

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 643E(WBA)

**Mr. bin 'Atash's Motion to Compel
Production of Mr. Christian Reismeier and Mr.
Jason Foster for Evidentiary Hearing on
Mr. bin 'Atash's Motion to Disqualify the
Convening Authority**

16 August 2019

1. **Timeliness**: This Motion is timely filed.
2. **Relief Sought**: Mr. bin 'Atash requests that the Military Judge compel the Government to produce Mr. Christian Reismeier and Mr. Jason Foster as witnesses for the evidentiary hearing on AE 643(WBA), Mr. bin 'Atash's Motion to Disqualify the Convening Authority. Mr. Reismeier currently serves as the very Convening Authority Mr. bin 'Atash seeks to disqualify. Mr. Foster is an attorney within the Office of the Deputy General Counsel (Legal Counsel) ("ODGCLC") who drafted and prepared a memorandum for the signature of the then-Acting Secretary of Defense, Mr. Shanahan. Mr. Foster's memorandum recommended Mr. Reismeier be appointed as the Convening Authority and attested to Mr. Reismeier's "necessary background, knowledge, and temperament to perform the duties of the Convening Authority." The ODGCLC directly supervises and works closely with the Office of the Chief Prosecutor ("OCP"); close organizational ties bind ODGCLC to the Prosecution. Mr. Foster's role in the selection of the Convening Authority further links the Prosecution to Mr. Reismeier and demonstrates at least the appearance of partiality. The testimonies of Mr. Reismeier and Mr.

Foster are relevant and necessary to develop the factual record underpinning Mr. bin 'Atash's Motion to Disqualify the Convening Authority.

3. Overview: Mr. bin 'Atash filed his Motion to Disqualify the Convening Authority, AE 643(WBA), on 9 July 2019. On 1 August 2019, Counsel for Mr. bin 'Atash requested an interview of Mr. Reismeier in preparation for the 09-27 September 2019 pretrial hearing on AE 643(WBA). Mr. Reismeier refused Defense Counsel's request to interview him about matters related to the instant motion. Counsel for Mr. bin 'Atash then issued two separate R.M.C. 703 witness requests to the Prosecution, requesting that Mr. Reismeier and Mr. Foster be produced for pre-trial interview and testimony at the 09-27 September 2019 pretrial hearing. The Prosecution declined both requests. Mr. bin 'Atash now files this Motion to Compel Mr. Reismeier and Mr. Foster.

Mr. Reismeier's testimony is necessary and relevant as required by R.M.C. 703(b)(1). His role as the very Convening Authority Mr. bin 'Atash seeks to disqualify renders Mr. Reismeier the most necessary and relevant witness to the resolution of AE 643(WBA). There is no substitute for his testimony, especially given that Mr. Reismeier has failed to provide a single sworn statement supporting his self-proclaimed impartiality, and when asked to be interviewed by Defense Counsel about the facts germane to Mr. bin 'Atash's Motion to Disqualify, he refused to answer a single question. Military appellate courts presented with the issue of convening authority partiality have consistently taken the testimony of the challenged convening authority before resolving the issue. This Commission must do the same and order the attendance of Mr. Reismeier at any hearing related to AE 643(WBA).

Mr. Foster's testimony is similarly necessary and relevant to explain the ties between the Prosecution and ODGCLC, how Mr. Reismeier's selection as Convening Authority evolved, and

how he came to assert that “[Mr. Reismeier] has the necessary background, knowledge, and temperament to perform the duties of the Convening Authority.” Because Mr. Foster, the Chief Prosecutor, and two other staff members who work to support the Prosecution all report directly to the same person—Deputy General Counsel (Legal Counsel) Ryan Newman—questions must be answered about how the staff of Mr. Newman’s office became involved in the apparent vetting of and selection of Mr. Reismeier, a task not within the regular purview of OGDCLC.

4. Burden of Proof: As the moving party, the Defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

a. On 9 July 2019, Mr. bin ‘Atash filed AE 643(WBA), Mr. bin ‘Atash’s Motion to Disqualify the Convening Authority. The Defense identified Mr. Reismeier as a witness in this filing. (AE 643(WBA) at 35). Mr. bin ‘Atash also offered this Commission evidence – in the form of a sworn declaration – by experts in ethics, professional responsibility, and military law. (AE 643(WBA), Attach. L (Joint Declaration of Lawrence J. Fox and Eugene R. Fidell)). In contrast, the Prosecution offered no sworn testimony – expert or otherwise – to support its position that Mr. Reismeier should not be disqualified as the Convening Authority. Instead, it relied on Mr. Reismeier’s unsworn statements wherein he avers his impartiality despite plentiful and repeated disqualifying contacts with the Prosecution. (AE 643(WBA), Attach. E & F); (AE 643C(GOV), Attach. B).

b. On 1 August 2019, Mr. Reismeier, along with members of his staff, conducted a walkthrough of the Defense’s office space in Rosslyn, VA. (Emails between Ms. Samantha Chen and Ms. Cheryl Bormann, Subject: Request for Interview, dated 1-8 August 2019, at 1 (copy provided as Attach. B)). The professed purpose of his visit “was to look at the defense

spaces with regards to resourcing matters and to meet MCDO personnel.” (Attach. B at 1). Presented with the rare opportunity to speak face-to-face with the Convening Authority, Ms. Cheryl Bormann, Learned Counsel for Mr. bin ‘Atash, asked Mr. Reismeier if he would agree to be interviewed about his recusal from the United States v. al Nashiri and United States v. Bahlul cases and other matters related to AE 643(WBA). (Attach. B at 2). Mr. Reismeier gestured to a member of his entourage and told Ms. Bormann to coordinate the interview request with Ms. Samantha Chen, his Executive Assistant. (Attach. B at 1). Approximately thirty minutes after this brief exchange, in accordance with Mr. Reismeier’s direction, Ms. Bormann emailed Ms. Chen, again requesting an interview with Mr. Reismeier. (Attach. B at 2).

c. Ms. Chen replied to Ms. Bormann’s email six days later, on 7 August 2019, with the following:

Ms. Bormann,

The CA declines such an interview. Mr. Reismeier visited MCDO spaces in Rosslyn and Crystal City, in his capacity as the Director of OMC, last Thursday, August 1, 2019. The purpose of the visit was to look at the defense spaces with regards to resourcing matters and to meet MCDO personnel. During the visit, upon introduction, you requested to speak with the CA regarding interactions with the prosecution. Consistent with the preference for managing requests from individual counsel, a preference he shared with General Baker after his appointment as CA, he asked you to coordinate the request with me. Your email came in shortly thereafter.

A declaration, and a supplemental declaration, addressing the matters you mention were filed with the Commission in June and July 2019, respectively. Those declarations address the scope of the matter you indicated a desire to discuss, and the CA has nothing to add on the matter.

V/R,
Samantha

(Attach. B at 1). On 8 August 2019, Ms. Bormann acknowledged receipt of Mr. Reismeier’s unambiguous refusal to be interviewed. (Attach. B at 1).

d. On 9 August 2019, Counsel for Mr. bin 'Atash issued a R.M.C. 703 witness request to the Prosecution, requesting that the Prosecution produce Mr. Reismeier for testimony at the 09-27 September 2019 pretrial hearings. (Request to Produce Witness for AE 643(WBA), dated 9 August 2019, at 1 (copy provided as Attach. C)). The request explained that Mr. Reismeier would testify about the numerous reasons he should be disqualified from serving as the Convening Authority, including his providing advice to the Prosecution on matters and issues that remain open and pending in Mr. bin 'Atash's case, as well as his relationship with members of the Prosecution, notably Chief Prosecutor BG Mark Martins. (Attach. C at 2).

e. A month prior to the Convening Authority's tour of Defense spaces, on 11 July 2019, Defense Counsel issued their first related discovery request to the Prosecution, specifically seeking information about the involvement of Mr. Foster in Mr. Reismeier's selection. (Request for Discovery – Involvement of OGC Personnel in Convening Authority Selection, dated 11 July 2019 (copy provided as Attach. D)). On 12 August 2019 at 4:55 p.m., the Prosecution responded that the Office of the Chief Prosecutor played no role “in the consideration, nomination, and/or selection of Mr. Reismeier as Convening Authority. (Prosecution Response to Request for Discovery (DR-395A-WBA, 11 July 2019), dated 12 August 2019, at 1 (copy provided as Attach. E)). In the Prosecution's own words, “No role means no role.” (Attach. E at 1). Two hours later, the Prosecution revealed a bombshell: prior to Mr. Reismeier's appointment, Mr. Foster had prepared an “Action Memo” meant to spur the Acting Secretary of Defense to act. Mr. Foster's memo recommended that Mr. Reismeier be designated as the Director and Convening Authority for Military Commissions and attested to Mr. Reismeier's “necessary background, knowledge, and temperament to perform the duties of the Convening Authority.” (Prosecution Response to Request for Discovery (DR-395A-WBA, 11 July 2019), dated 12

August 2019, at 2 (copy provided as Attach. F)). In light of this newly received discovery, Defense Counsel immediately requested the Prosecution produce Mr. Foster for interview and testimony pursuant to R.M.C. 703 so that he may explain how and why his influence in Mr. Reismeier's selection evolved, and how he learned of Mr. Reismeier's background, knowledge and temperament to which he attested. (Request to Produce Witness for AE 643(WBA), dated 14 August 2019 (copy provided as Attach. G)).

f. On 14 August 2019, the Prosecution responded to Mr. bin 'Atash's requests for production of Mr. Reismeier and Mr. Foster. (*United States v. Mohammad, et al* – Request for Production of Witnesses (Admiral Reismeier and Mr. Foster), dated 14 August 2019 (copy provided as Attach. H)). Unsurprisingly, the Prosecution notified the Defense that neither individual would agree to an interview. (Attach. H at 1). Moreover, the Prosecution declined to produce either witness, claiming that the Defense failed to demonstrate the relevance and necessity of their testimony. (Attach. H at 1).

g. AE 643(WBA) is set for hearing during the 09-27 September 2019 pretrial hearings. (AE 652(DO) at ¶ 4(g)).

6. Law and Argument:

Mr. bin 'Atash is entitled to the production of witnesses to provide testimony that is relevant and necessary under the Fifth, Sixth, and Eighth Amendments to the United States Constitution, the Military Commissions Act ("MCA") of 2009, the Rules for Military Commissions, and international law. In aggregate, this is known as the right of the defendant to present a complete defense. See, e.g., United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008) ("[t]he due process clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to present a complete defense"), citing California v.

Trombetta, 467 U.S. 479, 485 (1984). Inseparable from the right to present a complete defense is the right to obtain evidence to present such defense. See Washington v. Texas, 388 U.S. 14, 19 (1967) (guaranteeing production of documents and witnesses under the Fifth Amendment); Taylor v. United States, 329 F.2d 384, 386 (5th Cir. 1964) (guaranteeing production of documents and witnesses under the Sixth Amendment).

Not only is Mr. bin ‘Atash guaranteed the protections of the Fifth and Sixth Amendments to the U.S. Constitution to compel the production of witnesses, but because this is a capital case, “the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case.” Gilmore v. Taylor, 508 U.S. 333, 342 (1993). Because the penalty of death is qualitatively different than a sentence of imprisonment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case, and this need affects every procedure at trial. See Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring); Beck v. Alabama, 447 U.S. 625, 638 (1980); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

In the MCA of 2009, Congress specifically and consciously recognized the importance of calling witnesses to develop a robust factual record when it directed that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” 10 U.S.C. § 949j (2012). Under the Rules for Military Commissions, Mr. bin ‘Atash is entitled to “production of any available witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1). Testimony is relevant when a “reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it

would be without the evidence.” M.C.R.E. 401. In the military justice system, this is a “low threshold of relevance.” United States v. Wuterich, 67 M.J. 63, 77 (C.A.A.F. 2008). Testimony is thus necessary “when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.” R.M.C. 703(f)(1) (Discussion).

The production of witnesses is also guaranteed under international law. Common Article 3 of the Geneva Conventions of 1949 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The right to present a defense and call witnesses are two of those indispensable judicial guarantees. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, Jun. 8, 1977, 1125 U.N.T.S. 3 (“Protocol I”), which provides that any procedure “shall afford the accused before and during his trial all necessary rights and means of defence” and “the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); see also United Nations International Covenant on Civil and Political Rights, art. 14(3), Dec. 16, 1966, 999 U.N.T.S. 171 (recognizing right to preparation of the defense and to obtain the attendance and examination of witnesses in a criminal proceeding as a “minimum guarantee”).

There is arguably no one more uniquely situated and empowered to affect the outcome of Mr. bin ‘Atash’s case than the Convening Authority. As briefed in Mr. bin ‘Atash’s Motion to

Disqualify the Convening Authority, Mr. Reismeier, as the Convening Authority, wields great authority that is of a quasi-judicial and judicial nature. Beyond the power to make decisions regarding the resourcing of Mr. bin ‘Atash’s Defense, Mr. Reismeier also possesses the sole and absolute discretion to modify both the charges and sentence post-trial. 10 U.S.C. § 950b(c). With this power in mind, as well as the national media attention surrounding this case, it is imperative that the Convening Authority is not only impartial *in fact*, but also *appears to be impartial*. See United States v. Taylor, 60 M.J. 190, 193 (C.A.A.F. 2003) (“Maintaining [the convening authority’s] neutrality protects two important interests: (1) the accused’s right to a fair post-trial review; and (2) the system’s integrity”).

Mr. bin ‘Atash has made, at the very least, a *prima facie* case that Mr. Reismeier should be disqualified. Mr. Reismeier has sought to influence the outcome of Mr. bin ‘Atash’s Motion to Disqualify the Convening Authority: on 18 July 2019, he disseminated what he called “Supplement Memorandum to File,” directly addressing some of the allegations in Mr. bin ‘Atash’s motion to disqualify him. (AE 643(GOV) Attach. B). Despite the facts that no copies of AE 643(WBA) had been disseminated by Mr. bin ‘Atash beyond the served parties and Trial Judiciary, and that AE 643(WBA) had not yet been posted on the www.mc.mil website, Mr. Reismeier’s “Supplement Memorandum to File” commented on arguments made by Defense Counsel and made clear that Mr. Reismeier had received a copy of Mr. bin ‘Atash’s motion. Mr. Reismeier’s unsworn statements were then used by the prosecution to buttress its arguments in Response to Mr. bin ‘Atash’s Motion to Disqualify (AE 643(GOV)). All of Mr. Reismeier’s commentary has been injected by him and is unsworn. Mr. Reismeier should not be permitted to insert himself as an unsworn witness into pending litigation, make unsupported factual allegations, and then avoid questions by Defense Counsel off of and on the witness stand. The

Commission should hear sworn testimony on the subject before resolving the issue of Mr. Reismeier's partiality.

a. The Commission Must Compel the Production of Mr. Reismeier.

There is no witness whose testimony on the issue of whether Mr. Reismeier should be disqualified as the convening authority would be more relevant or necessary than the sitting Convening Authority. Mr. Reismeier himself has necessitated this Motion and his in-court testimony. He had the opportunity to provide a sworn declaration after the Defense filed AE 643(WBA) on 9 July 2019. Instead, on 18 July 2019 he provided an unsworn "Supplement to Memorandum for File," which the Prosecution then attached and submitted with its Response on 30 July 2019. (AE 643(GOV) Attach. B). He had the opportunity to grant an interview to Defense Counsel. Instead he stonewalled the Defense, inexplicably saying he had "nothing to add on the matter." (Attach. B at 1). Defense Counsel must be permitted to examine Mr. Reismeier in open court on the plethora of reasons supporting his disqualification as the Convening Authority, which are detailed in Mr. bin 'Atash's R.M.C. 703 witness request. This Court simply cannot decide an issue of this magnitude on Mr. Reismeier's unsworn, self-serving statements in which he attempts to minimize his contacts with the Prosecution and avers that he remains "impartial in all aspects of military commissions." (AE 643(WBA), Attach. E at 4). Mr. Reismeier's reassurances are not comforting. As our country's highest court has aptly noted: "Bias is easy to attribute to others and difficult to discern in oneself." Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016). Mr. Reismeier's sworn testimony is required for the fair resolution of Mr. bin 'Atash's underlying Motion to Disqualify the Convening Authority.

Appellate courts for the Armed Forces that have considered the issue of whether a convening authority should have been disqualified unequivocally hold that a record must be

sufficiently developed before a decision can be made. See United States v. Haagenson, 52 M.J. 34, 37 (ordering a DuBay hearing when presented with an “inadequately developed record” as to whether convening authority acted improperly). Logically, an essential part of that record is the testimony of the convening authority at issue. United States v. Dinges, 55 M.J. 308, 309 (resolving the issue of whether convening authority was a “type three” accuser only after hearing testimony from the convening authority at a DuBay hearing).

The necessity of Mr. Reismeier’s testimony cannot be understated. It would be reversible error for this Commission to deny Mr. bin ‘Atash’s motion to compel the testimony of Mr. Reismeier. In United States v. Nix, 40 M.J. 6 (C.M.A. 1994), the appellant had a friendship with the fiancé of the special court-martial convening authority (“SPCMCA”). Id. at *3. The appellant and the fiancé frequently bantered in a sexual nature leading some to believe that the appellant and the fiancé were having an affair. Id. When allegations of misconduct arose against the appellant, the SPCMCA ordered a pretrial investigation into this misconduct, then forwarded the charges with a recommendation that they be referred to a general court-martial. Id. at *2. At trial, the appellant filed a motion to dismiss the charges against him, arguing that the SPCMCA was disqualified to act on his case because the SPCMCA was biased against him. Id. at *3. The trial judge denied the motion as well as the appellant’s request to call the SPCMCA as a witness in support of his motion. Id. The Court of Military Appeals held, “Appellant reasonably raised the issue of [the SPCMCA’s] possible bias against him. Thus, appellant was entitled to present evidence on the issue ... Because the record has not been developed on the issue ... we cannot say appellant suffered no prejudice.” Id. at 4. Further lamenting the hole in the record due to the lack of the SPCMCA’s testimony, the Court stated, “the record fails to establish that [the SPCMCA] acted without improper motives. We cannot divine how a neutral SPCM convening

authority would have acted under the same circumstances. The cloud of the alleged conflict of interest has not been removed.” Id. at *6. Accordingly, the Court set aside the findings and sentence. Id.

In this case, the stakes are far higher – and the corresponding need for transparency and the appearance of fairness is far more acute. Mr. Reismeier’s refusal to recuse himself as the Convening Authority in Mr. bin ‘Atash’s case casts doubt on the integrity and fairness of the Military Commissions. Mr. Reismeier’s failure to provide a sworn declaration and subsequent refusal to agree to an interview with Counsel for Mr. bin ‘Atash cast doubt on Mr. Reismeier’s neutrality and transparency. And this Commission’s denial of Mr. bin ‘Atash’s Motion to Disqualify the Convening Authority based solely on unsworn, self-serving statements by Mr. Reismeier would not remove the cloud of partiality surrounding Mr. Reismeier, nor would it inspire confidence in any reasonable observer that this Military Commission is legitimate and fair.

b. The Commission Must Also Compel the Production of Mr. Foster.

Aside from the inquiry this Commission must undertake to sufficiently probe the appearance of partiality surrounding the Convening Authority himself, there is the separate inquiry required to assess the appearance of Prosecution involvement in his selection. Mr. Foster’s testimony is necessary and relevant to any hope of dispelling this second cloud of partiality hovering over Mr. Reismeier’s appointment as the Convening Authority. The facts presently before this Military Commission are that a member of the Chief Prosecutor’s supervisory office prepared a memorandum that not only recommended Mr. Reismeier’s designation, but went further to laud his qualifications as a person possessing the “necessary background, knowledge, and temperament to perform the duties of the Convening Authority.”

(Attach. E. at 3). Mr. Foster has declined to be interviewed regarding his preparation of this memorandum or his basis for concluding that Mr. Reismeier is so qualified. Just as it did with respect to Mr. Reismeier, the Prosecution has refused to produce Mr. Foster for questioning.

The Chief Prosecutor in this case directly reports to the same person who directly supervises Mr. Foster. The Chief Prosecutor in this case is rated by the same person who rates Mr. Foster. The Chief Prosecutor in this case collaborates with and is supported by the same colleagues who work with Mr. Foster. The Chief Prosecutor and his team work with Mr. Foster. As a result of the close ties between the preparer of this “Action Memo” and the Chief Prosecutor, and the Chief Prosecutor’s years-long relationship with Mr. Reismeier prior to Mr. Reismeier’s selection, the Convening Authority’s appointment appears to have been orchestrated by the Prosecution. The appearance of partiality is inescapable. Unlike Mr. Reismeier, Mr. Foster has not provided even *unsworn* statements to attempt to explain how he (and ODGCLC) became the supporters of Mr. Reismeier’s selection as Convening Authority. The Commission cannot fairly resolve the question of whether Mr. Reismeier must be disqualified without Mr. Foster’s testimony about the problematic role he played in Mr. Reismeier’s selection.

The Defense has met the low threshold of demonstrating the relevance and necessity of Mr. Reismeier and Mr. Foster’s testimonies as required by R.M.C. 703(b)(1). As such, this Commission must order the attendance of Mr. Reismeier and Mr. Foster at any hearing related to AE 643(WBA) or other related filings to ensure compliance with the Constitution, international law, and the MCA of 2009.

7. Oral Argument: Counsel for Mr. bin ‘Atash request oral argument.

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

9. Attachments:

- A. Certificate of Service (1 page).
- B. Emails between Ms. Samantha Chen and Ms. Cheryl Bormann, Subject: Request for Interview, dated 1-8 August 2019 (2 pages).
- C. Request to Produce Witness for AE 643(WBA), dated 9 August 2019 (3 pages).
- D. Request for Discovery – Involvement of OGC Personnel in Convening Authority Selection, dated 11 July 2019 (2 pages).
- E. Prosecution Response to Request for Discovery (DR-395A-WBA, 11 July 2019), dated 12 August 2019 (3 pages).
- F. Prosecution Response to Request for Discovery (DR-395A-WBA, 11 July 2019), dated 12 August 2019 (7 pages).
- G. Request to Produce Witness for AE 643(WBA), dated 14 August 2019 (3 pages).
- H. *United States v. Mohammad, et al* – Request for Production of Witnesses (Admiral Reismeier and Mr. Foster), dated 14 August 2019 (2 pages).

10. Signatures:

/s/
CHERYL T. BORMANN
Learned Counsel

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

/s/
EDWIN A. PERRY
Detailed Defense Counsel

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

Attachment A

CERTIFICATE OF SERVICE

I certify that on 16 August 2019, I electronically filed, with the Trial Judiciary the attached AE 643E(WBA), Mr. bin 'Atash's Motion to Compel Production of Mr. Christian Reismeier for Evidentiary Hearing on Mr. bin 'Atash's Motion to Disqualify the Convening Authority, and served copies on all counsel of record.

/s/

CHERYL T. BORMANN
Learned Counsel

Attachment B

[REDACTED]

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Subject: [REDACTED]
Signed By: [REDACTED]

-----Original Message-----

From: Bormann, Cheryl T CIV OSD OGC (USA) [REDACTED] >
Sent: Thursday, August 8, 2019 10:39 AM
To: Chen, Samantha T CIV OSD OMC CA (USA) [REDACTED] >
Cc: Reismeier, Christian L SES (USA) [REDACTED]; Montross, William CIV (USA) [REDACTED]; Perry, Edwin A CIV (USA) [REDACTED] >
Subject: RE: Request for interview

Ms. Chen,
I have received Mr. Reismeier's refusal to be interviewed. Thank you for the response.
Cheryl Bormann

-----Original Message-----

From: Chen, Samantha T CIV OSD OMC CA (USA) [REDACTED]
Sent: Wednesday, August 7, 2019 4:45 PM
To: Bormann, Cheryl T CIV OSD OGC (USA) [REDACTED] >
Cc: Reismeier, Christian L SES (USA) [REDACTED]; Montross, William CIV (USA) [REDACTED]; Perry, Edwin A CIV (USA) [REDACTED] >
Subject: RE: Request for interview

Ms. Bormann,

The CA declines such an interview. Mr. Reismeier visited MCDO spaces in Rosslyn and Crystal City, in his capacity as the Director of OMC, last Thursday, August 1, 2019. The purpose of the visit was to look at the defense spaces with regards to resourcing matters and to meet MCDO personnel. During the visit, upon introduction, you requested to speak with the CA regarding interactions with the prosecution. Consistent with the preference for managing requests from individual counsel, a preference he shared with General Baker after his appointment as CA, he asked you to coordinate the request with me. Your email came in shortly thereafter.

A declaration, and a supplemental declaration, addressing the matters you mention were filed with the Commission in June and July 2019, respectively. Those declarations address the scope of the matter you indicated a desire to discuss, and the CA has nothing to add on the matter.

V/R,
Samantha

Samantha T. Chen
Executive Assistant to the Convening Authority
[REDACTED]

[REDACTED]

This email communication is intended only for the use of the designated recipient, and may contain attorney-client communication. As such, it is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution, or copying of the message is strictly prohibited. If you have received this transmission in error, please destroy this transmission and provide notification to me of the erroneous transmission immediately.

-----Original Message-----

From: Bormann, Cheryl T CIV OSD OGC (USA) [REDACTED]
Sent: Thursday, August 1, 2019 10:29 AM
To: Chen, Samantha T CIV OSD OMC CA (USA) [REDACTED]
Cc: Reismeier, Christian L SES (USA) [REDACTED]; Montross, William CIV (USA) [REDACTED]
[REDACTED] >; Perry, Edwin A CIV (USA) [REDACTED] il>
Subject: Request for interview

Ms. Chen,

As you heard about 30 minutes ago, I asked Mr. Reismeier to meet with me to discuss matters related to his recusal from the al Nashiri and Bahlul cases, the two memoranda to file he submitted and his relationship to the prosecution. Mr. Reismeier asked me to set that up with you. Can you please let us know convenient times for such an interview? We anticipate needing approximately one hour of Mr. Reismeier's time.
Thank you for your assistance.

Cheryl Bormann
Learned Counsel for Walid bin 'Atash

Attachment C



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

09 August 2019

MEMORANDUM FOR TRIAL COUNSEL

FROM: Defense Counsel for Walid bin 'Atash

SUBJECT: Request to Produce Witness for AE 643(WBA)

Pursuant to the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, R.M.C. 703(c)(2)(B), and Common Article III of the Geneva Convention to the Treatment of Prisoners of War, Defense Counsel for Mr. bin 'Atash request that the Government make the following witness available for interview and produce him for testimony at any upcoming hearing regarding AE 643(WBA), Mr. bin 'Atash's Motion to Disqualify the Convening Authority. The Military Judge has set AE 643(WBA) for hearing during the 09-27 September 2019 pretrial hearings. (AE 652(DO) at ¶ 4.g).

1. Mr. Christian Reismeier

Effective 22 May 2019, Rear Admiral Christian L. Reismeier, USN (Ret) was designated by Acting Secretary of Defense Patrick M. Shanahan to serve as Convening Authority for Military Commissions. In that role, Mr. Reismeier wields great authority to shape the outcome of Mr. bin-Atash's trial. He decides which resources, including expert assistance, are relevant and necessary to the Defense. He has the power to resolve Mr. bin-Atash's case through a negotiated settlement. Even after trial is completed, Mr. Reismeier has the sole and absolute discretion to vacate findings of guilt, or disapprove the adjudged sentence in whole or in part. Given such expansive authority to impact Mr. bin-Atash's case, it is imperative that Mr. Reismeier is impartial. It is equally important that Mr. Reismeier appears impartial to protect the integrity of the Commission in the eyes of the public.

On 14 June 2019, Mr. Reismeier recused himself as the Convening Authority from two cases before the Commission: United States v. al Nashiri and United States v. Bahlul. In his recusal memoranda Mr. Reismeier averred that "recusal is appropriate in order to avoid even the appearance of partiality."

Mr. al Nashiri's case shares many similarities with the case against Mr. bin 'Atash, including the fact that Mr. bin Atash is an (as of yet) uncharged co-conspirator of Mr. al Nashiri; Mr. bin 'Atash's name appears no less than nineteen times on Mr. al Nashiri's Charge Sheet. Based on this fact alone, if Mr. Reismeier's recusal in al Nashiri and Bahlul was appropriate by an "appearance of partiality" standard, his recusal in Mr. bin 'Atash's case is equally appropriate. Nonetheless, Mr. Reismeier has not recused himself from Mr. bin 'Atash's case.

SUBJECT: Request to Produce Witness for AE 643(WBA)

This motion to disqualify Mr. Reismeier as the Convening Authority alleges that the previous actions of Mr. Reismeier demonstrate that he is a Type 3 accuser, maintains an inelastic attitude in exercising his duties as Convening Authority, and, at the very least, appears partial toward the capital prosecution of Mr. bin 'Atash. No witness' testimony is more necessary and relevant to this motion than Mr. Reismeier's. The Defense expects Mr. Reismeier to testify about the following subjects:

- a. His extensive involvement in the creation of the Military Commissions Act (MCA) of 2009 and his relationship with members of the Prosecution during that time;
- b. Following implementation of the MCA of 2009, his involvement in the interagency rewrite of both the rules of procedure and evidence for the Military Commissions and his relationship with members of the Prosecution during that time;
- c. His advice to the Prosecution on matters and issues that remain open and pending in Mr. bin-Atash's case;
- d. His assistance to the Prosecution as a subject matter expert helping to fashion arguments that could win the day during a moot argument in United States v. al Nashiri;
- e. His relationship with CDR Andrea Lockhart, a lawyer who worked closely with Chief Prosecutor BG Mark Martins in prosecuting United States v. al-Nashiri;
- f. His support of and signing onto a November 2015 amicus brief for submission to the D.C. Circuit in United States v. Bahlul, No. 11-1324, in which he advocates that the crime of conspiracy is chargeable before a United States military commission as a war crime—a position diametrically opposed to the legal interests of Mr. bin 'Atash;
- g. His relationship with BG Martins, their history of friendship, and mutual support;
- h. His contacts and relationships with certain staff in the Office of General Counsel, specifically the Deputy General Counsel (Legal Counsel), who supervises and works closely with BG Martins and who, on credible information, pushed for Mr. Reismeier's selection as Convening Authority; and
- i. His refusal of Defense Counsels' request to interview him regarding any of the above.

Your point of contact for this witness request is Edwin A. Perry: [REDACTED]

SUBJECT: Request to Produce Witness for AE 643(WBA)

Respectfully,

//s//
CHERYL T. BORMANN
Learned Counsel

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

//s//
EDWIN A. PERRY
Detailed Defense Counsel

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

Attachment D



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

11 July 2019

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

SUBJECT: Request for Discovery – Involvement of OGC Personnel in Convening Authority Selection

1. Pursuant to RMC 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.
2. Effective 22 May 2019, Mr. Christian Reismeier was appointed as Convening Authority for Military Commissions. On June 14, 2019, Mr. Reismeier issued letters of recusal from deciding issues related to *United States v. Al Bahlul* and *United States v. Al Nashiri*.
3. On 19 June 2019, Mr. bin ‘Atash requested that the Prosecution produce information regarding Mr. Reismeier’s recruitment and selection as Convening Authority and Mr. Reismeier’s connections with members of the Office of the Chief Prosecutor (OCP).¹ On 24 June 2019, Mr. Trivett rejected this request on behalf of the Prosecution, asserting in part “[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.”²
4. On information and belief, Mr. Jason Foster may have been involved in the recruitment and/or selection of Mr. Reismeier as the Convening Authority. At or near the time of Mr. Reismeier’s recruitment and selection as Convening Authority, Mr. Foster reported to or was supervised by Mr. Ryan Newman. Mr. Newman is the Deputy General Counsel (Legal Counsel) of the Office of General Counsel, Department of Defense. Relevant to this request, Mr. Newman is also the same individual who either directly supervises BG Mark Martins, the Chief Prosecutor or oversees BG Martins’ position and the Office of the Chief Prosecutor.³ Mr. Newman also supervises Ms. Karen Hecker, who has been Trial Counsel on several Military Commissions cases and was Special Trial Counsel in the 9/11 cases. Mr. Newman also supervises Mr. Michael Vozzo, who is “formally a member of OGC, but act[s] on behalf of the prosecution team”.⁴ In the carefully worded response to DR-394-WBA, the Prosecution stated that “[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

¹ See DR-394-WBA and DR-395-WBA, both dated 19 June 2019.

² See Prosecution response to DR-394-WBA and DR-395-WBA, dated 24 June 2019.

³ See <https://www.mc.mil/ABOUTUS/OrganizationOverview/OrganizationalChart.aspx>.

⁴ See AE 555V(KSM, AAA) at 6.

DR-394A-WBA

SUBJECT: Request for Discovery – Involvement of OGC Personnel in Convening Authority Selection

Authority.” However, the Prosecution made no mention of either Mr. Foster or Mr. Newman—two individuals with close ties and organizational links to the Prosecution while “not currently or formerly assigned to the Office of the Chief Prosecutor.”

5. In light of this revelation regarding Mr. Foster’s role in Mr. Reismeier’s selection, Mr. bin ‘Atash renews his request in DR-394-WBA. Mr. bin ‘Atash further requests production of all records and documentation concerning the roles of Mr. Foster and Mr. Newman in the recruitment and/or selection of Mr. Reismeier as Convening Authority. This is to include, but not be limited to any and all letters, memoranda, emails, notes or agendas of telephone calls, notes or agendas of meetings, and other correspondence between, amongst, or including Mr. Foster, Mr. Newman, BG Martins, other members of OCP, and Mr. Reismeier regarding Mr. Reismeier’s recruitment and/or selection as Convening Authority.
6. POC: Mr. Michael Garber, [REDACTED]

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
WILLIAM R. MONTROSS
Detailed Defense Counsel

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

Attachment E



OFFICE OF THE
CHIEF PROSECUTOR

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

12 August 2019

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Response to Request for Discovery (DR-395A-WBA, 11 July 2019)

1. The Prosecution received the Defense request for discovery on 11 July 2019. The Prosecution hereby responds to the Defense request, below, in bold.

2. The Defense writes in paragraph 3 of DR-395A-WBA that its 19 June 2019 request, DR-395-WBA, was "rejected" by the Prosecution, whose 24 June 2019 response asserted, in part, "[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."

As the previous joint Prosecution response to DR-394-WBA and DR-395-WBA made clear, no one currently or formerly assigned to the Office of the Chief Prosecutor was involved in any way in the consideration, nomination and/or selection of Mr. Reismeier as Convening Authority. The Prosecution notes that Defense speculation on this matter in AE 643, its motion and brief of 9 July 2019, is in error. Specifically, the Defense brief cites RDML (ret.) Reismeier's participation in a moot court, suggesting in that regard that the Prosecution thereafter may have had some role in RDML (ret.) Reismeier's candidacy for the convening authority position (AE 643, Att. L, at 6). To reaffirm: there was no Prosecution role. Similarly, the suggestion in DR-395A-WBA that "Reismeier Work with Detention Policy Task Force" may have precipitated some role for BG Martins or the Prosecution in his appointment as convening authority is erroneous. No role means no role. RDML (ret.) Reismeier's Detention Policy Task Force (DPTF) service in no way changes that fact.

3. The Defense writes in paragraph 4 of DR-395A-WBA that "[o]n information and belief, Mr. Reismeier worked under then-COL Mark Martins, now Chief Prosecutor of the Military Commissions, on the Detention Policy Task Force when then-COL Martins was Co-Executive Secretary" and that "Mr. Reismeier was elevated to Co-Executive Secretary of the Task Force when BG Martins left."

RDML (ret.) Reismeier disclosed in his Memorandum for File of 14 June 2019 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. Then-CAPT Reismeier served with BG Martins for eight months, as a result of the support provided by 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. 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 indicated above—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 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. He has also had only professional contacts with Brigadier General John G. Baker, the Chief Defense Counsel for Military Commissions.

4. Also in paragraph 4 of of DR-395A-WBA, the Defense writes that “[t]hus far, this information about the connection between BG Martins and Mr. Reismeier has not been formally disclosed.” And in paragraph 5, the Defense writes that in light of the “revelation” of such connection, “Mr. bin ‘Atash renews his request” for “all information regarding BG Martins and Mr. Reismeier’s work with the Detention Policy Task Force.”

BG Martins’s service with the DPTF has long been a matter of public record. See, e.g., <https://www.justice.gov/opa/pr/detention-policy-task-force-issues-preliminary-report> (disseminating publicly released Preliminary Report of the DPTF of July 20, 2009, attached to this Discovery Response as Attach. A). 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. B and C, which have been a matter of public record for more than a decade. As described above, COL Martins and then CAPT Reismeier served as day-to-day co-chairs (along with a DOJ counterpart) of the DPTF.

In light of this public record, and of RDML (ret.) Reismeier’s disclosures of 14 June 2019, the Prosecution is unable to understand the characterizations regarding a supposed lack of “disclos[ure]” and the DPTF connection between BG Martins and RDML (ret.) Reismeier being a “revelation.” Regardless, in light of Mr. Reismeier’s disclosures and analysis in his recusal memoranda of 14 June 2019 and supplemental memorandum of 18 July 2019 regarding limited and enumerated contacts with prosecutors concerning the Nashiri and Bahlul cases and no others, his stated lack of personal bias or prejudice concerning any parties to military commissions, his confidence in his ability to remain impartial, his lack of personal interest in the outcome of any litigation, and his clear compliance with the R.M.C. 504(c) and 601(c) prohibition on accusers serving as convening authorities, the Government has no further information to provide.

Regards,

 /s/

Clay Trivett
Managing Trial Counsel

Attachments A, B, and C
As Stated in Text

Attachment F



OFFICE OF THE
CHIEF PROSECUTOR

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

12 August 2019

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Response to Request for Discovery (DR-394A-WBA) dated 11 July 2019

1. The Prosecution received the Defense request for discovery on 11 July 2019. The Prosecution hereby responds to the Defense request, below, in bold.
2. The Defense renews its request of DR-394-WBA and additionally requests the Prosecution produce all records and documentation concerning the roles of Mr. Foster and Mr. Newman in the recruitment and/or selection of Mr. Reismeier as Convening Authority. This is to include, but not be limited to any and all letters, memoranda, emails, notes or agendas of telephone calls, notes or agendas of meetings, and other correspondence between, amongst, or including Mr. Foster, Mr. Newman, BG Martins, other members of OCP, and Mr. Reismeier regarding Mr. Reismeier's recruitment and/or selection as Convening Authority.

Without conceding that it is material to the preparation of the defense pursuant to R.M.C. 701, the Prosecution attaches the decision memo regarding the selection of Mr. Reismeier as Convening Authority.

Beyond that, your request for discovery, DR-394A-WBA is respectfully denied. No one currently or formerly assigned to the Office of the Chief Prosecutor was involved in any way in the consideration, nomination, and/or selection of Mr. Reismeier as Convening Authority. In light of Mr. Reismeier's disclosures and analysis in his recusal memoranda of 14 June 2019 and supplemental memorandum of 18 July 2019 regarding limited and enumerated contacts with prosecutors concerning the Nashiri and Bahlul cases and no others, his stated lack of personal bias or prejudice concerning any parties to military commissions, his confidence in his ability to remain impartial, his lack of personal interest in the outcome of any litigation, and his clear compliance with the R.M.C. 504(c) and 601(c) prohibition on accusers serving as convening authorities, the Government has no discoverable information to provide.

Regards,

//s//

Clay Trivett
Managing Trial Counsel



GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1800 DEFENSE PENTAGON
WASHINGTON, DC 20301-1800

ACTION MEMO

FOR: ACTING SECRETARY OF DEFENSE

FROM: Paul C. Ney, Jr., General Counsel *Paul Ney 5/10/19*

SUBJECT: Designation of RDML Christian L. Reismeier as Director, Office of the Convening Authority for Military Commissions and as the Convening Authority for Military Commissions

- I recommend that you designate RDML Reismeier (USN ret.) to serve as the Director, Office of Military Commissions by signing and dating the attached memorandum at TAB A1; and to further designate him to serve as Convening Authority for Military Commissions by signing and dating TAB A2.
- Military commissions may be convened "by the Secretary of Defense or by an officer or official of the United States designated by the Secretary for that purpose." Section 948h of Title 10, United States Code. The Convening Authority is the official who you designate to refer charges to military commissions and take other commission-related actions.
- On August 9, you designated Ms. Melinda L. Perritano, the Deputy General Counsel for the Defense Logistics Agency, as both the Acting Director and the Acting Convening Authority for Military Commissions. Ms. Perritano was so designated on an interim basis in order to maintain continuity of function and to permit the incoming General Counsel to make a recommendation of a full-time Convening Authority.
- RDML Reismeier is a retired United States Navy rear admiral who last served as the Chief Judge, Department of the Navy and Assistant Judge Advocate General of the Navy from 2012 to 2015. Prior to that, he served as the Chief Judge, Navy-Marine Corps Court of Criminal Appeals from 2010 to 2012, and as the Division Director, Criminal Law Division, Office of the Judge Advocate General from 2006 to 2009. He has the necessary background, knowledge, and temperament to perform the duties of the Convening Authority. See biography attached at TAB B.

RECOMMENDATION. Designate RDML Christian L. Reismeier as the Director and Convening Authority for Military Commissions and rescind the designation of Ms. Perritano by signing and dating the attached memoranda at TABS A1 and A2.

COORDINATION: NONE

Attachments:
As stated

Prepared by: Jason C. Foster, [REDACTED]

TAB A



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

MAY 23 2019

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

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

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

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

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

Patrick M. Shanahan
Acting

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



OSD005145-19/CMD006330-19



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

MAY 23 2019

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

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

Pursuant to chapter 47A of title 10, U.S.C., section 948h, Christian L. Reismeier is hereby designated as Director of the Office of the Convening Authority for Military Commissions. This designation is effective from May 22, 2019, until this designation is rescinded. In this role, Mr. Reismeier shall be responsible for the administrative and logistical oversight of the operations of the Office of the Convening Authority for Military Commissions. As appropriate, Mr. Reismeier may delegate the responsibilities to staff at the Office of the Convening Authority for Military Commissions.

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

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

Patrick M. Shanahan
Acting

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



OSD005145-19/CMD006329-19

TAB B

Christian Reismeier, Rear Admiral, Judge Advocate General's Corps, U.S. Navy (Ret.)

Christian Reismeier is a retired United States Navy rear admiral who last served as the Chief Judge, Department of the Navy and Assistant Judge Advocate General of the Navy from 2012 to 2015. Prior to that, Reismeier served as the Chief Judge, Navy-Marine Corps Court of Criminal Appeals from 2010 to 2012, and as the Division Director, Criminal Law Division, Office of the Judge Advocate General from 2006 to 2009. Immediately before assuming the assignment as the Chief Judge of the Court of Appeals, he served the Executive Secretary of the President's Detention Policy Task Force, providing the President legal options for detention policy. He retired on September 1, 2015.

Over his 31-year career, Reismeier served in numerous criminal law assignments as prosecutor, defense counsel, chief prosecutor, appellate attorney, chief defense counsel, trial judge and appellate judge. He also served as a full-time felony prosecutor in the Eastern District of Pennsylvania.

Reismeier graduated from Penn State in 1984 with a Bachelor of Arts degree in Foreign Service and International Politics. He served as an Intelligence Officer with the United States Navy until he was selected by the Navy for the Law Education Program. He received his Juris Doctor from the George Washington University and his Master of Laws degree in trial advocacy from Temple University.

With more than 100 contested trials as judge, prosecutor, or defense counsel, Reismeier has tried nearly every type of case, including murder, rape, child sexual abuse, child physical abuse, attempted espionage, and arson. He has practiced before the Court of Appeals for the Armed Forces, the Navy-Marine Corps Court of Criminal Appeals, Federal District Courts in Washington, D.C. and the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals. He has taught extensively at the Naval Justice School and the Army Judge Advocate General's Legal Center and School and has served as a panel member for various state and local bars.

Attachment G



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

14 August 2019

MEMORANDUM FOR TRIAL COUNSEL

FROM: Defense Counsel for Walid bin 'Atash

SUBJECT: Request to Produce Witness for AE 643(WBA)

Pursuant to the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, R.M.C. 703(c)(2)(B), and Common Article III of the Geneva Convention to the Treatment of Prisoners of War, Defense Counsel for Mr. bin 'Atash request that the Government produce the following witness whose testimony is relevant and necessary to address the issues raised in AE 643(WBA), Mr. bin 'Atash's Motion to Disqualify the Convening Authority. The Military Judge has set AE 643(WBA) for hearing during the 09-27 September 2019 pretrial hearings. (AE 652(DO) at ¶ 4.g). Failure to produce the requested witness will deny Mr. bin 'Atash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.

1. Background and History

Effective 22 May 2019, Rear Admiral Christian L. Reismeier, USN (Ret) was appointed by Acting Secretary of Defense Patrick M. Shanahan to serve as Convening Authority for Military Commissions. It is axiomatic that in this role, Mr. Reismeier must not only *be* impartial, he must also *appear* impartial in order to protect the integrity of the Commission in the eyes of the public.

On 14 June 2019, Mr. Reismeier recused himself from deciding issues related to *United States v. Al Bahlul* and *United States v. Al Nashiri* "in order to avoid even the appearance of partiality." Despite the fact that the same risk exists with Mr. Reismeier deciding issues in the case against Mr. bin 'Atash, Mr. Reismeier has not recused himself from the instant matter.

Defense counsel for Mr. bin 'Atash filed a motion to disqualify Mr. Reismeier on 9 July 2019, arguing, among other things, that Mr. Reismeier has been so closely aligned with the prosecution that any reasonable observer would question his partiality.¹ Counsel for Mr. Mohammed supplemented the Motion to Disqualify with newly uncovered information: namely that Mr. Reismeier's recruitment and/or selection as Convening Authority may have been influenced by the office that directly supervises (and advocates for) the Chief Prosecutor.²

¹ See AE 643 (WBA) Motion to Disqualify the Convening Authority.

² See AE 643 (KSM Sup) Mr. Mohammad's Supplement to AE 643 (WBA) and Request to Abate Proceedings Pending Decision on AE 643.

SUBJECT: Request to Produce Witness for AE 643(WBA)

In response, Trial Counsel disclaimed any involvement in Mr. Reismeier's selection as Convening Authority, but was careful to apply that denial only to the limited category of those "currently or formerly assigned to the *Office of the Chief Prosecutor*" (emphasis added).³

Late in the evening of August 12, 2019, the Prosecution disclosed a one-page memorandum in which General Counsel Paul Ney recommended that Acting Secretary of Defense Patrick Shanahan designate Mr. Reismeier as the Director of the Office of Military Commissions and appoint him Convening Authority. This recommendation memorandum and the attached designation memoranda signed by the Acting Secretary of Defense were prepared by Mr. Jason Foster.

2. Mr. Jason Foster

Mr. Foster is an attorney working for Mr. Ryan Newman, the Deputy General Counsel (Legal Counsel) to the Deputy Secretary of Defense. Mr. Foster's formal title is Associate Deputy General Counsel and he reports directly to Mr. Newman. Mr. Foster's office generally, and Mr. Newman specifically, directly supervises the Chief Prosecutor in this case, BG Mark Martins.

Mr. Foster's colleagues in the office of the Deputy General Counsel include, among others, Mr. Michael Vozzo and Ms. Karen Hecker. Like Mr. Foster, Mr. Vozzo's title is Associate Deputy General Counsel. In that role, Mr. Vozzo is the "Trial Team Coordinator" and works closely with the Office of the Chief Prosecutor. Though "formally a member of OGC," Mr. Vozzo "acts on behalf of the prosecution team" and is aligned with the prosecution.⁴ Also like Mr. Foster, Mr. Vozzo reports directly to Mr. Newman. Another of Mr. Foster's colleagues in the office the Deputy General Counsel is Ms. Karen Hecker, a prosecutor who was detailed to this case by BG Mark Martins as "Special Trial Counsel" in October of 2016.⁵ Both Ms. Hecker and Mr. Vozzo were involved in the removal of the former convening authority, Mr. Harvey Rishikof, and his Legal Advisor, Mr. Gary Brown.⁶

In light of the disclosure that Mr. Foster, a person ensconced within the prosecutorial fold, prepared the recommendation for Mr. Reismeier's appointment, Mr. bin 'Atash requests Mr. Foster be made available for questioning and testimony. Mr. Foster would be expected to testify on the following issues germane to AE 643 (WBA):

- a. His relationship to BG Mark Martins and/or the Office of the Chief Prosecutor;
- b. The relationship between the Office of the Deputy General Counsel and the Office of the Chief Prosecutor;
- c. His involvement in the identification, recruitment, and/or selection process that led to the recommendation of Mr. Reismeier for the position of Convening Authority;

³ See AE 643 (GOV) at 28.

⁴ See AE 555V (KSM, AAA) at 6, 23-24.

⁵ See AE 003K (GOV) Special TC Detail Memo.

⁶ See AE 643 (KSM Sup) at 4.

SUBJECT: Request to Produce Witness for AE 643(WBA)

d. His involvement in the determination that Mr. Reismeier “has the necessary background knowledge and temperament to perform the duties of the Convening Authority;”

e. His contacts with any other individuals related to the consideration, nomination, and selection of Mr. Reismeier as Convening Authority, including but not limited to:

- i. Any contacts or communications he had with anyone currently or formerly in the Office of the Chief Prosecutor regarding Mr. Reismeier’s consideration, recommendation, and designation as Convening Authority;
- ii. Any contacts or communications he had with Ryan Newman, Michael Vozzo, Karen Hecker, or any other person aligned with the prosecution regarding Mr. Reismeier’s consideration, recommendation, and designation as Convening Authority;

f. His knowledge of Mr. Reismeier’s involvement in United States v. al Nashiri and United States v. al Bahlul prior to the consideration, nomination, and selection of Mr. Reismeier as Convening Authority.

Your point of contact for this witness request is William Montross. Mr. Montross can be reached at [REDACTED]

Respectfully,

//s//
CHERYL T. BORMANN
Learned Counsel

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

//s//
EDWIN A. PERRY
Detailed Defense Counsel

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

Attachment H



OFFICE OF THE
CHIEF PROSECUTOR

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

14 August 2019

MEMORANDUM FOR Defense Counsel for Mr. Bin ‘Attash

SUBJECT: *United States v. Mohammad, et al* – Request for Production of Witnesses (Admiral Reismeier and Mr. Foster)

1. The Prosecution is in receipt of your witness requests, dated 9 and 14 August 2019, to produce Rear Admiral Christian Reismeier, USN (Ret), and Mr. Jason Foster to testify regarding the issues underlying AE 643 (WBA). The Prosecution forwarded your request for a pre-trial interview to both of these individuals, and both have respectfully declined your request. For the reasons discussed below, the Prosecution also respectfully declines to produce these witnesses at this time.
2. Rule for Military Commission (R.M.C.) 703 and AE 245, Trial Conduct Order, provides procedures for the production of witnesses for military commissions. The Defense is required to submit to the trial counsel a written list of witnesses whose production by the government the Defense requests 14 days prior to when production is needed. *See* R.M.C. 703(c)(2)(A); AE 245. The request must include “a synopsis of the expected testimony sufficient to show its relevance and necessity.” R.M.C. 703(c)(2)(B); *see also* AE 036C, Ruling, at 4–5 (stating “R.M.C. 703(c)(2) requires the defense to give the trial counsel a written list of witnesses they want and to provide contact information as well [as] a synopsis of the expected testimony sufficient to show each witness’ relevance and necessity.”). Testimony is *relevant* “when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to the determination of the commission action more probable or less probable than it would be without the evidence.” MCRE 401.
3. Military jurisprudence has further recognized that relevant testimony is only *necessary* “when it is not cumulative and when it would contribute to a party’s presentation in some positive way on a matter in issue.” *See* R.C.M. 703(b)(1), Discussion. The accused has no right to compel the attendance of witnesses whose testimony would be cumulative with other evidence already available to the Defense and which would better and more directly address the interlocutory question at issue. *See United States v. Williams*, 3 M.J. 239, 243 (C.M.A 1977); *see also United States v. Allen*, 31 M.J. 572, 610 (N.M.C.M.R. 1990).
4. In this instance, you request the in-court production of RDML (ret.) Reismeier and Mr. Foster to testify regarding the matters raised in AE 643 (WBA). However, at this time, and consistent with its response in AE 643C (GOV), the Prosecution respectfully declines to produce either of these witnesses as the Defense have failed to demonstrate through a synopsis how RDML (ret.) Reismeier is an “Accuser” in this case and 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 five Accused (i.e. that he is an “Accuser” in this case). Additionally, the Defense have failed to demonstrate that his disqualification is warranted under the circumstances where his involvement with the Office of the Chief Prosecutor in other cases involved different criminal offenses and different defendants, and which do not reasonably call into question his impartiality in this case. Given this, the Prosecution respectfully declines to produce RDML (ret.) Reismeier and, in turn, Mr. Foster, to testify regarding AE 643 (WBA), and asserts that the Defense motion should be decided on purely legal grounds (as the facts already known to the parties through the voluntary disclosures made by Admiral Reismeier are sufficient for the parties to make their claims as to whether Admiral Reismeier is an Accuser in this case warranting disqualification as the Convening Authority).

5. The Prosecution appreciates the Defense need for production of witnesses; however, the Prosecution is obligated to require that requests meet the minimum requirements under R.M.C. 703 and that such requests for in-court testimony are not just for discovery purposes.

Respectfully submitted,

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