of duties would have suffered. Similarly, if RDML (ret.) Reismeier were to have withheld subject matter expertise about the MCA because, despite retaining necessary distance from all but potentially two military commissions, he might later be broadly disqualified from serving as a convening authority across all cases, the fair administration of military justice would have lost a valued source of energy and wisdom. The Founders recognized that our nation gains when its active and retired officers pursue their duties and their continuing obligations to the Constitution vigorously, subject to always being professional and objective and impersonal in such interests. Alternatively, an imperative to fulfill the judges' R.M.C. 902 standard would encourage what the Founders might have described as "feeble execution" of the laws if applied to Executive Branch actors. This is why it is right and appropriate that Congress settled upon the accuser standard for convening authorities, rather than the "appearance of partiality" test for judges.

II. RDML (ret.) Reismeier Is Not "An Accuser," and Therefore He Should Not Be Disqualified as Convening Authority in this Case

A. RDML (ret.) Reismeier Fits None of the Three Types of Accuser Recognized By Courts Interpreting 10 U.S.C. § 801(9)

The Manual for Military Commissions ("M.M.C.") defines an "accuser" as: "a person who signs and swears to charges ['type one'], any person who directs that charges nominally be signed and sworn to by another ['type two'], and any other person who has an interest other than an official interest in the prosecution of the accused ['type three']." M.M.C. II-9 (Discussion)

(bracketed references to numbered types furnished). The M.M.C.'s definition is identical to the UCMJ's definition of "accuser." *See* UCMJ art. 1(9); 10 U.S.C. § 801(9) (2019). The motions do not contend that the Convening Authority signed or swore charges or directed anyone else to sign or swear charges. Instead, Counsel for Mr. Bin 'Attash argue that RDML (ret.) Reismeier is a "'type three' Accuser" because he allegedly "possesses an interest in this proceeding that disqualifies him as the Convening Authority," AE 643 (WBA) at 4, while Counsel for Mr. Mohammad make no such effort to even acknowledge this standard, *see generally* AE 643 (KSM Sup) (never using the term "Accuser").

The test for determining whether a convening authority is a "type three" accuser is whether he is "so closely connected to the offense that a reasonable person would conclude that he has a personal interest in the matter." *Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001) (Baker, J., concurring) (quoting *United States v. Allen*, 31 M.J. 572, 585 (N-M. C.M.R. 1990)). *See also United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) ("The test for determining whether a convening authority is an 'accuser' under Articles 1(9) and 23(b) 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.'") (citing *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)); *United States v. Deford*, 49 C.M.R. 120 (N-M. C.M.R. 1974) ("Whether the commanding officer who convened the court is an accuser is a question of fact. The test is not the animus of the convening authority but whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.") (citing *United States v. Gordon*, 2 C.M.R. 161 (C.M.A 1952)). As the C.A.A.F. has repeatedly stated, "[p]ersonal interests relate to matters affecting the convening authority's ego, family, and personal property." *Voorhees*, 50 M.J. at 499 (citing *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977) and *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986)).

Illustrative of this standard, the C.M.A. has found that a convening authority had a personal interest in a court-martial where he was the victim in the case, *United States v. Gordon*,

1 C.M.A. 255, 260–61 (C.M.A. 1952); where the accused attempted to blackmail the convening authority, *Jeter*, 35 M.J. at 446; and where the accused had potentially inappropriate personal contacts with the convening authority's fiancée, *United States v. Nix*, 40 M.J. 6, 7 (C.M.A. 1994). The C.A.A.F. has also found, under certain circumstances, that "[a] convening authority's dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity. . . . 'Misguided zeal,' alone, however, is not sufficient." *Voorhees*, 50 M.J. at 499.

An example in which a convening authority was found not to have a personal interest is *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). There, the accused was a Marine pilot who flew an EA-6B Prowler aircraft through a gondola cable in the Italian Alps, killing 20 passengers. *Id*. at 112. The accused was court-martialed twice. *Id.* at 112–13. In the first trial, he was acquitted of all charges relating to the deaths. During that trial, the Government preferred additional charges for conduct unbecoming an officer. The accused objected to the charges being joined, so the military judge ordered them severed from the original charges and the Government tried the accused for these offenses at a second court-martial. *Id.* at 112. During the second trial, the defense alleged unlawful command influence, based in part on the intense media interest in the case. *Id.* at 113. The defense also alleged that the convening authority was disqualified as an accuser. *Id.* at 126. The eventual general court-martial convening authority, Lieutenant General ("LtGen") Pace, had, in his capacity as Commander, United States Marine Corps Forces Atlantic, and Commander, United States Marine Corps Forces Europe, previously convened a command investigation board ("CIB") into the same gondola accident and had appointed his deputy commanding general to investigate. *Id.* The defense in that case further argued that LtGen Pace was disqualified because of his personal involvement in the CIB and because he allegedly had a general predisposition regarding the accused's guilt. *Id.*

In rejecting *Ashby*'s "type three" accuser argument, the C.A.A.F. noted that official action generally will not make the convening authority an accuser. *Id.* at 130. The C.A.A.F.

further found that LtGen Pace's interest was "wholly official," as commanders have a responsibility to investigate accidents and his frequent contact with the CIB did not show a "personal rather than a professional interest." *Id.* at 131. "Interest in an incident and the investigation thereof is not personal—it is in fact the responsibility of a commander." *Id.* Also, the C.A.A.F. noted the presumption of regularity that applies to convening authorities, *id.* at 130, a presumption discussed *supra* at Section 6.I.C. of this response. *See also generally Voorhees*, 50 M.J. at 497–99 (rejecting a "type three" accuser argument).

B. RDML (ret.) Reismeier Did Not Have a Personal Interest in the Prosecution of the *Al Nashiri* and *Al Bahlul* Cases, and He Does Not Have a Personal Interest in the Prosecution of This Case

As the analysis in Section 6.I., *supra*, makes clear, the correct legal standard to apply to a challenge to disqualify the Convening Authority is the accuser standard. RDML (ret.) Reismeier cannot be disqualified because he is not an accuser. Significantly, he was not an accuser in the *Al Nashiri* and *Al Bahlul* cases, and therefore his voluntary recusal in those cases was not legally required. That he chose to recuse himself out of an abundance of caution was prophylactic, and it does not call into question his impartiality in this or any other case. RDML (ret.) Reismeier has no connection to the charged offenses, nor does he have any connection to the Accused. His limited contacts with the Prosecution on discrete legal issues, his mentorship of a Prosecution attorney and a Defense attorney, and his role in crafting the statutes and rules governing military commissions do not mean that he is closely connected to the alleged offenses or to the Accused such that he would have a personal interest in their prosecution, thereby becoming an accuser.

Counsel for Mr. Bin 'Attash allege that the Convening Authority has a "personal interest in the matter" because of his "ego." Specifically, Counsel argue that, because the Convening Authority participated in the working group tasked with researching the law of war related to military commissions and participated in the drafting of the 2006 MCA and the 2009 MCA, his previous professional involvement calls his "ego" into question. This argument is meritless. Counsel for Mr. Bin 'Attash twice state that the 2006 MCA was "invalidated." AE 643 (WBA)

at 12 ("The MCA of 2006 was invalidated."); *id*. at 30 ("When that Act [i.e., the 2006 MCA] 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.'"). The 2006 MCA was not "invalidated." Rather, the 2006 MCA was amended by the 2009 MCA. *See* PUB. L. NO. 111-84 (Oct. 28, 2009) ("Chapter 47A of title 10, United States Code, is amended to read as follows . . . ."). The Convening Authority's "ego" would not be on the line simply because a statute he helped draft was later amended by another statute he also helped draft.

Counsel for Mr. Bin 'Attash argue that because the Convening Authority is an experienced expert in national security law and the law of war, and because he participated in the working group that helped draft the 2006 MCA and then the 2009 MCA, his ego will not allow him to approve requests by the Defense to hire an expert to help them develop arguments that attack the constitutionality or validity of either MCA. Setting aside that this is beside the point (i.e., none of this connects him to the offense or the accused such that he is thereby an accuser) and that it disregards the presumption that convening authorities act without bias (discussed in Section 6.I.C., *supra*), this argument also ignores the well-settled procedure by which an accused can request the assistance of an expert. Even if a convening authority denies a request for an expert witness, an accused still has a remedy: he can make his request to the military judge. *See generally* R.M.C. 703. Mr. Mohammad's claims of irreparable injury are similarly unavailing.

Counsel for Mr. Bin 'Attash insist that RDML (ret.) Reismeier's prior participation with other military commission cases was done in a personal capacity, thereby giving him a disqualifying personal interest in the outcome of Mr. Bin 'Attash's case. On the contrary, the Convening Authority's contacts with the *Al Nashiri* and *Al Bahlul* cases all fell within the scope of his official capacity and interests as an active and retired officer and judge advocate. From 2012 to 2015 then-CAPT Reismeier was the AJAG-CJDON, and his professional responsibilities included managing the Navy JAG Corps' MJLQ community to ensure each officer received the

proper education, training, development, and courtroom experience, and that each MJLQ officer was placed in appropriate JAG Corps billets. As AJAG-CJDON, RDML (ret.) Reismeier was a mentor to several MJLQ officers who were assigned to OCP, MCDO, and the Fleet.

Also, as the community manager, then-CAPT Reismeier discussed and became familiar with the type of work and experience each MJLQ officer experienced in his or her job. This allowed him to make educated billeting recommendations for his MJLQ officers to TJAG. His contact with OCP and MCDO judge advocates was part of his responsibilities as a leader of the MJLQ community and AJAG-CJDON. It did not reflect any personal interest in the *Al Nashiri* prosecution or other commission cases. *Cf. United States v. Mack*, 56 M.J. 786, 794 (A. Ct. Crim. App. 2002) ("[T]he appellant has established that [the convening authority] and [the accused] had a personal and professional relationship. Nevertheless, nothing in the record convinces us that this relationship was unusual or different from the relationship that most staff principals would hope to enjoy with their commanding general. The record contains no evidence to cause us to conclude that their relationship—however close it may have been—equates to a personal interest in the outcome of the appellant's case.").

Similarly, though it is unclear what relationship Counsel for Mr. Mohammad believe RDML (ret.) Reismeier and DoD General Counsel have, a professional relationship between the convening authority and the supervisor to the prosecutors in a military commission does not require recusal. Indeed, trial counsel are routinely supervised by staff judge advocates, who in turn advise, are commanded by, and otherwise have a professional relationship with convening authorities. This routine relationship between attorney and commander does not by itself transform the convening authority into an accuser. Moreover, as discussed in Section 6.I., *supra*, the correct standard for disqualification of a convening authority does not incorporate an "appearance of partiality" component.

Likewise, signing an *amicus curiae* brief in one commission—containing general information regarding the history of the law of war and the history of the conflict between the

United States and al Qaeda—does not mean that RDML (ret.) Reismeier is closely related to the alleged offense or to the accused in that or another commission, including this one. For comparison, in *United States v. Fernandez*, the convening authority wrote a drug-abuse policy memorandum that characterized illegal drugs as a "threat to combat readiness," and stated "the full weight of the military justice system must be brought to bear against [drug-trafficking] criminals[.]" 24 M.J. 77, 78–79 (C.M.A. 1987). Even in this situation, the C.M.A. nevertheless rejected a challenge that the convening authority was impermissibly predisposed to act in a particular manner in a drug distribution case. *Id.* at 79. The court reasoned that the letter made no reference to the appellant's case, showed no predisposition to the appellant, and contained no indication of an impermissible, inflexible predisposition to approve a certain sentence. *Id.*; *see also United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003) (noting that a convening authority "need not appear indifferent to crime" but merely must refrain from staking an "inflexible" predisposition toward post-trial responsibilities). The brief signed by RDML (ret.) Reismeier, *a fortiori*, reflects no inflexible predisposition towards Mr. Bin 'Attash, Mr. Mohammad, or any Accused. Nor does it reflect inflexibility regarding a potential sentence or evidence a personal interest of RDML (ret.) Reismeier's. Therefore, the *amicus* brief does not constitute grounds for disqualification, despite addressing a constitutional issue that bears upon other cases.

Before conflating the recusal standards of military judges and convening authorities, Counsel for Mr. Mohammad briefly aver that the *amicus* brief demonstrates an "inelastic attitude" for which appellate courts have previously disqualified convening authorities. AE 643 (KSM Sup) at 6 (citing *Davis*, 58 M.J. at 104). This argument fails to recognize that the courts do not prohibit expressing a position on crime or demonstrating awareness of criminal issues; convening authorities are expected to make such statements. *See Davis*, 58 M.J. at 103 ("Adopting a strong anti-crime position, manifesting an awareness of criminal issues within a command, and taking active steps to deter crime are consonant with the oath to support the Constitution; they do not per se disqualify a convening authority."). Courts only prohibit such

statements when they demonstrate an "inelastic attitude *toward the proper fulfillment of post-trial responsibilities*." *Id.* (emphasis added). Indeed, courts focus on whether the statements demonstrate an incapability to *consider* clemency requests in violation of the statutory duty to do so. *See, e.g.*, *id.* at 104 (holding that the convening authority's statement that convicted servicemembers "should not come crying to him" with clemency requests reflected an impermissible predisposition to approve an adjudged sentence); *United States v. Wise*, 20 C.M.R. 188, 192 (C.M.A. 1955) (holding that a convening authority's policy that "he would not *consider* the retention in the military service of any individual who had been sentenced to a punitive discharge" amounted to an impermissible refusal to perform post-trial duties) (emphasis added).

The *amicus* brief does not demonstrate an equivalent refusal to consider clemency requests—it does not speak to clemency or appropriate sentences at all. It especially does not demonstrate an inability to perform post-trial duties when considered in the context of RDML (ret.) Reismeier's affirmation that he remains "impartial in all aspects of military commissions." Memorandum for File, *supra* note 7, at 4. Moreover, even applying the "appearance of impartiality" standard appropriate for evaluating the disqualification of military judges, courts have held that the expression of "views on a legal subject is not ground for disqualification." *Burton v. Am. Cyanamid*, 690 F. Supp. 2d 757, 762 (E.D. Wis. 2009); *see, e.g.*, *In re Charges of Judicial Misconduct*, 769 F.3d 762, 782–83 (D.C. Cir. 2014) (holding that judges should not necessarily from be disqualified from a case simply because they have written legal text or a law review article on the subject at issue); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) (stating that the fact that the judge had written and spoken on the subject of contingent fees did not require his recusal from a case in which he had to determine an attorney's fee); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000) (stating that "[a] judge's views on legal issues may not serve as the basis for motions to disqualify").

Allowing such expression to serve as grounds for recusal would effectively halt judicial scholarship, which the Code of Conduct for United States Judges explicitly encourages. *Burton*,

690 F. Supp. 2d at 764; *see also In re Charges of Judicial Misconduct*, 769 F.3d at 797 (observing that writing need not be "neutral" to be regarded as "scholarly" and thereby encouraged by the Canon 4 of the Code of Conduct for United States Judges); *Mass v. McClenahan*, 1995 U.S. Dist. LEXIS 2845, at *9 (S.D.N.Y. Mar. 6, 1995) ("As a judge, I have continued to be active in bar association affairs and serve as a member of a committee of the Association of the Bar of the City of New York. In connection with that service, I have worked on reports with other members of the committee. I certainly would not consider such professional association alone as giving rise to a ground for recusal if another such member of that committee were to appear before me."). RDML (ret.) Reismeier's participation in a moot with the prosecution in *Al Nashiri* also does not establish that he has so close a connection to the *U.S.S. COLE* bombing or Mr. Al Nashiri that he has a personal interest in the prosecution of Mr. Al Nashiri. In 2016, BG Martins asked RDML (ret.) Reismeier to participate in a moot court of an oral argument regarding an interlocutory appeal taken by the Government in *Al Nashiri*. At this time, although RDML (ret.) Reismeier had been placed on the rolls of retired officers and was a private citizen establishing his own private defense counsel practice, he had continued to follow developments in military justice. His continued professional interest was consistent with his obligation as a retired officer and judge advocate to promote the rule of law. RDML (ret.) Reismeier was not paid for his participation in the moot, during which OCP counsel argued that the military judge committed legal error by excluding evidence of injuries sustained by foreign-national civilians in close proximity to the *U.S.S. COLE* bombing. This moot court, which occurred on 29 June 2016, did not involve the conspiracy charge facing Mr. Al Nashiri, and RDML (ret.) Reismeier did not discuss conspiracy or any other issues unrelated to the appeal.

The contacts and interactions between CAPT and then RDML (ret.) Reismeier and OCP have been purely professional, consistent with promoting the fair administration of justice for all, and within the scope of his active and retired status as a military officer, a judge advocate, and a

military justice subject matter expert. They certainly do not establish a close connection to any of the offenses or the accused such that RDML (ret.) Reismeier has a personal interest in the prosecution of the accused.

Finally, with respect to the "Joint Report of Lawrence J. Fox and Eugene Fidell," which concludes that RDML (ret.) Reismeier's ties to the Prosecution are "disqualifying and require recusal," it is apparent that the authors were unaware of several important and readily available facts. Mr. Fox and Mr. Fidell base their 4 July 2019 conclusion in large part on RDML (ret.) Reismeier's moot court participation with OCP and on his joining of an *amicus* brief supportive of the Government as respondent. However, Mr. Fox and Mr. Fidell's characterization of those events appears to have been made either without seeing or without considering the 24 June 2019 "Prosecution Response to Requests for Discovery (DR-394-WBA and DR-395-WBA)," part of the record on the issue of the Convening Authority's impartiality at Attachment J of AE 643 (WBA).

Regarding their assessment of RDML (ret.) Reismeier's participation in a moot court for the Prosecution, Mr. Fox and Mr. Fidell state,

> 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 RDML (ret.) Reismeier as a candidate for appointment as convening authority or commenting on his fitness for the position.

AE 643 (WBA), Attach. L. A not-so-subtle insinuation in these consecutive statements is that RDML (ret.) Reismeier's participation in the moot court resulted in evidence, protected by attorney-client privilege, of a Prosecution role in RDML (ret.) Reismeier's candidacy for the convening authority position. Counsel for Mr. Mohammad likewise insinuate that OCP played some role in RDML (ret.) Reismeier's appointment. *See* AE 643 (KSM Sup) at 6. There is absolutely no factual basis for such an insinuation. In its response to the Defense's 19 June 2019 requests for discovery, the Prosecution stated, "[n]o 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." Prosecution Response to Requests for Discovery (DR-394-WBA and DR-395-WBA) at 2 (June 24, 2019). Simply put, the Prosecution played no role in RDML (ret.) Reismeier's selection as Convening Authority. His prior moot court participation for the Prosecution in no way changes that fact.

Regarding Mr. Fox and Mr. Fidell's assessment of RDML (ret.) Reismeier's joining an *amicus* brief in support of a position taken by the Government, the Declarants argue, again without any factual basis, that RDML (ret.) Reismeier was briefed by OCP "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" and that "[h]e thereafter became one of the *amici* on that brief." AE 643 (WBA), Attach. L. Again, however, this unfounded assertion seems to have been made without consideration of the Prosecution's 24 June 2019 response to the Defense discovery requests. In its response, the Prosecution stated, "[n]or 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." Prosecution Response to Requests for Discovery (DR-394-WBA and DR-395-WBA) at 2 (June 24, 2019). The Prosecution did not brief RDML (ret.) Reismeier to try to persuade him to join any amicus brief; they consulted him as a subject matter expert on why and how conspiracy was codified in the 2006 MCA.

Like the Defense, Mr. Fox and Mr. Fidell confuse the Convening Authority discharging judicial functions with a full-time sitting judge, and they cite authorities that discuss the role of judges, as opposed to that of convening authorities. As previously discussed, the *Ashby* court found that LtGen Pace, who had convened the investigation into the gondola accident for which the accused was being tried, was acting in a "wholly official" capacity, and, as such, his role as an investigating officer did not disqualify him from his role as Convening Authority. *See Ashby*, 68 M.J. at 130–31. Moreover, the court found that "the frequency of Lt. Gen. Pace's contact with the CIB or the number of times that he reviewed the draft CIB report do not reflect a

personal rather than a professional interest." *Id.* at 131. Similarly, RDML (ret.) Reismeier's willingness to be consulted by the government in the *Al Nashiri* and *Al Bahlul* appeals fell within the scope of his official capacity. As Navy regulations demonstrate, at the time that he participated in the moot in anticipation of oral argument in the interlocutory appeal before the U.S.C.M.C.R., RDML (ret.) Reismeier was acting well within the scope of his professional capacity and interests, addressing issues in which he gained expertise wholly as a result of his official duties, and in furtherance of the oath to support and defend the Constitution that he never renounced. *See, e.g.*, 10 U.S.C. § 1370 (providing a grade upon retirement of commissioned officers); 10 U.S.C. § 802 (subjecting retired members of the armed forces to the Uniformed Code of Military Justice); 10 U.S.C. § 688 (providing authority to order retired members to active duty); U.S. DEP'T OF DEF., 5500.7-r, JOINT ETHICS REGULATION (JER) ch. 9, sec. 6 (AUG. 30, 1993) (C7, Nov. 17, 2011) [hereinafter JER] (imposing post-government service employment restrictions on retired military service members); JER, para. 2.304 (authorizing retired military members to use military titles in connection with commercial enterprises, subject to standards of conduct restrictions); JER, para. A.201.k (applying the Emoluments Clause of the Constitution to retired military members); U.S. DEP'T OF THE NAVY, NAVAL PERSONNEL COMMAND REGULATION 15665I, UNITED STATES NAVY UNIFORM REGULATIONS sec. 610002 (authorizing retired personnel to wear uniforms at ceremonies or official functions); MODEL RULES OF PROF'L CONDUCT r. 1.11 (Am. Bar Ass'n 2002) (acknowledging ongoing responsibilities of former attorneys of the government). RDML (ret.) Reismeier's limited and enumerated contacts with the prosecution all reflect an official and professional interest rather than a personal interest in the cases before military commissions. None of those contacts remotely amounts to a close connection to the alleged offense or to the accused such that he had a personal interest in their prosecution.

C. RDML (ret.) Reismeier Recused Himself from *Al Nashiri* and *Al Bahlul* as a Prophylactic Measure, Not Because He Is an Accuser in Those Cases

Acting out of an abundance of caution, RDML (ret.) Reismeier decided to record for the Acting Secretary of Defense, and disclose to the public and the defense bar, the extent of his previous interactions with the Office of Military Commissions and OCP. Though not required by law to do so—as he continues to be impartial with regard to Mr. Al Nashiri and Mr. Al Bahlul—RDML (ret.) Reismeier concluded that it was appropriate to unilaterally and voluntarily recuse himself from these two cases, the only two military commission cases in which he had case-specific involvement with the prosecution. Such actions of self-identifying potential conflicts of interest and voluntarily and *sua sponte* recusing himself exemplify why the convening authority merits the presumption of acting without bias. *See Argo*, 46 M.J. at 465 (stating that "convening authorities are presumed to act without bias"). His review of active commissions and self-removal in two cases logically implies that he considered the remaining cases—to include this one—with a critical eye and determined that he did not have a conflict requiring recusal, under either the "accuser" standard or his own self-imposed and prophylactic standard of "appearance of impartiality."

D. RDML (ret.) Reismeier's Voluntary Recusal in *Al Nashiri* and *Al Bahlul* Does Not Require His Recusal in the Present Case, Where He Also Has No Personal Interest

Significantly, Counsel cite no case, and the Government is not aware of any, where a convening authority's decision to recuse himself in one case required his recusal or disqualification in a separate case.

RDML (ret.) Reismeier did not recuse himself from this Commission because he has had no prior interactions with this case; nor has he had any interaction with any of the five Accused. Though RDML (ret.) Reismeier concluded he did not have a personal interest in the outcome of either *United States v. Al Nashiri* or *United States v. Al Bahlul*, even if he had, specific circumstances in one case that prompt disqualification from acting on that case do not disqualify

a convening authority from acting in other cases. For example, in *United States v. Walker*, the convening authority visited a confinement facility and stated,

> I have no sympathy for you guys, you made your own decisions and put yourself in this situation. . . . I show no mercy for you. . . . [H]alf of you will go on and try to cheat civilian laws and end up in a worst [sic] place than this.

56 M.J. 617, 619 (A.F. Ct. Crim. App. 2001). Though this statement—certainly more demonstrative of an inelastic disposition than anything that led to the self-imposed and prophylactic recusal in *Al Nashiri* and *Al Bahlul*—resulted in that convening authority's disqualification, the Air Force Court of Criminal Appeals concluded that his comments would not disqualify him from taking action on other cases. *Id.* at 613. Here, even if the moot in *Al Nashiri* and the *amicus* brief in *Al Bahlul* were to have led to a personal interest vis-á-vis *Al Nashiri* and *Al Bahlul*, disqualification in those cases would not require disqualification in this, unrelated Commission.

III. RDML (ret.) Reismeier's Limited Involvement with the Prosecution in *Al Nashiri* and *Al Bahlul* Does Not Create an Appearance of Bias with Respect to Cases in Which He Was Not Involved

Even if the judicial disqualification standard applied to the convening authority, disqualification of RDML (ret.) Reismeier is not warranted in this case because his involvement with the prosecution in other cases involving different criminal offenses and different defendants does not reasonably call into question his impartiality in this case. If anything, RDML (ret.) Reismeier's decision to recuse himself from the other cases out of an abundance of caution only confirms his commitment to impartiality and fairness.

Were the judicial recusal standard for judges applicable in this instance, RDML (ret.) Reismeier would still not be disqualified. The gravamen of the *amicus* argument is best expressed at page 10 of the amicus brief, which states, that "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."

AE 643 (WBA), Attach. G at 19. The brief further states that "[a]s the United States has well documented, American history is replete with examples of conspiracy charges being tried by military commissions." *Id*. The expression of a legal opinion on historical practice in an unrelated case—particularly when the position expressed is adopted by the appellate court—does not reflect bias or an "inelastic attitude" toward the present case. There is no support for that premise in law. Moreover, to the extent the jurisdictional question addressed in *Al Bahlul* remains applicable to the cases for which RDML (ret.) Reismeier has not recused, the matter, to the extent the *amicus* opined on it, has been settled by the Court of Appeals. RDML (ret.) Reismeier is bound by that decision.

All the more so with respect to the contacts with the prosecution in *Al Nashiri*. RDML (ret.) Reismeier participated in a moot court. He interacted with the appellate counsel on a narrow issue and, per moot practice, asked questions designed to probe the strengths and identify weaknesses with the prosecution's position. That activity does not reflect any insight into RDML (ret.) Reismeier's view of Mr. Al Nashiri nor the *U.S.S. COLE* bombing. It certainly does not provide any perspective into his view of the accused in this case, nor the offenses at issue. And to the extent that any inference could be divined of RDML (ret.) Reismeier's views due to his contacts with the prosecution, he took the affirmative, prophylactic step of recusing himself from further action in the case. It does not follow that the appearance of bias foreclosed by recusal in *Al Nashiri* is resurrected in the present case.

7. <u>Conclusion</u>

For the foregoing reasons, the Commission should deny the motions.

8. <u>Oral Argument</u>

The Prosecution does not request oral argument. However, if the Defense is granted oral argument, the Prosecution requests an opportunity to respond.

9. Witnesses and Evidence

RDML (ret.) Reismeier has furnished a Supplement to Memorandum for File. *See* Attach. B. The Prosecution will not rely on any witnesses or further evidence in this matter, for which the facts are established and a straightforward application of the R.M.C. 504(c) test is now called for.

10. Additional Information

The Prosecution has no additional information.

11. Attachments

A. Certificate of Service, dated 30 July 2019.

B. Supplement to Memorandum for File of RDML (ret.) Christian Reismeier, dated 18 July 2019.

C. E.O. 13493, Review of Detention Policy Options (Jan. 22, 2009).

D. E.O. 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009).

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 30th day of July 2019, I filed AE 643C (GOV), Government Consolidated Response To AE 643 (WBA), Mr. Bin 'Attash's Motion to Disqualify the Convening Authority, and AE 643 (KSM Sup), Mr. Mohammad's Supplement to AE 643 (WBA) and Request to Abate Proceedings Pending Decision on AE 643, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher Dykstra
Major, USAF
Assistant Trial Counsel

ATTACHMENT B

18 July 2019

Supplement to Memorandum for File

Pursuant to questions raised by parties based on my 14 June 2019 declaration, I offer the following additional information.

Regarding Mr. Nashiri, my contacts with CDR Lockhart were based on the challenges she faced in a multi-service, multi-agency environment that lacked active duty Navy senior officer mentors with whom she could discuss those leadership challenges. My focus was on her continuing development as a senior officer. My interaction with CDR Lockhart was about CDR Lockhart. I was, in colloquial terms, a sounding board for her as she worked through the challenges of leadership.

CDR Lockhart was a member of the Navy's Military Justice Litigation Career Track (MJLCT). She, like any MJLCT officer in the Navy JAG Corps, regardless of their assignment or location, was someone I tried to mentor whenever possible. Anyone from the MJLCT located anywhere at OMC during those years would have been someone I mentored, tried to mentor, guided and/or helped with follow-on career progression. For context, I was asked to establish the MJLCT in 2006. I helped bring into that community every one of the 70+ officers who were in it when I retired in 2015. Commander Lockhart, like every counsel assigned to MCDO or anyone at OMC from the MJLCT regardless of assignment would have been someone I tried to mentor and guide professionally. Some had other mentors, but none were left alone. I was not focused on her, or on OMC-P. She happened to be the one OMC-P person with whom I had case-related conversations.

When CDR Lockhart mentioned the charge sheet from Mr. Nashiri's case, she noted it because it was, in her estimation, different from what we were used to seeing in military justice cases. She described it as something I knew as a "speaking indictment" from cases I have seen in Article III courts, and when she asked if I wanted to see it, I said yes. When she sent it, I saw its size, and put it aside. I never read it because it simply was not germane to my conversations with her. Once I saw the size of the document, I realized it was far too large for me to spend time on, given its irrelevance to my contacts with her. I have absolutely no knowledge whether or if Mr. Bin Attash is or was mentioned on the charge sheet. Although the defense attached a copy of Mr. Nashiri's charge sheet to some recent filings, to this day, I still have not reviewed his charge sheet and do not know what is on it.

I have not spoken to any member of the prosecution about Mr. Bin Attash, or any of the "9/11" cases. I know nothing about any referenced connection between Mr. Bin Attash (or the other "9/11" accuseds) and Mr. Nashiri other than what the defense alleged in their recent filings, and I never discussed conspiracy relative to Mr. Nashiri. Had the defense not raised the issue, I would have had no idea Mr. Nashiri's charge sheet mentioned Mr. Bin Attash.

Regarding Mr. al Bahlul, the briefing by OMC-P, and the *amicus* brief, I attended a briefing by OMC-P regarding the issue that was pending appeal because I was a subject matter expert who had a professional interest in the issue, and possessed background information regarding the provision of the statute at issue. I did not read the government's filing in the case. I was contacted separately by a staff member whom I did not know at the Washington Legal Foundation regarding the *amicus* brief, presumably because of my familiarity with military justice, national security law, and frankly, because I am a retired Flag officer. I had never heard of the WLF before, and have no affiliation with it. I was contacted directly by the WLF, telling me that a number of other Flag and General officers had, or were going to, sign onto the brief, and that the WLF was seeking my signature. OMC-P had nothing to do with my interaction with the Washington Legal Foundation or joining the *amicus* brief, and I have never been compensated by anyone for my past contacts relative to Mr. al Bahlul – or Mr. Nashiri or OMC.

As for Captain Waits, for clarification, the process of making a Navy judge available for detail as a military commissions trial judge was fairly superficial, at least for Navy-Marine Corps judges. The judges were all judicially screened, selected and trained as military judges prior to being detailed as military judges for purposes of courts-martial. When the Chief Judge for military commissions determined that he or she needed a nominee from the service, the clerk of court (commissions) would contact the Chief Judge, Navy-Marine Corps Trial Judiciary, who would then let the Chief Judge, Department of the Navy, know that a request had come in. The request would sometimes come via e-mail to the trial judiciary and the Chief Judge, Department of the Navy at the same time. The Judge Advocate General was made aware, and nominees were considered who were (1) O6/Captain, (2) with clearances, (3) with at least 2 years left on their orders, and (4) who were considered sufficiently experienced. We would also consider the geographic area from which a nominee was coming, to determine the Navy's ability to back-fill for that judge if he or she was actually detailed to a commission.

My recollection is that Captain Waits was made available while he was still the Circuit Military Judge in Jacksonville, Florida, which meant that my predecessor as the Chief Judge, Department of the Navy, would have been involved, not me. I was the Chief Judge, Navy-Marine Corps Court of Criminal Appeals at the time, and would have played no role in that decision. When Captain Waits moved to Naples, I had taken over as the Chief Judge, Department of the Navy, and I had conversations with his immediate boss, the Chief Judge of the Trial Judiciary, about how to fill his seat in Naples if he was detailed to a commission, but my recollection is that he had already been made available for commission assignment before I became his second-level supervisor. That is the total involvement in the assignment of trial judges to military commissions. Once they are made available, any specific assignment/detail is done by the Chief Judge for military commissions, without involvement of the services. The Navy would be informed after the fact that a trial judge had been detailed to a military commission.

I was generally aware that Captain Waits planned on retiring upon the conclusion of his Naples assignment, and I believe he personally informed me because his retirement would have an impact on plans for a judicial relief, but I recall no specific discussions with him about what he planned on pursuing. I have no way of knowing what, if anything he revealed to counsel on commissions, or when, if ever, he engaged in job searches. His supervisors would have been, respectively, the Chief Judge, Navy-Marine Corps Trial Judiciary, for Navy-Marine Corps cases, and the Chief Judge for Military Commissions for any trials he was detailed to for commissions.

Christian L. Reismeier

ATTACHMENT C

Presidential Documents

Executive Order 13493 of January 22, 2009

Review of Detention Policy Options

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Special Interagency Task Force on Detainee Disposition.*

(a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Detainee Disposition (Special Task Force) to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

(b) **Membership.** The Special Task Force shall consist of the following members, or their designees:

(i) the Attorney General, who shall serve as Co-Chair;

(ii) the Secretary of Defense, who shall serve as Co-Chair;

(iii) the Secretary of State;

(iv) the Secretary of Homeland Security;

(v) the Director of National Intelligence;

(vi) the Director of the Central Intelligence Agency;

(vii) the Chairman of the Joint Chiefs of Staff; and

(viii) other officers or full-time or permanent part-time employees of the United States, as determined by either of the Co-Chairs, with the concurrence of the head of the department or agency concerned.

(c) **Staff.** Either Co-Chair may designate officers and employees within their respective departments to serve as staff to support the Special Task Force. At the request of the Co-Chairs, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the heads of the departments or agencies that employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Co-Chairs shall jointly select an officer or employee of the Department of Justice or Department of Defense to serve as the Executive Secretary of the Special Task Force.

(d) **Operation.** The Co-Chairs shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) **Mission.** The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

(f) **Administration.** The Special Task Force shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

(g) **Report.** The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order unless the Co-Chairs determine that an extension is necessary, and shall provide periodic preliminary reports during those 180 days.

(h) **Termination.** The Co-Chairs shall terminate the Special Task Force upon the completion of its duties.

Sec. 2. *General Provisions.*

(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1895
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Billing code 3195–W9–P

ATTACHMENT D

Presidential Documents

Executive Order 13492 of January 22, 2009

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Definitions.* As used in this order:

(a) ''Common Article 3'' means Article 3 of each of the Geneva Conventions.

(b) ''Geneva Conventions'' means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) ''Individuals currently detained at Guantánamo'' and ''individuals covered by this order'' mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. *Findings.*

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals

have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109–366, as well as of the military commission process more generally.

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) **Review Participants.** The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

(3) the Secretary of State;

(4) the Secretary of Homeland Security;

(5) the Director of National Intelligence;

(6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. *Diplomatic Efforts.* The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. *Humane Standards of Confinement.* No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. *Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. *General Provisions.*

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 22, 2009.

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