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 743B (GOV)** **Government Response** to Mr. Mohammad's Motion to Declare § 949a(b)(1) of the MCA Unconstitutional Because the Attorney General's Involvement in Military Commission Rulemaking Violates Procedural Due Process 24 February 2020

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. Relief Sought

The Prosecution respectfully requests the Commission deny the relief requested within AE 743 (KSM), Mr. Mohammad's Motion to Declare § 949a(b)(1) of the MCA Unconstitutional Because the Attorney General's Involvement in Military Commission Rulemaking Violates Procedural Due Process, without oral argument.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c)(1)–(2).

4. Facts

Mr. Mohammad was captured in Pakistan in March 2003. From March 2003 to September 2006, Mr. Mohammad was detained by the Central Intelligence Agency ("CIA"). On 6 September 2006, Mr. Mohammad was transferred from the custody of the CIA to the custody

of the Department of Defense ("DoD"). The Accused continues to remain in DoD custody and is presently detained at Naval Station Guantanamo Bay, Cuba.

Soon after Mr. Mohammad came into DoD custody, the DoD held a Combatant Status Review Tribunal ("CSRT") to determine his status for detention purposes. The CSRT determined that Mr. Mohammad "meets the criteria to be designated as an enemy combatant." Memo. from the Tribunal President, provided to the Defense at MEA-CSRT-0000086 (KSM).

On 31 May 2011 and 26 January 2012, charges in connection with the September 11, 2001 attacks were sworn against Mr. Mohammad and his four co-Accused, Walid Muhammad Salih Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

For the limited purpose of resolving the Defense motion, the Prosecution does not dispute the facts set forth therein. *See* AE 743 (KSM) at 2–3, ¶¶ 5.a.–d.

5. Law and Argument

I. The Attorney General Is Not a Self-Interested Entity with Rulemaking Authority over the Accused and the Commission

A. The Secretary of Defense—Not the Attorney General—Has the Authority To Prescribe Regulations Governing the Commission

It is the Secretary of Defense—not the Attorney General—who has the authority to prescribe regulations governing the Commission. The Defense motion seeks to stretch the narrow holding regarding the appearance of partiality of a military commission trial judge in *In re Al-Nashiri* (*Al-Nashiri III*), 921 F.3d 224 (D.C. Cir. 2019), beyond its limits in attempting to find support for the relief requested. In the Defense motion the Accused asserts that "[t]he Attorney General is a self-interested entity with *rulemaking authority* over Mr. Mohammad and the Commission." AE 743 (KSM) at 8 (emphasis added). This claim fails for two reasons.

First, it is directly contrary to the Military Commissions Act of 2009 ("MCA"), where Congress provided that, "Pre-trial, trial, and post-trial procedures including elements and modes of proof, for cases triable by military commission . . . may be prescribed by the *Secretary of Defense*." 10 U.S.C. § 949a(a) (emphasis added). Second, it is unsupported by the principal authority the Defense offers in support of their claim: *Al-Nashiri III*. *See* AE 743 (KSM) at 8–10.

In *Al-Nashiri III*, the U.S. Court of Appeals for the District of Columbia Circuit's ("Court of Appeals") determined that a military judge's "job application to the Justice Department created a disqualifying appearance of partiality" requiring vacatur of the orders he issued after submitting the application. 921 F.3d at 226. The Court of Appeals examined whether the military judge's "prospective employer was a party to Al-Nashiri's case such that it would appear to a reasonable person . . . knowing all the circumstances, that [his] impartiality was in jeopardy." *Id.* at 235 (citation and internal quotation marks omitted). Although the Court of Appeals determined that the Attorney General was "a participant" in the *Al Nashiri* case, the court also recognized that his participation in rulemaking consisted of merely providing "consult[ation]" to the Secretary of Defense in "establish[ing] rules for 'trials by military commission' that depart from 'the procedures . . . otherwise applicable in general courts-martial[.]'" *Id.* at 236 (quoting 10 U.S.C. § 949a(b)(1)). The Court of Appeals also did not claim or imply that the *Attorney General* harbored actual bias or appeared to be partial. In sum, *Al-Nashiri III* does not transform the Attorney General from a consultant for a narrow set of rules to a "rulemaking authority" as the Defense claims, nor does it suggest that the Attorney General's involvement in military commissions is in any way improper or "antagonistic" to the Accused. *See* AE 743 (KSM) at 10.

B. The Attorney General Has a Role in Advising the Heads of the Federal Executive Departments

Moreover, the Attorney General has an institutional role in advising the heads of the federal executive departments, and such a role is incompatible with "declaring" 10 U.S.C. § 949a(b)(1) facially unconstitutional, or granting the Accused the alternative relief requested.

Since creating the office of Attorney General in 1789, Congress has envisioned that office as having an active role in advising the heads of other executive departments,[1] and that responsibility continues today.[2] The MCA reflects Congress's intent that the Attorney General fulfill this general statutory responsibility by providing counsel to the Secretary of Defense in drafting specific types of rules—specifically, "exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial." 10 U.S.C. § 949a(b)(1).

Such routine consultation also extends to the drafting of procedural rules for courts, as Department of Justice representatives are included on the advisory committee that drafts the Federal Rules of Criminal Procedure.[3] Moreover, the Attorney General or his representatives participate as part of the Sentencing Commission that creates the Federal Sentencing Guidelines. *See Mistretta v. United States*, 488 U.S. 361, 368 (1989) (noting that the Attorney General or his designee is an *ex officio* non-voting member of the commission). It is also common knowledge that Congress routinely consults the Attorney General and other Department of Justice representatives in enacting substantive criminal provisions. The Defense fails to cite even a single case suggesting that this type of advisory role violates due process.

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[1] Under the Judiciary Act of 1789, for instance, the First Congress established the office of the Attorney General. Specifically, the Judiciary Act provides, "there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States . . . whose duty it shall be . . . *to give his* advice *and opinion upon questions of law* when required by the President of the United States, or when requested by the *heads of any of the departments*, touching any matters that may concern their departments." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1789) (emphases added).

[2] *See, e.g.*, 8 U.S.C. § 1182 (requiring the Secretary of Homeland Security, "in consultation with the Attorney General," to implement procedures for the screening of visas and other immigration benefits); 10 U.S.C. § 1565 (providing that the Secretary of Defense, "in consultation with the Attorney General," to determine qualifying military offenses for purposes of DNA collection requirements); 50 U.S.C. § 3024 (requiring the Director of National Intelligence, "in consultation with the Attorney General," to establish procedures for conducting an accountability review of deficiencies within the intelligence community).

[3] *See Overview for the Bench, Bar, and Public*, United States Courts, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (explaining that representatives of the Department of Justice serve on the Standing Committee and the Advisory Committee that drafts the Federal Rules of Criminal Procedure, as authorized by Congress in 28 U.S.C. § 2073).

Thus, contrary to the Defense's claims, the Attorney General's statutory role in the MCA to consult with the Secretary of Defense is not an unprecedented legislative scheme, or a "statutory defect." AE 743 (KSM) at 11. Of course, it makes sense that Congress would want the Attorney General involved due to the sensitive nature of this category of rules, *see generally Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and the fact that an Article III court—the Court of Appeals for the District of Columbia Circuit—reviews convictions by military commissions, *see* 10 U.S.C. § 950g. Notably, when Congress drafted the Classified Information Procedures Act ("CIPA"), it also chose to include a similar provision. Specifically, CIPA § 9(a) provides that,

> [T]he Chief Justice of the United States, *in consultation with the Attorney General*, the Director of National Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

18 U.S.C. app. 3 § 9 (emphasis added). Thus, both the MCA and CIPA are statutes that employ the Attorney General's expertise in national security matters in order to ensure cases involving some of the nation's most sensitive classified materials are able to proceed with proper procedural rules.

Congress's clear intent is also reflected in the legislative history of the MCA. When drafting the MCA, Congress was keen on ensuring that the rules of evidence and procedure would adequately preserve our nation's security interests given that our country was and continues to be in armed conflict with al Qaeda and associated forces. *See generally Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the Senate Committee on Armed Services*, 111th Cong. 4–7 (July 7, 2009) (statement of Sen. John McCain). During these Senate Armed Services Committee hearings on what would become the MCA, Senator McCain aptly explained the modern day challenges of drafting rules for use in military commissions. He stated,

> [T]oday, trials during an ongoing war present greater risks to national security through the unintended release or compromise of classified material than the military tribunals at the end of World War II when fighting had ended. . . . [M]any experts from the Judge Advocates General to experienced prosecutors and national security officials in DOJ felt that use of the CIPA standards could inadvertently expose some classified information, including sensitive sources and methods, through the process of discovery and trial.

Id. at 101 (question posed by Senator McCain). It is within this national security context that Congress drafted 10 U.S.C. § 949a(a), requiring the Secretary of Defense to *consult* with the Attorney General, thereby utilizing his expertise in national security law matters before establishing rules affecting this field of practice.

At the same time, Congress knew that the Office of Military Commissions had and would continue to rely on the national security law expertise of the Department of Justice's National Security Division ("NSD") on its prosecution teams. During the same Senate Armed Services Committee hearing, the Assistant Attorney General for NSD, the Hon. David S. Kris, stated, "In the last administration, NSD assembled a team of experienced Federal prosecutors drawn from across the country to assist the DOD Office of Military Commissions (OMC) and litigate cases at Guantanamo Bay . . . I can assure you that assistance will continue." *Id.* at 9 (statement of David Kris, Assistant Att'y Gen., NSD).

As the legislative history demonstrates, the Attorney General's consultation with the Secretary of Defense before the latter exercises his Congressionally-delegated rulemaking authority helps ensure proper protections for national security interests. The text of the subsection of the MCA the Defense seeks to attack makes abundantly clear that the nature of the Secretary of Defense's consultations with the Attorney General concerns national security matters. Under 10 U.S.C. § 949a(a), the Secretary of Defense, "in consultation with the Attorney General," may make exceptions to procedures and rules of evidence "as may be required *by the unique circumstances of the conduct of military and intelligence operations during hostilities* or by other practical need." 10 U.S.C. § 949a(a) (emphasis added).

Although the Defense claims that the Attorney General's consultations with the Secretary of Defense about rulemaking is unfair, the Attorney General's role under the MCA is actually much narrower in this Commission than the Attorney General's role in an Article III federal court where CIPA applies. The Attorney General has a less active role under the MCA than under CIPA where the Attorney General advises on the rules and signs affidavits[4] identifying areas where identifiable damage to national security would occur. If the Defense's theory were to prevail, then this theory would not only undermine the Attorney General's limited role under the MCA, but would also unravel decades of case law upholding the validity of CIPA and CIPA practice. *See United States v. Sedaghaty*, 728 F.3d 885, 908 (9th Cir. 2013) (noting that challenging the constitutionality of CIPA "is a battle already lost in the federal courts"); *United States v. Hausa*, 232 F. Supp. 3d 257, 259 (E.D.N.Y. 2017) ("Significantly, every court in the country, including the Second Circuit, that has addressed arguments that CIPA is unconstitutional, has rejected these challenges and upheld its constitutionality.").

Taking the Accused's argument at face value would also contradict Supreme Court decisions recognizing the validity of the military justice system writ large. *See, e.g.*, *Weiss v. United States,* 510 U.S. 163 (1994); *see also United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). The Supreme Court has consistently upheld the delegation of rulemaking authority by Congress to both the Executive and Judicial Branches when such officials and agencies possess "independent authority over the subject matter." *Loving v. United States*, 517 U.S. 748, 771–73 (1996). The Secretary of Defense has such independent authority here:

> [The] Secretary of Defense . . . is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. . . . The Secretary [of Defense] is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title [Title 10] and section 2 of the National Security Act of

[4] CIPA requires the submission of an affidavit from the Attorney General, 18 U.S.C. app. 3 § 6(c)(2), whereas the MCA requires a "declaration . . . signed by a knowledgeable United States official." *See, e.g.*, 10 U.S.C. §§ 949p-6(a)(3), 949p-6(d)(4).

> 1947 (50 U.S.C. 401), he has authority, direction, and control over the Department of Defense.

10 U.S.C. § 113. The duties and responsibilities of the Secretary of Defense with respect to the military overlap and are subordinate to those belonging to the President.

If this Commission were to find that the Attorney General's consultative role envisioned in 10 U.S.C. § 949a(b)(1) eliminates the fairness of the proceedings in this Commission, it could have significant ramifications for the military justice structure overall. Under the parallel court-martial system, the Secretary of Defense and service secretaries promulgate rules overseeing the structure of courts-martial but are concomitantly responsible for ensuring good order and discipline. Courts have upheld this structure in courts-martial; so too should this Commission uphold the rulemaking structure in 10 U.S.C. § 949a.

Ultimately, the Defense motion is a challenge to the advisory role the Attorney General has played across the Executive Branch since the office was established in 1789. Nowhere in *Al-Nashiri III* does the court even hint that it had such an expansive and destabilizing result in mind when it ruled that a trial judge had an appearance of bias requiring recusal after having applied to and accepting a job in the Department of Justice while still sitting as a judge where an employee of the Department of Justice was a "participant." Accordingly, this Commission should preserve the Attorney General's long-established role to advise department heads by upholding the constitutionality of 10 U.S.C. § 949a(a), and rejecting the Defense's assertion that the language contained in 10 U.S.C. § 949a(a) is a "statutory defect."

C. The Attorney General's Role Does Not Affect the Validity of 10 U.S.C. § 949a(a)

The Defense's invocation of *Al-Nashiri III* and *Association of American Railroads v. United States Department of Transportation (AARR)*, 821 F.3d 19, 35 (D.C. Cir. 2016), is also unavailing. *See* AE 743 (KSM) at 8–10. As explained above, *Al-Nashiri III* recognized the Attorney General's role in providing counsel to the Secretary of Defense, but it did not recognize the Attorney General as a "rulemaking authority" as the Defense claims.

The Defense's argument that the Court of Appeals "held previously in *Ass'n of Am. R.R.* [that] the Attorney General's status as a governmental entity does not shield him from being self-interested," AE 743 (KSM) at 10, also does not withstand scrutiny. Initially, despite the Defense's blatant mischaracterization, *AARR* was a case that did not involve the Attorney General or even criminal law. It was a civil case about Amtrak. In *AARR*, the statute at issue was the Passenger Rail Investment and Improvement Act of 2008, which gave Amtrak the authority to "regulate its resource competitors." *AARR*, 821 F.3d at 23. The issue, as framed by the Court of Appeals, was "whether an *economically* self-interested entity may exercise regulatory authority over its rivals." *Id.* at 27. Ultimately, the Court of Appeals found this unacceptable and held that "due process of law is violated when a self-interested entity is 'entrusted with the power to regulate the business . . . of a competitor.'" *Id*. at 31 (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

Even leaving aside the commercial nature of the case, *AARR* is also inapposite for several other reasons. First, unlike Amtrak, the Attorney General has not been given the power to regulate military commissions; that power belongs expressly to the Secretary of Defense. Second, Amtrak is a *sui generis* entity. As explained by the Court of Appeals, "Congress created Amtrak, a for-profit corporation indirectly controlled by the President." *Id.* at 23. The court further explained that "[Amtrak's] public venture into private enterprise was, and remains, unprecedented." *Id*. This unique structure, by which Amtrak was statutorily created as a for-profit organization but was also responsible for regulating its competitors, created a situation where it could act with a financial bias in business dealings. *See generally id*. at 28. Amtrak's position thus stands in stark contrast to the Attorney General. As explained by the Court of Appeals, "Amtrak's self-interest is readily apparent when viewed, by contrast, alongside more traditional governmental entities that are decidedly not self-interested." *Id.* at 32. Because the Attorney General is plainly not responsible for rulemaking under the MCA and has no financial "self-interest" to be promoted through the consultation he provides to the Secretary of Defense, *AARR* is inapposite and certainly does not support granting the Defense the relief they request.

II. The Fifth Amendment Due Process Clause Does Not Apply to the Accused, Whose Rights in this Military Commission Are Provided by the MCA

The Defense's generic invocation of "due process" also does not support granting the requested relief. No controlling precedent has ever held that the Fifth Amendment applies to a military commission proceeding, including this one. Indeed, controlling precedents from the Supreme Court and the Court of Appeals show the contrary. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) ("Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (noting that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic"); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (observing that the Supreme Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic borders") (citations omitted); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011); *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010); *see also Ali v. Trump*, 317 F. Supp. 3d 480, 488 (D.D.C. 2018) (citing cases for the proposition that aliens without property or presence in the United States do not enjoy due process protections under the Fifth Amendment).

In the instant case, because the Accused are alien enemy belligerents without property or presence in the United States, the Due Process Clause does not extend to them.

Although the Fifth Amendment does not apply to the Accused, 10 U.S.C. § 949a and its corresponding rules nonetheless provide the Accused due process and a fair trial. The MCA and the rules of procedure and evidence implementing the MCA were designed to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Manual for Military Commission, Preamble (2019 ed.). Indeed, that was an express purpose of both the statute and the rules promulgated in accordance with the statute. *See id*.

Two Congresses and two Presidents have codified a system which provides the Accused with the judicial guarantees recognized as indispensable. As in federal courts employing CIPA, the military commission system has CIPA-modeled safeguards to protect national security information while ensuring the Accused a fair trial.

6. Conclusion

The Defense's efforts to extend *Al-Nashiri III* past its narrow holding is not justified in law or fact. The Attorney General's role in consulting with the Secretary of Defense, a role commonly and historically assigned to the Attorney General by Congress in myriad other statutes, and with a multitude of other government agencies, in no way ascribes any rulemaking authority over military commissions to the Attorney General. The Defense elides the fact that the Attorney General has no actual rulemaking authority over military commissions, and the Defense ignores that the Attorney General's consultative role is one the office has fulfilled since 1789 and continues to fulfill under CIPA and many other statutes. If the Commission were to adopt the Defense argument, extend *Al-Nashiri III* to the Attorney General's role in advising department heads, and find 10 U.S.C. § 949a(b)(1) to be unconstitutional, such a finding would be incongruent with similar advisory roles in rulemaking for federal courts and pursuant to other well-established statutory procedures, like those in CIPA. Given the complete lack of indication in the opinion that it was making such an expansive and government-wide ruling, this could not have been the intent of the Court of Appeals in deciding *Al Nashiri III*, a case involving the recusal of a military judge who had applied to the Department of Justice while he was sitting as a judge and failed to disclose the information to the parties, and decided on the unique standard applicable to judges of "an appearance" of bias. Accordingly, the Defense motion should be denied.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to

the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

9. Additional Information

The Prosecution has no additional information.

10. Attachment

A. Certificate of Service, dated 24 February 2020

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of February 2020, I filed AE 743B (GOV), Government Response To Mr. Mohammad's Motion to Declare § 949a(b)(1) of the MCA Unconstitutional Because the Attorney General's Involvement in Military Commission Rulemaking Violates Procedural Due Process, with the Trial Judiciary and I served a copy on counsel of record.

//s//
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