

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

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>ABD AL HADI AL IRAQI</b>	<b>AE 157</b>  <b>Defense Motion</b> to Dismiss on the Basis that the Convening Authority has a Personal Interest in the Outcome of the Military Commission  <b>08 July 2019</b>
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**1. Timeliness:**

This motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7(c).

**2. Relief Sought:**

The defense respectfully requests that the military judge dismiss the charges against Mr. al-Tamir.

**3. Overview:**

Under Rule for Military Commission (R.M.C.) 504(c), an accuser is disqualified from serving as a convening authority. Article 1(9) of the Uniform Code of Military Justice (UCMJ), which R.M.C. 103(a)(31) incorporates into practice before the Military Commissions, provides that an individual with “an interest other than an official interest” in the outcome of litigation (i.e., a personal interest) is an accuser.<sup>1</sup> For at least three reasons, the convening authority has a personal

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<sup>1</sup> *United States v. Ashby*, 68 M.J. 108, 129 (C.A.A.F. 2009).

interest in the outcome of litigation in Mr. al-Tamir's case, and as a result is disqualified under R.M.C. 504(c)(1) from serving as a convening authority.

First, the convening authority is a witness. As the Chief Judge, Department of the Navy from 2012 to 2015, the convening authority maintained administrative oversight of CAPT (Ret.) John K. Waits, JAGC, USN, a former military judge in Mr. al-Tamir's case. Recently, the defense learned that while serving as the military judge, CAPT Waits applied for a job with the Department of Justice—a party to Mr. al-Tamir's case—and thus labored under a conflict of interest.<sup>2</sup> Given his failure to identify or resolve this issue while supervising CAPT Waits, the convening authority has a personal interest in attempting to minimize or justify his conduct, which puts the convening authority's personal interest at odds with the official interest of the Office of the Military Commissions Convening Authority.

Second, the convening authority has demonstrated a personal interest in assisting the Office of the Chief Prosecutor. From 2014 to 2016, while serving as the Chief Judge, Department of the Navy and as an attorney in private practice, the convening authority repeatedly assisted the Chief Prosecutor and his subordinates, providing expert-level guidance on issues such as jurisdiction and the admissibility of evidence. The convening authority even went so far as to personally appear before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) as one of several *amici* in support of the prosecution. Following his appointment in May 2019, the Office of the Chief Prosecutor's expert is now the Military Commissions Convening Authority.

Finally, the convening authority has a personal interest in protecting this Commission from constitutional challenges to its structure and operation given his past involvement in the creation of the Military Commissions Act of 2009 (MCA 2009). The private practice profile that the

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<sup>2</sup> *In re Al-Nashiri*, 921 F.3d 224, 236 (D.C. Cir. 2019).



convening authority used to advertise his experience as an attorney-for-hire featured his authorship of the draft legislation for MCA 2009, signaling that it is one of the most important accomplishments of his career. Therefore, when Mr. al-Tamir challenges the constitutionality of any aspect of MCA 2009, in effect, he will also be challenging the ideas of its author, putting him at odds with the personal interest of the convening authority.

In sum, the convening authority has several personal interests in the outcome of Mr. al-Tamir's case, and as a result, he is disqualified under R.M.C. 504(c)(1) from serving as the convening authority. Under R.M.C. 504(c)(2), it is necessary for the convening authority to forward the charges against Mr. al-Tamir to the Secretary of Defense for disposition. Because the convening authority has not done so, Mr. al-Tamir respectfully moves this Commission to dismiss the charges against him.

#### **4. Burden and Standard of Proof:**

The defense has the burden to establish any fact necessary for resolution of the motion,<sup>3</sup> which includes a burden to establish facts sufficient to rebut the presumption that a convening authority acts without bias.<sup>4</sup> The standard of proof required to overcome this presumption is a preponderance of the evidence.<sup>5</sup>

#### **5. Facts:**

a. The Acting Secretary of Defense appointed "Rear Admiral Christian L. Reismeier, USN (Ret) as Convening Authority for Military Commission" on 23 May 2019.<sup>6</sup> On 28 May 2019 the

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<sup>3</sup> R.M.C. 905(c)(1)-(2).

<sup>4</sup> *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997).

<sup>5</sup> R.M.C. 905(c)(1).

<sup>6</sup> Attachment B; 10 U.S.C. § 948h (authorizing a designee of the Secretary of Defense to convene a military commission).

Department of Defense issued a news release (NR-131-19) announcing RDML Reismeier as the Convening Authority for Military Commissions and Director of the Office of the Convening Authority for Military Commissions. The news release described RDML Reismeier's background, noting that he is a retired rear admiral in the U.S. Navy who served as both an Assistant Judge Advocate General of the Navy and Chief Judge, Department of the Navy.<sup>7</sup>

b. On 14 June 2019 RDML Reismeier issued a Memorandum for Secretary of Defense in two military commission cases—*United States v. al Nashiri* and *United States v. Bahlul*.<sup>8</sup> In the memorandum for each case, RDML Reismeier recused himself “from serving as the Convening Authority.”<sup>9</sup> In both cases, RDML Reismeier explained that recusal was “appropriate in order to avoid even the appearance of partiality,” and cited several facts that could give rise to such appearance.<sup>10</sup> In *al Nashiri*, RDML Reismeier “provided assistance” to the prosecution in 2014 and 2016 “on certain legal issues” and mentored a prior member of the prosecution team.<sup>11</sup> In *Bahlul*, RDML Reismeier “joined several retired military flag officers . . . in signing an *amicus* brief . . . when the case was before the United States Court of Appeals for the District of Columbia Circuit” and “attended a prosecution sponsored briefing on the appeal.”<sup>12</sup>

c. RDML Reismeier attached a “Memorandum for File” dated 14 June 2019 to each Memorandum for Secretary of Defense.<sup>13</sup> In the Memorandum for File, he described his

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<sup>7</sup> Attachment C.

<sup>8</sup> Attachments D, E.

<sup>9</sup> Attachments D, E.

<sup>10</sup> Attachments D, E.

<sup>11</sup> Attachment E.

<sup>12</sup> Attachment D.

<sup>13</sup> Attachments D, E.



“[i]nvolvement in Military Commissions,” which started when RDML Reismeier served as the Navy representative on a working group to develop the procedural and evidentiary rules for military commissions practice under the Military Commissions Act of 2006 (MCA).<sup>14</sup> In 2008, he again participated in a working group focused on “rules/regulatory changes that could be made swiftly to the MCA without statutory change and . . . changes to the MCA itself.”<sup>15</sup> Following his service on the working group, he was assigned as the Chair of the Military Commissions Sub-Working Group for the Detention Policy Task Force (DPTF) and a staff member of the DPTF.<sup>16</sup>

d. While working on the DPTF, RDML Reismeier worked with Brigadier General Mark Martins, USA—the current Chief Prosecutor of Military Commissions—and was involved in both the drafting of legislative proposals and the presentation of possible changes to the MCA.<sup>17</sup> In coordination with another attorney, he personally participated in a rewrite of the MCA entirely.<sup>18</sup> In fact, in his private practice profile, RDML Reismeier took personal credit for the rewrite. “Mr. Reismeier authored the legislative draft that became the 2009 Military Commissions Act.”<sup>19</sup>

e. Congress eventually passed MCA 2009, and working up to its passage, RDML Reismeier prepared the Judge Advocate General of the Navy for testimony before the Senate and House Armed Services Committees on military commissions.<sup>20</sup> Later, because of his “repeated work on military commissions” the “General Counsel, Department of Defense . . . ask[ed] for [RDML

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<sup>14</sup> Attachments D, E.

<sup>15</sup> Attachments D, E.

<sup>16</sup> Attachments D, E.

<sup>17</sup> Attachments D, E.

<sup>18</sup> Attachments D, E, and F.

<sup>19</sup> Attachment F.

<sup>20</sup> Attachments D, E, and F.

Reismeier] by name to work on the Presidentially designated” DPTF.<sup>21</sup> Starting in 2009, RDML Reismeier served as the Co-Chair of the DPTF—a responsibility he shared with a Department of Justice representative.<sup>22</sup> As early as 5 June 2014, the Department of Justice also assigned an attorney to prosecute Mr. al-Tamir before this Commission.<sup>23</sup>

f. After co-chairing the DPTF with a Department of Justice representative, RDML Reismeier became the Chief Judge, Department of the Navy (CJDON), which is a position he held from 2012 to 2015.<sup>24</sup> As the CJDON, RDML Reismeier was the senior supervisory jurist of the Department of the Navy with primary administrative oversight responsibility of the judiciary at both the trial and appellate levels.<sup>25</sup> This meant that he played an integral role in the selection, evaluation, and assignment of military judges within the Department of the Navy. He served as the “reporting senior for the Chief Judge of the Trial Judiciary . . . [and] any judge requiring second-level review in accordance with governing fitness report instructions, including military judges in the paygrade of O-6 . . . .”<sup>26</sup> He was “the Judge Advocate General’s principal advisor on the assignment of officers to positions within the trial and appellate judiciaries,” which included “officers to be nominated for duty under the Department of Defense as military commission trial or appellate judges.”<sup>27</sup> He served as “the principal strategic planner for the professional development,

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<sup>21</sup> Attachment F.

<sup>22</sup> Attachments D, E.

<sup>23</sup> AE 003.

<sup>24</sup> Attachments D, E.

<sup>25</sup> Attachment G.

<sup>26</sup> Attachment H.

<sup>27</sup> *Id.*



selection, training, and deployment of the judiciary.”<sup>28</sup> And he was the “designated Rules Counsel for judicial misconduct and for professional responsibility matters involving military judges . . .

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g. During RDML Reismeier’s tenure as CJDON, the Judge Advocate General of the Navy (TJAG) nominated CAPT Waits to serve as a member of the Military Commissions Trial Judiciary.<sup>30</sup> On 3 June 2014, the Chief Judge, Military Commissions Trial Judiciary detailed CAPT Waits as the military judge in Mr. al-Tamir’s case.<sup>31</sup> While serving as the judge in Mr. al-Tamir’s case, CAPT Waits applied for jobs with the Department of Justice and the Department of the Navy.<sup>32</sup>

h. CAPT Waits’s application to the Department of Justice followed the career path of his direct supervisor within the Navy-Marine Corps Trial Judiciary, Colonel Daniel Daugherty, USMC.<sup>33</sup> In 2015, shortly after retiring as the Chief Judge of the Navy-Marine Corps Trial Judiciary, Col. Daugherty accepted a job as an Assistant Chief Immigration Judge within the United States Department of Justice.<sup>34</sup> CAPT Waits’s career path, however, ultimately deviated from Col.

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<sup>28</sup> Attachment G.

<sup>29</sup> *Id.*

<sup>30</sup> Pursuant to the 2012 version of R.M.C. 503(b)(1), the Chief Judge detailed CAPT Waits “from a pool of certified military judges nominated for that purpose by” the Judge Advocate General of the Navy.

<sup>31</sup> AE 001.

<sup>32</sup> AE 151C; Attachment I.

<sup>33</sup> As a member of the Navy’s trial judiciary between 2012 and 2015, CAPT Waits fell under the “administrative oversight” of RDML Reismeier and “supervisory authority” of Col. Daugherty. Attachments G, H. Moreover, RDML Reismeier served as the second-level reviewing authority for CAPT Waits’s fitness report. Attachments G, H.

<sup>34</sup> United States Department of Justice, Office of the Chief Immigration Judge, Biographical Information, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios#DanielJ.Daugherty>.

Daughtery's path. After retiring, CAPT Waits did not accept employment with the Department of Justice. Rather, he accepted a position within the Department of the Navy as a civilian employee at the Office of the Judge Advocate General.<sup>35</sup>

i. Before his retirement from active duty RDML Reismeier also served as a mentor to at least one prosecutor assigned to the Office of the Chief Prosecutor for Military Commissions.<sup>36</sup> In the 2010-2011 timeframe, RDML Reismeier established a mentor-mentee relationship with an attorney prosecuting Mr. al-Nashiri.<sup>37</sup> Taking a strong interest in the professional development of this prosecutor, he maintained direct contact with her.<sup>38</sup> They discussed her work on Mr. al-Nashiri's case, which included things like who she was interviewing, where she was traveling, and the complexity of the charges against Mr. al-Nashiri. Notably, like Mr. al-Tamir, the government charged Mr. al-Nashiri with conspiracy, as well as using treachery or perfidy in violation of 10 U.S.C. § 950t(17).<sup>39</sup>

j. While serving as the Chief Prosecutor of Military Commissions Brig. Gen. Martins repeatedly sought and received assistance from RDML Reismeier. First, he sought and received assistance from RDML Reismeier in 2014 on a jurisdiction issue in Mr. al-Nashiri's case. Notably, in 2014, RDML Reismeier was on active duty and serving as the Department of the Navy's senior jurist. This meant he had a duty to maintain administrative oversight of the Department of the Navy's military judges, which included CAPT Waits. At the same time, it appears, RDML

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<sup>35</sup> Attachment I.

<sup>36</sup> Attachments D, E.

<sup>37</sup> In disclosing this information, RDML Reismeier did not disclose the name of his mentee. Attachments D, E.

<sup>38</sup> Attachments D, E.

<sup>39</sup> Charge Sheet; Attachment J.



Reismeier was also advising the Chief Prosecutor on an issue that could arise in numerous cases before military commissions—jurisdiction. As the Chief Prosecutor in 2014, Brig. Gen. Martins oversaw (and continues to oversee) more than just the attorneys in Mr. al-Nashiri’s case. He oversees all the prosecutors representing the United States before military commissions, including the prosecutors in Mr. al-Tamir’s case.<sup>40</sup>

k. Later, after RDML Reismeier retired from active duty and started practicing law in a private capacity, the Chief Prosecutor again sought and received assistance from RDML Reismeier. He contacted RDML Reismeier in 2016 and asked him to “sit on a moot involving Mr. al Nashiri[‘s]” case as a subject matter expert on the admissibility of evidence.<sup>41</sup> The particular question RDML Reismeier provided guidance on was “the scope of evidence admissible on the issue of damage allegedly caused by explosions”—an issue that is common to many cases currently pending before military commissions, including Mr. al-Tamir’s case.<sup>42</sup> In his Memorandum for File, RDML Reismeier did not disclose whether the Office of the Chief Prosecutor compensated him for his time or if he volunteered *pro bono* to serve as a subject matter expert for the Office of the Chief Prosecutor.

l. In addition to the direct assistance that RDML Reismeier provided to the Chief Prosecutor and his subordinates, RDML Reismeier also publicly aligned himself with the Office of the Chief Prosecutor. On 2 November 2015, while in private practice, RDML Reismeier joined an *amicus* brief in *Ali Hamza Ahmad Suliman al Bahlul v. United States* filed by the Washington Legal

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<sup>40</sup> Office of Military Commissions, Organization Overview, <https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>.

<sup>41</sup> Attachments D, E.

<sup>42</sup> Attachments D, E.

Foundation in support of the respondent, the United States.<sup>43</sup> At the request of the Chief Prosecutor RDML Reismeier reviewed the government's position, attended a briefing in the spaces of the Office of the Chief Prosecutor, and agreed to publicly align himself with the government on the issue.<sup>44</sup> Once again, in his Memorandum for the Record, RDML Reismeier did not disclose whether the Office of the Chief Prosecutor compensated him for his time or if he volunteered *pro bono* to consult with the Office of the Chief Prosecutor in *Bahlul*. The *amicus* brief argued that the Constitution does not bar Congress from authorizing the trial of conspiracy charges by a military commission and advocated for the affirmance of Mr. al Bahlul's conspiracy conviction.<sup>45</sup> Like Mr. al Bahlul, the government has charged Mr. al-Tamir with a conspiracy offense for conspiring with the same person during the same time period as Mr. al Bahlul.<sup>46</sup>

m. In joining an *amicus* brief sponsored by the Washington Legal Foundation, RDML Reismeier aligned himself with an organization whose self-described purpose is to "ensure the federal government possesses the tools necessary to protect [the United States] from those who would seek to destroy it and/or harm its citizens."<sup>47</sup> To that end, the *amici*, which included RDML Reismeier, sought to avoid a decision from the D.C. Circuit that "would impose unwarranted restrictions on the authority of the elected branches of government to convene military commissions to conduct trials of law-of-war offenses."<sup>48</sup> In the view of RDML Reismeier and the

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<sup>43</sup> Attachment K.

<sup>44</sup> Attachments D, E.

<sup>45</sup> Attachment K.

<sup>46</sup> Charge Sheet; Attachment L.

<sup>47</sup> Attachment K at 3.

<sup>48</sup> *Id.* at 4.



*amici*, it was “inappropriate for the courts to second-guess the considered judgments of the political branches regarding how to best conduct an armed conflict.”<sup>49</sup>

n. In his Memorandum for the Record, RDML Reismeier offered the following self-description: “I do not have a personal bias or prejudice concerning any parties to prior, existing or prospective military commissions. I do not have any personal interest in the outcome in any litigation. I remain impartial in all aspects of military commissions.”<sup>50</sup> Nowhere in his Memorandum for the Record does RDML Reismeier describe the nature of his private practice or how he was compensated for his assistance to the Office of the Chief Prosecutor. Nevertheless, it is clear that RDML Reismeier used his service as the Chief Judge, Department of the Navy and his involvement with the military commissions as part of the experience he listed on his private practice website advertising his services.<sup>51</sup>

## **6. Law and Argument:**

Like the Uniform Code of Military Justice, the Military Commissions Act and the Rules for Military Commission set out discrete roles for convening authorities and accusers.<sup>52</sup> In Article 1(9) of the UCMJ, which R.M.C. 103(a)(31) incorporates into practice before the Military Commissions, Congress defined three people for whom the label “accuser” may apply: “an individual: (1) who signs and swears to charges; (2) who directs that charges nominally be signed and sworn to by another [type two accuser]; or (3) who has an interest other than an official interest in the prosecution of the accused [type three accuser].”<sup>53</sup> And R.M.C. 504 makes the distinction

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<sup>49</sup> *Id.*

<sup>50</sup> Attachments D, E.

<sup>51</sup> Attachment F.

<sup>52</sup> See 10 §§ U.S.C. 801(9), 822, 823, 948h; R.M.C. 103(a)(31); R.M.C. 504.

<sup>53</sup> *Ashby*, 68 M.J. at 129 (internal quotation marks omitted) (alternation in original).

between convening authorities and accusers clear in the context of the Military Commissions. “An accuser may not convene a military commission for the trial of the person accused.”<sup>54</sup> Instead, an accuser is deemed “disqualified” and must “forward the charges to the Secretary of Defense for disposition.”<sup>55</sup>

For type three accusers, military courts have elaborated on what constitutes a disqualifying interest for a convening authority (i.e., an interest other than an official interest in the prosecution of the accused). The test focuses on the connection between a convening authority’s personal interest and the outcome of litigation, asking whether “a reasonable person would conclude that [the convening authority] had a personal interest in the matter.”<sup>56</sup> Personal interests can range from the convening authority’s “ego” to “family” to “property” or other “similar personal interests.”<sup>57</sup> And where a convening authority’s interest is of a “personal rather than an official nature,” such interest is disqualifying.<sup>58</sup>

R.M.C. 504’s disqualification of individuals serving as convening authorities in cases where they have a personal interest in the prosecution of charged offenses is consistent with the judicial

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<sup>54</sup> R.M.C. 504(c)(1).

<sup>55</sup> R.M.C. 504(c)(2).

<sup>56</sup> *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999); *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001) (Baker, J. concurring).

<sup>57</sup> *United States v. Loiacono*, 2014 CCA LEXIS 194, \*32 (N-M. Ct. Crim. App. 2014) (citing *Voorhees*, 50 M.J. at 499).

<sup>58</sup> *Dinges*, 55 M.J. at 312 (Baker, J. concurring) (“[T]he role of an accuser is judged on a factual continuum rather than with absolute thresholds.”); *see also United States v. Boyce*, 76 M.J. 242, 253-54 (C.A.A.F. 2017) (Stucky, J. dissenting) (finding that a convening authority’s financial interest in his retirement grade constituted an “other than official” interest that disqualified him from serving as a convening authority because he was an “accuser”); Claudia Grisales, *Court-martial of USS Fitzgerald commander no longer valid, judge says*, STARS AND STRIPES (Jan. 23, 2019), <https://www.stripes.com/court-martial-of-uss-fitzgerald-commander-no-longer-valid-judge-says-1.565667> (stating a military judge disqualified a convening authority who “stepped outside his neutral role”).



nature of a convening authority's role. As stated in 10 U.S.C. § 949b, Congress made clear that some of the actions of a convening authority are "judicial."<sup>59</sup> For example, under 10 U.S.C. § 950b(c), a convening authority is required to act in a judicial capacity and is authorized to, among other things, "modify the findings and sentence of a military commission," which includes the statutory authority to "dismiss any charge or specification by setting aside a finding of guilty" and "approve, disapprove, commute, or suspend the sentence in whole or in part."<sup>60</sup> The convening authority also has the authority to order a rehearing under 10 U.S.C. § 950b(d). Therefore, as a result of a convening authority's judicial role, it is necessary for the convening authority to be "neutral," both in fact and appearance.<sup>61</sup> His or her "motives may not be prosecutorial in nature."<sup>62</sup>

For the three reasons outlined below, RDML Reismeier has a personal interest in the outcome of litigation in Mr. al-Tamir's case that disqualifies him from service as a convening authority under R.M.C. 504(c)(1).<sup>63</sup> Accordingly, given that RDML Reismeier is currently serving as the

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<sup>59</sup> 10 U.S.C. § 949b. While this Commission previously described a convening authority's discretion as "executive in nature" and not judicial, see AE 078F, such a finding ignores the plain language of 10 U.S.C. § 949b, which notably mirrors the language in the statute applicable to convening authorities in courts-martial—10 U.S.C. § 837. In the court-martial context, a majority on the Supreme Court reached a contrary conclusion in *Ortiz v. United States*, 138 S. Ct. 2165, 2172-78 (2018) regarding the character of a convening authority's role, rejecting Justice Alito's argument in dissent that a court-martial can only exercise executive power. See also *Runkle v. United States*, 122 U.S. 543, 558 (1887) ("Undoubtedly the President, in passing upon the sentence of a court-martial, and giving it the approval without which it cannot be executed, acts judicially[;] . . . his act has all the solemnity and significance of the judgment of a court of law.") (quoting 11 Op. Att. Gen. 19, 21 (1864) (internal quotations omitted)).

<sup>60</sup> 10 U.S.C. § 950b(c).

<sup>61</sup> ABA Model Code of Conduct Rule 1.2 states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety *and the appearance of impropriety*." (Emphasis added).

<sup>61</sup> *Smith v. Doe*, 538 U.S. 84, 99 (2003).

<sup>62</sup> *United States v. Kelley*, 2001 CCA LEXIS 243, at \*8 (N-M. Ct. Crim. App. 2001).

<sup>63</sup> Notably, R.M.C. 504's impartiality requirement is tethered to the requirements of due process. See, e.g., *Williams v. Pennsylvania*, 136 S. CT. 1899 (2016) (discussing circumstances when

convening authority despite having a disqualifying personal interest, Mr. al-Tamir respectfully moves this Commission to dismiss the charges against him.

**I. As a former supervisor of CAPT Waits, RDML Reismeier is a witness who has a personal interest in the outcome of Mr. al-Tamir's case.**

Given that RDML Reismeier was the senior jurist in the Department of the Navy from 2012 to 2015, the designated Rules Counsel for adjudicating professional responsibility complaints against military judges, an individual who played an integral role in the TJAG's nomination and detailing of military judges to the Military Commissions Trial Judiciary, and the second-level supervisor of Mr. al-Tamir's former military judge, CAPT Waits, who appears to have labored under of a conflict of interest when pursuing employment with the Department of Justice and/or Department of the Navy, RDML Reismeier is now a relevant fact witness on AE 158. And as a fact witness, his personal interest does not align with an official interest in the outcome of litigation.

As the D.C. Circuit recently stated in *In re al Nashiri*, "whenever and however military judges are assigned, rehired, and reviewed, they must always maintain the appearance of impartiality demanded by Rule for Military Commission 902(a)."<sup>64</sup> Moreover, the D.C. Circuit made clear that maintaining an appearance of impartiality is a "shared responsibility."<sup>65</sup> With respect to CAPT Waits, this means that RDML Reismeier, as Chief Judge, Department of the Navy, was responsible, at least in part, for nominating and detailing CAPT Waits to the Military Commissions Trial Judiciary and otherwise allowing CAPT Waits to labor under a conflict of interest while

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judicial recusal is warranted due to bias as a due process matter); *United States v. Ashby*, 2007 CCA LEXIS 235, at \*59 (N-M. Ct. Crim. App., 2007) ("Every individual accused of an offense . . . is entitled to have his or her case handled by an unbiased and impartial convening authority.") (citing *United States v. Nix*, 40 M.J. 6, 7 (C.M.A. 1994)).

<sup>64</sup> *In re al Nashiri*, 921 F.3d 224, 240 (D.C. Cir. 2019).

<sup>65</sup> *Id.* at 239.



detailed as the military judge in Mr. al-Tamir's case.<sup>66</sup> As a result, RDML Reismeier has a personal interest in attempting to minimize or justify his failure to identify and address the issue of CAPT Waits's conflict of interest, especially given the way that RDML Reismeier has cited his service as the Chief Judge, Department of the Navy to enhance his credibility and advertise his services when in private practice.<sup>67</sup> Given this personal interest, RDML Reismeier is disqualified under R.M.C. 504(c)(1) from serving as the convening authority in Mr. al-Tamir's case.

**II. RDML Reismeier's past alignment with the Office of the Chief Prosecutor evidences the appearance, if not the reality, of partiality in favor of the government.**

While RDML Reismeier described himself as unbiased and without a personal interest in the outcome of the litigation in cases before the Military Commissions, his actions indicate otherwise.<sup>68</sup> After devoting years of his military career to the legislative policymaking that culminated in his legislative draft of MCA 2009, RDML Reismeier went on to co-chair the DPTF with a representative from the Department of Justice. This aligned RDML Reismeier with the Department of Justice from the outset of MCA 2009's implementation, requiring him to work hand-in-hand with an attorney from the same agency involved in the prosecution of individuals before military commissions operating under MCA 2009. To be sure, this experience was valuable. It gave RDML Reismeier unique insight into the structure and operation of the military commissions as an adjudicatory apparatus and made him a knowledgeable resource. Therefore, it is not surprising that in 2014, while RDML Reismeier was serving as the Chief Judge, Department

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<sup>66</sup> Whether, and to what degree, RDML Reismeier had knowledge of CAPT Waits's pursuit of employment with the Department of Justice or the Department of the Navy is a question of fact for this commission. The defense requested to interview RDML Reismeier on this issue, and he declined. Attachment M.

<sup>67</sup> Attachment F.

<sup>68</sup> "Bias is easy to attribute to others and difficult to discern in oneself." *Williams*, 136 S. Ct. at 1905.

of the Navy, the Chief Prosecutor started to seek out and capitalize on RDML Reismeier's experience. And notably, the Chief Prosecutor did so on issues common to several cases pending before military commissions, including Mr. al-Tamir's case.

The 2014 issue was jurisdiction. The Chief Prosecutor needed guidance on offering proof of jurisdiction in *United States v. al Nashiri*, and he sought out RDML Reismeier, who could provide unique insight on the issue given his role in authoring the legislative draft of MCA 2009. Despite holding a position as the Department of the Navy's senior jurist, RDML Reismeier discussed the issue with the Chief Prosecutor. And while the jurisdiction issue in *al Nashiri* may not be the same as the jurisdiction issues in other cases pending before military commissions, jurisdiction is nevertheless still an issue the government must prove, which makes any guidance on how the Chief Prosecutor and his subordinates can best offer such proof relevant to any case before a military commission, including Mr. al-Tamir's case.

Shortly after RDML Reismeier's retirement in November 2015, the Chief Prosecutor again sought him out. This time the issue was the charge of conspiracy and whether the Constitution permitted Congress to proscribe the offense in the MCA. Given his work on the MCA, RDML Reismeier possessed unique insight on the issue, and at the Chief Prosecutor's request, RDML Reismeier, now an attorney in private practice, traveled to the Chief Prosecutor's "spaces" for a briefing.<sup>69</sup> The issue was before the D.C. Circuit in *United States v. Bahlul*, and because of *stare decisis*,<sup>70</sup> the D.C. Circuit's ruling would impact every case before a military commission where the government charged the accused with engaging in a conspiracy, including Mr. al-Tamir's case.

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<sup>69</sup> Attachments D, E.

<sup>70</sup> As an experienced military judge, RDML Reismeier was undoubtedly aware of this legal concept. *See, e.g., United States v. Fosler*, 69 M.J. 669, 675 (N-M. Ct. Crim. App. 2010) (referencing the doctrine of *stare decisis* in an opinion authored by then-Chief Judge Reismeier).



At some point, an unidentified person<sup>71</sup> asked RDML Reismeier to appear as one of several *amici* in support of the government on the issue, and RDML Reismeier agreed. In doing so, RDML Reismeier did not provide any edits after reviewing the *amicus* brief in support of the government's position, and thus he appears to have adopted the arguments in their entirety.<sup>72</sup>

The Washington Legal Foundation sponsored the *amicus* brief and made the interest of the *amici*, including RDML Reismeier, clear—to avoid “unwarranted restrictions on the authority of the elected branches of government to convene military commissions to conduct trials of law-of-war offenses” because they “deem[ed] it inappropriate for the courts to second-guess the considered judgments of the political branches regarding how best to conduct an armed conflict.”<sup>73</sup> As this public declaration in *Bahlul* demonstrates, RDML Reismeier's interest extended far beyond the confines of a single case. He sought a ruling from the D.C. Circuit that would minimize the restrictions on the authority of executive branch officials in the prosecution of law-of-war offenses before military commissions in general. In doing so, RDML Reismeier aligned himself, publicly and definitively, with the Office of the Chief Prosecutor.<sup>74</sup> Moreover, RDML Reismeier and the Chief Prosecutor were successful not only in their opposition to the petitioner in *Bahlul*, but also

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<sup>71</sup> In his Memorandum for the Record, RDML Reismeier neither discloses the name of the person who asked him to sign the *amicus* brief nor the precise sequence of events leading up to that request. Attachments D, E.

<sup>72</sup> Attachment K at 4.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> It is the duty of the Office of the Chief Prosecutor “to represent the United States before military commissions.” Office of Military Commissions, Organization Overview, <https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>.

in establishing “controlling precedent” in cases before the military commissions in general, including Mr. al-Tamir’s case.<sup>75</sup>

In 2016, following RDML Reismeier’s public declaration, the Chief Prosecutor once again contacted RDML Reismeier for guidance. This time the issue involved the scope of evidence admissible to prove the damage allegedly caused by an explosion—a potential evidentiary issue in many military commission cases, including Mr. al-Tamir’s case. The Chief Prosecutor even went so far as to ask RDML Reismeier to “sit on a moot” (i.e. a practice argument) involving Mr. al-Nashiri’s case.<sup>76</sup> Given his experience, RDML Reismeier was uniquely qualified as a subject matter expert on the issue, and as a private practice attorney, he was not restricted from assisting the prosecutors. As RDML Reismeier stated in his Memorandum for the Record, he “did in fact participate in that moot argument as a subject matter expert.”<sup>77</sup>

With RDML Reismeier’s appointment in May 2019, the Office of the Chief Prosecutor’s subject matter expert is now the Military Commissions Convening Authority. To be fair, the full extent of RDML Reismeier’s involvement with attorneys practicing before military commissions is not clear. In his Memorandum for the Record, RDML Reismeier only lists instances between 2014 and 2016 where he provided guidance and assistance to attorneys working in the Office of the Chief Prosecutor, while also acknowledging that he mentored a prosecutor in Mr. al-Nashiri’s case before 2014.<sup>78</sup> His Memorandum for the Record does not purport to recount all of his

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<sup>75</sup> See e.g., AE 026B (citing *Bahlul v. United States*, 840 F.3d 757, 758 (D.C. Cir. 2016) in the Commission’s denial of Mr. al-Tamir’s motion to dismiss).

<sup>76</sup> Attachments D, E.

<sup>77</sup> Attachments D, E.

<sup>78</sup> As a part of this relationship, RDML Reismeier and a prosecutor in the Office of the Chief Prosecutor discussed the complexity of the charges in Mr. al Nashiri’s case, which similar to Mr. al-Tamir’s case, includes a charge of perfidy. Charge Sheet; Attachment J.



interaction with attorneys practicing before military commissions.<sup>79</sup> Yet the following fact remains: nowhere in RDML Reismeier's Memorandum for the Record does he recount mentoring or providing assistance as a subject matter expert to the attorneys assigned to the Military Commissions Defense Organization.

Moreover, it is notable that RDML Reismeier omitted any mention of whether he was compensated for the assistance he provided to the Office of the Chief Prosecutor, which is surprising given that he now claims to have no personal bias concerning the parties or personal interest in the outcome of litigation. That said, whether the Office of the Chief Prosecutor compensated RDML Reismeier or not, there is an issue of apparent bias. Either the Office of the Chief Prosecutor paid RDML Reismeier for his time and assistance, establishing a contractual-type relationship, or RDML Reismeier volunteered (i.e., donated the value of his time) to assist the Office of the Chief Prosecutor in its representation of the United States before military commissions out of a personal interest. Regardless, the appearance of bias, if not the reality, is present.

The bottom line is that RDML Reismeier cannot divorce his current service as the Military Commissions Convening Authority from his past alignment with the Office of the Chief Prosecutor, and as a result, there is, at a minimum, an appearance that RDML Reismeier has a personal interest in supporting the Office of the Chief Prosecutor. Given this personal interest, RDML Reismeier is disqualified under R.M.C. 504(c)(1) from serving as the convening authority in Mr. al-Tamir's case.

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<sup>79</sup> The defense has requested additional discovery on this issue. Attachment N.

**III. RDML Reismeier has a personal interest in protecting this Commission from constitutional challenges to its structure and operation given his past involvement in the creation of MCA 2009.**

The private practice profile that RDML Reismeier used to advertise his experience as an attorney-for-hire contains the following statement:

His repeated work on military commissions caused the General Counsel, Department of Defense, to ask for him by name to work on the Presidentially-designated interagency Detention Policy Task Force. Mr. Reismeier authored the legislative draft that became the 2009 Military Commissions Act and ultimately served as the Task Force staff as co-executive secretary, where he oversaw the day-to-day operations of the interagency Task Force Staff in creating lawful options for the President in detention policy matters.<sup>80</sup>

Aside from prompting potential clients to contact him or his firm, RDML Reismeier's profile reflected the important accomplishments in his career; the achievements in which he could take pride. As military courts have observed, a convening authority's ego (i.e., his or her sense of self-importance) can give rise to a disqualifying personal interest.<sup>81</sup> And in RDML Reismeier's case, it is evident from his private practice profile that he derived a sense of self-importance from his work on the military commissions. He featured his authorship of the legislative draft of MCA 2009 as one of the most important accomplishments of his career. Indeed, Congress passed MCA 2009 into law, and it currently sets out both the framework of the military commissions and the substantive offenses that the government can prosecute in them. As a result, given the current operation of the military commissions under MCA 2009, RDML Reismeier's professional reputation—and ego—are linked, in a very direct way, to any claim that challenges an aspect of the military commissions under MCA 2009 (facially or as-applied), including challenges to its ability to function as a constitutional adjudicatory apparatus.

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<sup>80</sup> Attachment F.

<sup>81</sup> *Ashby*, 68 M.J. at 130.



As this Commission is aware, Mr. al-Tamir has already challenged the constitutionality of various aspects of MCA 2009,<sup>82</sup> and he may eventually present those challenges to the convening authority post-trial, asking for dismissal under R.M.C. 1107(c)(2)(A) if he is convicted of one of the charged offenses.<sup>83</sup> Doing so, however, will place Mr. al-Tamir directly at odds with the person who authored the draft legislation of MCA 2009—an individual who has a personal interest in declaring MCA 2009 free of legal error. Make no mistake, the convening authority’s professional reputation and ego are at stake in Mr. al-Tamir’s case.

The government may argue that RDML Reismeier’s personal interest in seeing the military commissions continue to operate in accordance with MCA 2009 is too tangential to make him a type three accuser. But such an argument ignores RDML Reismeier’s past actions. Consider the fact that he made an appearance as one of the *amici* in *Bahlul*. When attorneys for *Bahlul* challenged the constitutionality of an offense under the MCA, RDML Reismeier was compelled to make an appearance—personally—before the D.C. Circuit, defending an aspect of a system he had a hand in creating. In doing so, his actions demonstrated a bias against challenges to the MCA, and going forward this bias will inure to the detriment of Mr. al-Tamir with respect to challenges to the constitutionality of any aspect of MCA 2009, especially given the expansive power a convening authority possesses to shape the proceedings.<sup>84</sup> Accordingly, RDML Reismeier has a

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<sup>82</sup> See, e.g., AE 078 (challenging the constitutionality of the convening authority structure).

<sup>83</sup> There is precedent for presenting legal errors to the convening authority post-trial. In *United States v. Noor Uthman Muhammed*, for example, the convening authority found “it was legal error to try the offenses of providing material support for terrorism before the military commission” and dismissed the charges. Attachment O.

<sup>84</sup> “No sentence of a military commission may be executed unless it has been approved by the convening authority.” R.M.C. 1113. While the convening authority is not “required to review the case for legal errors or for factual sufficiency,” the Secretary of Defense nevertheless gave the convening authority the power to conduct such review if he or she chooses to do so. R.M.C. 1107 (“Determining what action to take on findings and sentence of a military commission is a

personal interest in the outcome of Mr. al-Tamir's legal proceedings and is disqualified under R.M.C. 504(c)(1) from serving as the convening authority.

**7. Conclusion:**

As outlined above, RDML Reismeier is a type three accuser. As such, he is disqualified under R.M.C. 504(c)(1) from serving as the convening authority in Mr. al-Tamir's case and must forward the charges to the Secretary of Defense for disposition. Given that RDML Reismeier has not done so, Mr. al-Tamir respectfully moves this Commission to dismiss the charges against him.

**8. Oral Argument:**

The Defense requests oral argument unless the Commission grants the motion on the pleadings. While RDML Reismeier's Memorandum for the Record is an incomplete record of his involvement in the military commissions, the defense believes that when combined with the publicly available information about RDML Reismeier, the record is sufficient for the Commission to grant the motion. That said, the government has not responded to the defense requests for discovery on this issue, and it is possible that the factual record could develop further. Moreover, resolution of this motion will likely require the Commission to make findings of fact based on witness testimony. As a result, giving counsel the opportunity to make arguments after the Commission hears from witnesses is necessary to ensure the parties have a full and fair opportunity to comment on the factual record, as well as to present their respective arguments on the issue.

**9. Witness and Evidence:**

The defense offers attachments A through O in support of this motion. The government has not yet responded to the discovery requests from the defense (Attachment N), and in accordance

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matter of prerogative.”). Moreover, as this Commission previously observed, the role of the Military Commissions Convening Authority is wide-ranging. AE 078F at 8 n.11.



with AE 149A, the defense believes the following witnesses will offer relevant and necessary testimony in support of this motion: (1) RDML (Ret.) Christian Reismeier, (2) Brig. Gen. Mark Martins, (3) CAPT (Ret.) John Waits, (4) Col. (Ret.) Daniel Daugherty, and (5) RDML Reismeier's unnamed mentee who formerly served as a prosecutor in Mr. al-Nashiri's case. The defense has contemporaneously filed a motion to compel the production of these witnesses, reserving the right to present additional evidence and witnesses on this motion.

10. **Conference with Opposing Counsel:**

The Prosecution opposes the relief Mr. al-Tamir seeks herein.

11. **Attachments:**

- A. Certificate of Service, dated 8 July 2019
- B. Letter from Acting Secretary of Defense Appointing RDML (Ret.) Reismeier
- C. Department of Defense News Release on RDML (Ret.) Reismeier's Appointment
- D. Convening Authority Recusal Memo in *Bahlul* w/ enclosure
- E. Convening Authority Recusal Memo in *al Nashiri* w/ enclosure
- F. JAG Defense Profile of RDML (Ret.) Reismeier
- G. JAG/CNLSCINST 5400.1C (excerpts)
- H. JAGNOTE 5450
- I. Office of the Judge Advocate General (Code 20), Sharepoint Profile
- J. Mr. al-Nashiri's Charge Sheet
- K. Brief of *Amici Curiae*, *Bahlul v. United States*, 840 F.3d 757 (2016) (No. 11-1324)
- L. Mr. al-Bahlul's Charge Sheet
- M. Email to Mr. Toole requesting meeting with convening authority
- N. Fifty Sixth Supplemental Discovery Request (and Supplement)

O. Convening Authority's Action in Mr. Noor's case

Respectfully Submitted,

//s//  
SUSAN HENSLER  
Lead Counsel

//s//  
LT CHARLES D. BALL  
JAGC, USN  
Detailed Defense Counsel



# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on **8 July 2019**, I filed **AE 157 Defense Motion to Dismiss on the Basis that the Convening Authority has a Personal Interest in the Outcome of the Military Commission** with the Office of Military Commissions Trial Judiciary and I served a copy on Government counsel of record.

//s//

SUSAN HENSLER  
Lead Defense Counsel



# **ATTACHMENT B**



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".

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 below the text.

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

# ATTACHMENT C



6/18/2019

SecDef Names New Convening Authority &gt; U.S. DEPARTMENT OF DEFENSE &gt; News Release View



DEPARTMENT OF DEFENSE



LEGACY HOMEPAGE &gt; NEWS &gt; RELEASES &gt; NEWS RELEASE VIEW

**IMMEDIATE RELEASE****SecDef Names New Convening Authority****May 28, 2019**

News Release

Release No: NR-131-19

The Department of Defense announced the selection of Christian L. Reismeyer to serve as the Convening Authority for Military Commissions and Director of the Office of the Convening Authority for Military Commissions.

Mr. Reismeyer is a retired U.S. Navy rear admiral. During his last active-duty tour, he simultaneously served as Assistant Judge Advocate General of the Navy and Chief Judge, Department of the Navy. Throughout his career, he provided legal and policy advice to a variety of federal agencies, including the White House, Department of State, Office of the Secretary of Defense, Secretary of the Navy, Chief of Naval Operations, and the Judge Advocate General of the Navy, with specific concentration on the topic of military criminal justice.

<https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1858937/secdef-names-new-convening-authority/>

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# **ATTACHMENT D**





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

JUN 14 2019

MEMORANDUM FOR SECRETARY OF DEFENSE

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

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

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

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

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

Christian L. Reismeier  
Convening Authority  
for Military Commissions

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

Attachment:  
As stated

14 June 2019

**Memorandum for File**

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

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

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

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

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

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

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

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



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

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

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

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

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

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

#### **4. 2010-2015 – Ad Hoc Consultation/Communications**

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

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

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

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

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

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

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

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

## **B. Conclusions**

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



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

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



Christian L. Reismeier

# **ATTACHMENT E**



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

JUN 14 2019

MEMORANDUM FOR SECRETARY OF DEFENSE

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

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

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

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

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

Christian L. Reismeier  
Convening Authority  
for Military Commissions

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

Attachment:  
As stated



14 June 2019

**Memorandum for File**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **4. 2010-2015 – Ad Hoc Consultation/Communications**

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

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

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

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

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

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

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

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

## **B. Conclusions**

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



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

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

A handwritten signature in black ink, appearing to read 'Christian L. Reismeier', with a horizontal line extending to the right.

Christian L. Reismeier

# **ATTACHMENT F**

← → X https://jagdefense.com/christian-l-reismeyer/ ☆

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## CHRISTIAN L. REISMEIER

Christian Reismeyer is "Of Counsel" with JAG Defense. In 2015, Mr. Reismeyer retired at the rank of Rear Admiral (Lower Half) from the United States Navy following 31 years of exemplary service. Retiring as the founding member and architect of the Navy's Military Justice Litigation Career Path, Mr. Reismeyer capped his career as the Chief Judge, Department of the Navy, where he supervised the entire Navy-Marine Corps trial and appellate judiciary. He simultaneously served as the Assistant Judge Advocate General of the Navy, a Flag-level position and the number three leadership position in the Navy's Judge Advocate General's Corps. His duties included the selection, training, and placement of all Military Justice Litigation Career Path officers (career litigators) in the Navy. Mr. Reismeyer earned a reputation throughout the Department of Defense as a top expert in military criminal law and criminal law policy matters.

Prior to his selection to Flag rank, Mr. Reismeyer served for three years as the Chief Judge, Navy-Marine Corps Court of Criminal Appeals, deciding some of the most difficult cases in the Navy while supervising every Navy and Marine Corps appellate judge assigned to the Court. In addition to his vast appellate experience, Mr. Reismeyer served for three years as the Director of the Navy's Criminal Law

**Christian (Chris) L. Reismeyer**

*Of Counsel*

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← X https://jagdefense.com/christian-l-reismeier/ ☆ M J

Mr. Reismeier served for three years as the Director of the Navy's Criminal Law Division, overseeing criminal law policy matters for the service. His work as the Director included policy advice to the Judge Advocate General of the Navy, the General Counsel of the Navy, the Chief of Naval Operations, and the Secretary of the Navy. His repeated work on military commissions caused the General Counsel, Department of Defense, to ask for him by name to work on the Presidentially-designated interagency Detention Policy Task Force. Mr. Reismeier authored the legislative draft that became the 2009 Military Commissions Act and ultimately served as the Task Force staff as co-executive secretary, where he oversaw the day-to-day operations of the Interagency Task Force Staff in creating lawful options for the President in detention policy matters.

In addition to his vast military justice experience as an appellate judge, policy advisor and member of the senior leadership of the JAG Corps, Mr. Reismeier served for 4 years as a trial judge in Norfolk and San Diego, two years representing the government on appeals of Navy and Marine Corps courts-martial, four years as the Chief Defense Counsel in Norfolk, Virginia, and four years as a prosecutor, Chief Defense Counsel and Chief Prosecutor in Mayport, Florida, where he ultimately supervised all prosecutions in a 13-state region with 9 offices across the Southeast. As one of the most experienced litigators in the Navy, his experience includes national security cases, attempted espionage, murder, arson, maiming, sexual assaults, drug offenses, fraud, conspiracy – nearly every offense within the Uniform Code of Military Justice. He also has vast experience in administrative separations, detachments for cause of senior officers, boards of inquiry, and attorney ethics hearings. He has been consulted as an expert in military justice matters by the Washington Post, featured on CBS' *48Hours*, and testified before various congressionally-mandated panels reviewing sexual assault policies in the military.

Mr. Reismeier started his Navy career at Aviation Officer Candidate School in Pensacola, Florida, as an Intelligence Officer Candidate. He then served with an A-6 squadron in Virginia Beach, deploying on the USS FORRESTAL (CV-59), with a second assignment at the Pentagon, providing current intelligence to senior Navy

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Mr. Reismeyer started his Navy career at Aviation Officer Candidate School in Pensacola, Florida, as an Intelligence Officer Candidate. He then served with an A-6 squadron in Virginia Beach, deploying on the USS FORRESTAL (CV-59), with a second assignment at the Pentagon, providing current intelligence to senior Navy leaders. He was then selected for the Law Education Program by the Navy and attended Law School on fully-funded Navy orders.

**Military & Professional Experience**


- Rear Admiral (Retired), U.S. Navy JAG Corps, 1984-2015
- B.A., Pennsylvania State University, 1984
- J.D., George Washington University School of Law, 1992
- LL.M., Trial Advocacy, Temple University, Beasley School of Law 1999

**Bar Admissions**

- Virginia, 1992
- Third Circuit
- United States Court of Appeals for the Armed Forces
- United States Navy-Marine Corps Court of Criminal Appeals

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**Attorney Profiles**







**Grover H. Baxley**  
Grover H. Baxley is the founding attorney of JAG Defense. As a former member of the U.S. Air Force Judge Advocate General's Corps, Mr. Baxley now provides highly experienced representation

**Success Stories**

Air Force E-7 tested positive on a random urinalysis for marijuana. At his subsequent court-martial, the military lawyers at JAG Defense challenged the laboratory's testing methods and presented compelling evidence of our client's exceptional military character. Result: The officer members found our client NOT GUILTY of the charge against him.

**Contact Us**

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# **ATTACHMENT G**





DEPARTMENT OF THE NAVY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
1322 PATTERSON AVENUE SA, SUITE 3000  
WASHINGTON NAVY YARD DC 20374-5066

JAG/CNLSCINST 5400.1C  
Code 60  
26 Apr 17

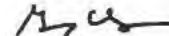
JAG / COMNAVLEGSVCCOM INSTRUCTION 5400.1C

From: Assistant Judge Advocate General (Operations & Management)

Subj: EXTENSION OF STANDARD ORGANIZATION MANUAL

Ref: (a) OPNAVINST 5215.17A

1. The above instruction has been reviewed, and the effective date extended for one year in accordance with reference (a).

  
G. E. SHARP

Releasability and distribution:

This instruction is cleared for public release and is available electronically only via The Judge Advocate General's Web site [www.jag.navy.mil](http://www.jag.navy.mil).



DEPARTMENT OF THE NAVY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON NAVY YARD  
1322 PATTERSON AVENUE SE, SUITE 3000  
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO:  
JAG/CNLSCINST 5400.1C  
Code 60

JUN 14

JAG/COMNAVLEGSVCCOM INSTRUCTION 5400.1C

From: Judge Advocate General  
Commander, Naval Legal Service Command

Subj: STANDARD ORGANIZATION MANUAL

Ref: (a) OPNAVINST 3120.32[series]  
(b) COMNAVLEGSVCCOMINST 5450.1[series]  
(c) COMNAVLEGSVCCOMINST 5800.1[series]  
(d) COMNAVLEGSVCCOMINST 5450.3[series]  
(e) SECNAVINST 5430.27[series]  
(f) Navy Regulations, Article 0331  
(g) OPNAVINST 5430.48[series]  
(h) DEPSECDEF Memo of 8 Nov 09  
(i) Uniform Code of Military Justice (UCMJ)  
(j) JAGINST 1301.2[series]  
(k) JAGINST 5803.1[series]  
(l) SECNAVINST 5030.4[series]  
(m) SECNAVINST 5430.57[series]  
(n) JAGNOTE 5401 (Collateral Duties List)

Encl: (1) Organization and Responsibilities of OJAG/NLSC  
(2) Organizational Charts

1. Purpose. To issue regulations and guidance governing the specific duties, responsibilities and authorities of the headquarters activity of the Office of the Judge Advocate General (OJAG) and for Naval Legal Service Command (NLSC). This instruction is a complete revision and should be read in its entirety. For regulations, directives, instructions or other guidance that govern OJAG and NLSC, see the Navy JAG Library at <http://www.jag.navy.mil/library.htm>; Department of the Navy Issuances at <http://doni.daps.dla.mil>; and Department of Defense Issuances at <http://www.dtic.mil/whs/directives>.

2. Cancellation. JAG/COMNAVLEGSVCCOMINST 5400.1B.

3. Background. The OJAG/NLSC Standard Organization Manual (SOM) defines the official organizational structure and assigns mission and functions of OJAG/NLSC headquarters. This instruction is issued per reference (a).

JAG/CNLSCINST 5400.1C

for punitive discharges and for presidential pardons. Provides administrative and logistical support services to personnel assigned to NAMARA and the NMCCA. Controls and maintains court-martial records of trial.

d. Appellate Defense Division (Code 45). Provides attorney representation of DON service members before the Supreme Court, USCAAF, and the NMCCA pursuant to Article 70(c), reference (i). Provides appellate defense counsel to perform such other functions in connection with the review of courts-martial as the JAG or AJAG (Military Justice) directs. Provides training and administrative support to Navy and Marine Corps reserve units and judge advocates providing appellate defense representation. Coordinates day-to-day policy and procedures relating to the appellate review process with appellate courts, Appellate Government Division (Code 46), and Administrative Support Division (Code 40). Provides training and legal updates to Navy and Marine Corps trial defense attorneys.

e. Appellate Government Division (Code 46). Has primary responsibility for oversight of U.S. appellate advocacy matters within the DON. Prepares and files pleadings with NMCCA and USCAAF. Prepares and submits pleadings in cooperation with the Solicitor General of the United States. Responsible for representing the United States before NMCCA, USCAAF and, in conjunction with the Solicitor General, the Supreme Court. Advises trial counsel and other government attorneys on the propriety of filing government interlocutory appeals and government extraordinary writs and prepares and files appellate pleadings for U.S. interlocutory appeals and extraordinary writs. In coordination with Navy and Marine Corps Trial Counsel Assistance Programs, advises and instructs trial counsel and other government attorneys on military justice matters having appellate implications. Initiates and staffs requests to JAG for certification of issues to USCAAF. Coordinates with appellate court administrators and judges and government appellate divisions of other military branches on matters pertinent to appellate advocacy. Responds to outside inquiries regarding division activities.

4. Assistant Judge Advocate General, Chief Judge, Department of the Navy (Code 05). The AJAG, Chief Judge, Department of the Navy (CJDON) is the senior supervisory jurist of the Department of the Navy with primary administrative oversight responsibility of the judiciary at both the trial and appellate levels, as judges throughout the DON execute their statutory duties as authorized in reference (i), the MCM, and the JAGMAN. CJDON is the



JAG/CNLSCINST 5400.1C

reporting senior for the Chief Judge of the Trial Judiciary and the judges of the NMCCA (Code 51); is the principal strategic planner for professional development, selection, training, and deployment of the judiciary; is designated Rules Counsel for judicial misconduct and for professional responsibility matters involving military judges per reference (k); serves as the Navy's judicial representative on the Code Committee; serves as the Chairman of the Judicial Screening Board; and is the principal advisor for courtroom design and judicial security.

a. Navy-Marine Corps Court of Criminal Appeals (NMCCA) (Code 51). Conducts mandatory review, unless waived by the appellant, of all courts-martial of members of the naval service referred to the court pursuant to Articles 62, 66, 69 and 73, reference (i), and, when necessary in furtherance of its jurisdiction, reviews all petitions for extraordinary relief properly filed before it.

b. Navy-Marine Corps Trial Judiciary (Code 52). The Navy-Marine Corps Trial Judiciary (NMCTJ) is a unified trial judiciary with the core mission of providing certified military judges for all Navy and Marine Corps general and special courts martial. The NMCTJ is organized into seven judicial circuits world-wide and is supported by Naval Reserve and Marine Corps Reserve Individual Mobilization Augmentees. The Chief Trial Judge is responsible for supervising and supporting Navy and Marine Corps trial judges worldwide. The Chief Judge of the Navy-Marine Corps Trial Judiciary reports directly to CJDON.

5. Assistant Judge Advocate General (Operations and Management) (Code 06). The AJAG (Operations and Management) exercises primary responsibility for operations and management functions within OJAG/NLSC. The AJAG (Operations and Management) supervises the Executive Director (Code 06A) and concurrently serves as COS-RLSO.

a. Executive Director (Code 06A). Primary assistant to AJAG (Operations and Management). The Executive Director is responsible for the seven divisions within the Operations and Management organization. Oversees the day-to-day operations of the 06 organization, including managing civilian and military staff. Assists in the formulation, development, and execution of organizational policies. Oversees the provision of manpower, budgeting, supply, and information technology support to all Codes within OJAG and to all Echelon III activities within NLSC.

# ATTACHMENT H



**DEPARTMENT OF THE NAVY**  
**OFFICE OF THE JUDGE ADVOCATE GENERAL**  
 1322 PATTERSON AVENUE SE SUITE 3000  
 WASHINGTON NAVY YARD DC 20374-5068

IN REPLY REFER TO:

JAGNOTE 5450  
 Code 05

DEC 17 2013

JAG NOTICE 5450

Subj: MISSION AND FUNCTION OF ASSISTANT JUDGE ADVOCATE GENERAL,  
 CHIEF JUDGE, DEPARTMENT OF THE NAVY

Ref: (a) 10 U.S.C. Sec. 5149  
 (b) JAG memo of 18 Dec 07  
 (c) JAG ltr 5817 Ser 00/0123 of 1 Sep 09  
 (d) JAG/CNLSCINST 5400.1 (Series)  
 (e) JAGINST 5814.1 (Series)  
 (f) JAGINST 5803.1 (Series)  
 (g) JAGINST 5817.1 (Series)  
 (h) JAGINST 1150.2 (Series)  
 (i) JAGINST 5813.4 (Series)  
 (j) JAG/CNLSCINST 5530.2 (Series)

1. Purpose. Pursuant to references (a) through (j), this Notice promulgates policy, prescribes procedures and assigns responsibilities for the position of Assistant Judge Advocate General, Chief Judge of the Department of the Navy (AJAG-CJ).

2. Background. On 18 December 2007, the Secretary of the Navy established the AJAG-CJ whose principal duties include supervision and management of the trial and appellate judiciary organizations within the Department of the Navy, and strategic planning and community sponsorship for the military justice litigation career track.

3. Primary Duties. Per references (d) and (h), the AJAG-CJ oversees the Department of the Navy judiciary and is the principal strategic planner for the military justice litigation career track. The AJAG-CJ duties and responsibilities include the following:

a. Judicial Supervision

(1) The AJAG-CJ is the senior supervisory jurist in the Department of the Navy. When performing this judicial function, the AJAG-CJ shall comply with the American Bar Association (ABA) Code of Judicial Conduct (Canons). When performing other duties, the AJAG-CJ shall ensure that the duties do not compromise judicial independence. The AJAG-CJ will monitor the timeliness and productivity of the trial and appellate judiciaries and adjust, provide, or request resources needed to maintain fair, impartial, and timely disposition of courts-martial by the trial and appellate judiciaries. Additionally, the



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Code 05

AJAG-CJ will take such administrative action consistent with the Canons and other governing regulations as are necessary to ensure all judges perform their duties timely and effectively.

(2) Per reference (d), the AJAG-CJ is the reporting senior for the Chief Judge of the Trial Judiciary (TRIJUDACT), the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and all appellate judges of the NMCCA, both active and reserve component. Whenever the AJAG-CJ evaluates a Marine Corps judge, the AJAG-CJ will forward that fitness report for review by the Staff Judge Advocate to the Commandant of the Marine Corps.

(a) The AJAG-CJ is the reviewing officer of any judge requiring second-level review in accordance with governing fitness report instructions, including military judges in the paygrade of O-6 and Marine Corps judges who are evaluated by the Chief Judge, TRIJUDACT.

(b) The AJAG-CJ is the higher level reviewer for the Clerk of Court, NMCCA, and any other civilian rated by either the Chief Judge, NMCCA or Chief Judge, TRIJUDACT.

(c) In the event the AJAG-CJ develops a conflict of interest in the evaluation of any subordinate, the Deputy Judge Advocate General will be the reporting senior. When such a conflict pertains to a reserve component judge, the Deputy Judge Advocate General (Reserve Affairs and Operations) will be the reporting senior.

(3) Reports to the Judge Advocate General required by references (d) through (g) shall be made to the AJAG-CJ. The AJAG-CJ shall report at least quarterly to the Judge Advocate General regarding the status of courts-martial pending before military trial judges for authentication, or docketed by the NMCCA, with specific comment on any administrative impediment, such as a lack of resources, which might cause any case to fail to be processed within the standards set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In addition, the AJAG-CJ will report the status and administrative needs or resource short-fall of any case docketed at NMCCA for longer than one year, in panel for longer than six months, or in which corrective or other action has been directed by NMCCA, when such action has not been completed by the date specified.

(4) The AJAG-CJ will ensure there are rules of practice and procedure, including internal operating procedures, for the trial and appellate judiciaries that will provide timely and efficient trial and post-trial processing of courts-martial, consistent with applicable law, and in the interests of justice. Rules promulgated by the chief judges of the TRIJUDACT and NMCCA shall be provided to the Judge Advocate General via the AJAG-CJ.

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b. Judicial Misconduct. Per reference (f), the Chief Judge, Trial Judiciary is a member of the Professional Responsibility Committee. The AJAG-CJ is designated Rules Counsel for all inquiries into judicial misconduct involving judges of the NMCCA and TRIJUDACT. All complaints of judicial misconduct or unfitness will be submitted to the AJAG-CJ. In the case of complaints against a Marine Corps judge, the AJAG-CJ will notify the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps, and will appoint any necessary preliminary inquiry officer or ethics investigating officer from among current or former Marine Corps judges, unless impractical to do so.

c. Judicial Screening. Per reference (g), the AJAG-CJ is the Chair of the Judicial Screening Board. The AJAG-CJ is responsible for scheduling and conducting periodic boards to select the best qualified candidates for future judicial service.

d. Judicial Training. Per references (d) and (f), the AJAG-CJ is responsible for the initial training of all judicial candidates, as well as the continuing education of current TRIJUDACT and NMCCA judges. The AJAG-CJ will prescribe the minimum training standards for all judges, requirements for continuing legal education for judges, and represent the Navy-Marine Corps judiciaries at the flag and general officer level regarding matters of judicial training and qualifications, when those policy decisions are coordinated with the other Services. In discharging these responsibilities, the AJAG-CJ will coordinate with other Service chief judges to create and maintain a standard military judges training symposium that incorporates the courses of the National Judicial College, and other similar programs, improving the profile of the military judiciary by providing a cost-effective means of post-graduate and continuing education specifically oriented towards the judiciary.

e. Judicial Assignments. The AJAG-CJ is responsible for supervising the assignment of active and reserve judicial resources to best serve the interests of justice within the Department of the Navy. This includes recommendations to the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps on billet structure, including the number and geographic location of judiciary billets. The AJAG-CJ is also the Judge Advocate General's principal advisor on the assignment of officers to positions within the trial and appellate judiciaries, active and reserve components, including officers to be nominated for duty under the Department of Defense as military commission trial or appellate judges. In carrying out these responsibilities, the AJAG-CJ will coordinate closely with the Staff Judge Advocate to the Commandant of the Marine Corps regarding the nomination and appointment of Marine Corps judges.

f. Judicial Representative. Per reference (d), the AJAG-CJ is the principal advisor to the Judge Advocate General regarding the Article 146, UCMJ, Code Committee, on matters affecting the judiciary, and

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will represent the Judge Advocate General on the Code Committee when so designated.

g. Judicial Process Improvement. Per reference (d), the AJAG-CJ is the principal strategic planner for the judiciary and is responsible for the continuous monitoring and assessment of judicial quality and efficiency, including methods of decreasing error rates and the cost of providing judicial services in the military justice process. In carrying out these responsibilities, the AJAG-CJ will coordinate with other Service judges, as well as the civilian judiciary, to identify and implement best judicial practices, including in such areas as standardization of judicial forms and court filings, efficient and effective case management and tracking systems, and other advances in courtroom technology and judicial practice. To the extent advances in judicial practice and procedure necessarily implicate changes in court-martial practice, such as changes in the trial script or pretrial agreement format, development of cutting-edge technology, including electronic records of trial, or other trial practices, the AJAG-CJ will coordinate with the other AJAGs and make recommendations to the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps.

h. Judicial Security. Per reference (j), the AJAG-CJ is the principal advisor to the Department of the Navy for courtroom and judicial security. In this role the AJAG-CJ will promulgate baseline security measures for trial and appellate courts as well as developing guidelines and best practices for security of trial and appellate judges.

i. Community Sponsor. Per reference (h), the AJAG-CJ serves in the capstone billet of the military justice litigation career track for judge advocates of the Navy. When executing these duties, the AJAG-CJ is performing executive functions, and is not bound by the Judicial Canons. The AJAG-CJ is the principal strategic planner and community sponsor for the military justice litigation career track. As such, the AJAG-CJ will affirmatively lead that community in identifying, developing, training, retaining and assigning litigators and judges, and has the primary responsibility for maintaining the strategic vision for a balanced and responsive litigation career track billet distribution plan. In carrying out these responsibilities, the AJAG-CJ will coordinate with, and be supported by, the other AJAGs.

j. Succession. The AJAG-CJ shall serve in succession as the Judge Advocate General of the Navy when so directed by the Secretary of the Navy, the Judge Advocate General, or their designees, and as set forth in governing regulations.

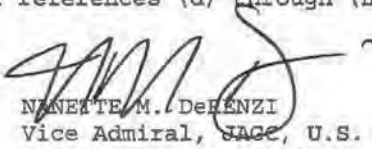
k. Other Duties. The AJAG-CJ shall discharge such other duties as assigned by the Judge Advocate General, consistent with the Canons and judicial independence. Other duties may include, but are not limited to, serving as a member of the United States Court of Military



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Commission Review, a member of the Naval Justice School Board of Advisors, a member of the Office of the Judge Advocate General Awards Board, and as a Performance Award Review Board manager. When requested by the Judge Advocate General and consistent with judicial independence, the AJAG-CJ may provide advice regarding the improvement of military justice training, practice, procedure, rules and legislation. Additionally, the AJAG-CJ is authorized to detail himself or herself to preside over any general court-martial or military commission upon the request of an authorized Department of Defense official, the Chief Judge TRIJUDACT, or any other Service Judge Advocate General or designee pursuant to the Inter-Service Memorandum of Understanding on cross-service detailing of military judges. The Navy Judge Advocate General shall be notified of the circumstances attending the detailing of the AJAG-CJ to any court-martial, and the impact such detailing will have on the discharge of the AJAG-CJ's other duties. The AJAG-CJ will serve simultaneously as the Chief Judge NMCCA only when so appointed by the Judge Advocate General.

4. Cancellation Contingency. This Notice shall be effective until incorporated into revisions of references (d) through (h).



NINETEEN M. DeLENZI  
Vice Admiral, JAGC, U.S. Navy  
Judge Advocate General

Distribution:




Electronic only via the Office of the Judge Advocate General website,  
<http://www.jag.navy.mil>.

# ATTACHMENT I

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## Criminal Law ⓘ

### Welcome


The Criminal Law Division oversees all aspects of military justice policy within the Department of the Navy (DoN). This includes the following.

**Military Justice Policy**


- Draft legal and policy advice for the Judge Advocate General (JAG) on wide variety of military justice matters.
- Review all legislative and regulatory proposals affecting military justice.
- Represent the Navy in regular meetings of the Joint Service Committee on Military Justice (JSC), the principal vehicle for staffing amendments to the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial; provide Navy representative for meetings of the joint-service working group supporting the JSC; and staff all amendments to Secretarial and DoN regulations implementing or affecting the UCMJ.

**Military Justice Administration**


- Review all decisions of military appellate courts, and staff JAG certification of Navy-Marine Corps Court of Criminal Appeals decisions for review by U.S. Court of Appeals for the Armed Forces.
- Provide legal opinions upon request to the Board for Correction of Naval Records.
- Provide JAG representative to the Naval Clemency and Parole Board.
- Staff matters requiring approval of SECNAV, JAG, or Department of Justice (DoJ), including requests to grant immunity / orders to testify, issue warrants of




**Division Director**



**Mr. Kirk Waits**  
**Deputy Director**







# ATTACHMENT J

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

MC FORM 458 JAN 2007

MC FORM 45B JAN 2007



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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19. ~~7b~~. At some point after January 2000, but prior to 12 October 2000, NASHIRI filled the attack boat with explosives in preparation for the attack. *AP 9/28/11*
20. ~~7b~~. In approximately September or October 2000, prior to the attack, NASHIRI left Yemen, as instructed by bin Laden. NASHIRI met Khallad, and the two traveled together to Qandahar, Afghanistan, to meet with bin Laden. NASHIRI informed bin Laden that an attack on a United States warship in Aden was imminent. *AP 9/28/11*
21. ~~7b~~. On or about 12 October 2000, pursuant to NASHIRI's instructions, the co-conspirators removed the attack boat from its storage location, drove the attack boat to the launch site and, using a crane, lowered it into the water. *AP 9/29/11*
22. ~~7b~~. On or about 12 October 2000, as a result of planning and preparation by NASHIRI and others, the suicide bombers, at the direction of NASHIRI, dressed in civilian clothes, piloted the explosives-laden boat to where USS COLE (DDG 67) was refueling, offered friendly gestures to several crew members, and brought their boat alongside USS COLE (DDG 67), roughly amidships. Once alongside at approximately 11:18 a.m. (local), the suicide bombers detonated the explosives, blasting a hole in the side of USS COLE (DDG 67) approximately 30 feet in diameter, killing 17 crewmembers and injuring at least 37 crewmembers. The suicide bombers died in the attack. *AP 9/29/11*
23. ~~7b~~. In approximately May 2001, NASHIRI met with bin Laden and another high-ranking member of al Qaeda at bin Laden's compound in Qandahar. *AP 9/28/11*
24. ~~7b~~. In approximately 2001 and 2002, NASHIRI continued al Qaeda's boats operation by directing acts which included, but were not limited to, acquiring a boat for use in the attack, acquiring explosives for use in the attack, transferring ownership and registration of the boat, and obtaining a global positioning system (GPS) device for use in planning the attack. NASHIRI supplied the necessary resources, planned the attack, and directed the transfer of money for use in an upcoming attack. *AP 9/28/11*
25. ~~7b~~. In approximately 2001 and 2002, NASHIRI and other co-conspirators implemented operational security measures to avoid detection. *AP 9/28/11*
26. ~~7b~~. On or about 6 October 2002, near the port of Al Mukallah, Yemen, as a result of planning by NASHIRI and others, suicide bombers, at the direction of NASHIRI, used an explosives-laden boat to attack the French supertanker *MV Limburg*. The explosion blasted a hole through the hull of the ship, resulting in the death of a crewmember, injury to approximately 12 crewmembers, and spillage of approximately 90,000 barrels of oil into the Gulf of Aden. *AP 9/29/11*

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

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

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

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16. [REDACTED]

17. [REDACTED]



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

~~CHARGE VII: VIOLATION OF 10 U.S.C. § 950(16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR~~ *AD 9/23/11*

~~Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, intentionally destroy property belonging to another person, without that person's consent, in violation of the law of war, to wit: two men perfidiously approaching USS COLE (DDG 67), and detonating concealed explosives, resulting in the destruction of USS COLE (DDG 67), property of the U.S. government, destruction of supplies and rations located onboard USS COLE (DDG 67), property of the U.S. government, and destruction of personal effects located onboard USS COLE (DDG 67), property of the crewmembers onboard USS COLE (DDG 67).~~ *AD 9/23/11*

~~CHARGE VIII: VIOLATION OF 10 U.S.C. § 950(28), ATTEMPTED DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR~~ *AD 9/23/11*

~~Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 3 January 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Destruction of Property in Violation of the Law of War, attempt to intentionally destroy property on board USS THE SULLIVANS (DDG 68), belonging to another, without the lawful owner's consent, in violation of the law of war, to wit: by committing certain acts that amount to more than mere preparation and to effect the commission of Destruction of Property in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), detonate the explosives while alongside USS THE SULLIVANS (DDG 68), so as to damage and sink USS THE SULLIVANS (DDG 68), and destroy USS THE SULLIVANS (DDG 68), property of the U.S. government,~~ *AD 9/23/11*



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

~~destroy supplies and rations located onboard USS THE SULLIVANS (DDG 68), property of the U.S. government, and destroy personal effects located onboard USS THE SULLIVANS (DDG 68), property of the crewmembers onboard USS THE SULLIVANS (DDG 68).~~ *12/9/28/11*

~~VII~~  
CHARGE ~~DC~~: VIOLATION OF 10 U.S.C. § 950t(2), ATTACKING CIVILIANS *12/9/28/11*

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

~~VIII~~  
CHARGE ~~X~~: VIOLATION OF 10 U.S.C. § 950t(3), ATTACKING CIVILIAN OBJECTS *12/9/28/11*

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

~~IX~~  
CHARGE ~~XI~~: VIOLATION OF 10 U.S.C. § 950t(23), HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT *12/9/28/11*

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

**Appendix A**

**List of al Nashiri aliases:**

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

Abda  
(Variants: Abdo, Abdoh)

Abdella

Abdo Hussein  
(Variant: Abdoh Hussein)

Abdoh Mohammed

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

Abu Al-Miqdad

Al Farouq al Hijazi

Al Farouq al Maki  
(Variant: Farouq Al Maki)

Bilal al Harazi  
(Variant: Al Harazi)

Bulbul

Eid Al Harbi

Eid Muabadi

The Engineer

Mayoub

Mohammad Abdullah

**Appendix A**

Mohammad Omar Al-Harazi

(Variant: Muhammad Umar Al-Harazi)

Mullah Bilal al Makki

(Variants: Bilal, Abu Bilal, Bilal al Maki, Abu Bilal Al-Makki,  
Mullah Bilal, Mula Bilal, Al Mulla Bilal, Al Mullah)

Mullah Mohammed Omar

Saeed Abdallah Qasem Al-Mansouri

(Variant: Said 'Abdullah Qasim Al-Mansuri)



**Appendix B**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Appendix B**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Appendix B**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



**Appendix B**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Appendix C**

**List of co-conspirator aliases:**

**Usama bin Laden**

Sheikh Abu Abdullah

(Variant: Abu Abdullah)

Usama bin Muhammed bin Laden

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

The Sheikh

**Ayman Al Zawahiri**

Dr. Ayman Al-Zawahiri

(Variant: Ayman Al Zawahiri)

**Mohammed Atef**

Abu Hafs Al Masri

(Variant: Sheikh Abu Hafs, Abu Hafs)

Abu Hafs Al-Kabir

Al-Komandat

Mohammed Atef

The Commandant

**Mushin Musa Matwalli Atwah**

Abu Abdul Rahman Al-Muhajir

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

Al-Nimr

Muhammad

Muhsin Musa Matwalli Atwah

(Variant: Mushin Musa Matwali Atwah)

**Walid Muhammad Salih Mubarak bin 'Attash**

Khallad Al Hijazi

Khallad Al Jadawi

Khallad Bin Attash

(Variants: Abu Khallad, Khallad)

Salah Sa'eed Mohammad Bin Yousuf

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

Tawfiq Abu Khallad

Tawfiq Mohammed Saleh Bin Attash

Tawfiq Muhammad Salih Bin Rashid

(Variant: Tawfiq Bin Rashid)

Walid Muhammad Salih Mubarak Bin 'Attash

(Variant: Walid Bin 'Attash)

**Appendix C**

**Jamal Ahmed Mohammed Ali Al-Badawi**

Abu Abdul Rahman Al-Badawi

(Variants: Abu Abed Al-Rahman Al-Badawi,  
Abu 'Abd Al-Rahman,  
Abu Abdul Rahman)

Jamal Mohammed Ahmad Ali Al-Badawi

(Variants: Jamal Muhammad Ahmad 'Ali Al-Badawi,  
Jamal Ahmed Mohammed Ali Al-Badawi,  
Jamal Mohamed Ahmed Ali,  
Jamal Mohamed Ahmed,  
Jamal Al-Badawi)

Jamal Muhsin Hamid Al-T'ali

(Variant: Jamal Muhsin Hamid Al Talli)

**Fahd Mohammed Ahmed Al-Quso**

Abu Huthayfa Al-'Adini

Fahd Mohammed Ahmed Al-Awlaqi

Fahd Mohammed Ahmed Al-Quso

(Variants: Fahd Mohammed Al-Quso, Fahd Al-Quso, Fahd)

**Hassan Sa'id Awad Al Khamri**

Abdallah Ahmed Khalid Saeed Misawi

(Variants: Abdulah Ahmed Khaled Said Masawa,  
Abdullah Ahmad Khalid Sa'id Msawa,  
Abdallah Ahmed Khalid,  
Abdallah Ahmed Khalid Misawi,  
Abdullah Ahmad Said Msawa,  
Abdallah Ahmed Khalid Saeed,  
Abdullah Ahmad Khalid Al-Sa'ed,  
Abdullah Khallid Musawa,  
Abdullah Mohammed Khaled Said,  
Abdullah Mohammed Khalid,  
Abdullah Msawa,  
Abdullah Sa'eed Musawa,  
Abdallah, Abdullah)

Abdo

Abu Ali

Abu Hassan Al-Ta'efi

(Variant: Hassan Al-Ta'efi, Abu Yousef Al-Ta'efi)

Hassan Al-Yemeni

Hassan Sa'id Awad Al-Khamri

(Variants: Hassan Awadh Al-Khamiri, Hassan Al Khamiri,  
Hassan Al-Khamari, Hassan Al-Khameri, Hasan, Hassan, Hussein)

The Hadrami

**Ibrahim Al-Thawar**

**Appendix C**

**Ibrahim Al-Nibrass**

(Variants: Ibrahim Abu Nibras, Abu Nibras, Abu Nibrass, Nibras)

**Ibrahim Al-Thawar**

(Variant: Ibrahim Al-Thawr)

**Taha Ibrahim Hussein Al-Ahdal**

Mahyub

Rabe'i Al Ahdal

Rabe'i Al Maki

(Variant: Raba'i)

**Taha Hassan Ibrahim Al-Ahdal**

**Taher Hussein Ibrahim Al-Tahami**

(Variants: Tahir Hussein Ibrahim Al-Tuhami,

Taher Hussein Al-Tuhami,

Taher Hussein Tuhami,

Taha Hussein Al Nahami, Taha Hussein, Taha)

**Hadi Muhammad Salih Al-Wirsh**

Abu Usama Al-Wa'ili

Hadi Dilkum

(Variant: Hadi Dilqum)

Hadi Muhammad Salah Al-Wa'ili

(Variant: Hadi Al-Wa'ili)

Hadi Muhammad Salah Tbadah

Hadi Muhammad Salih al-Wirsh

(Variant: Hadi Muhammad Salih)

**Nasser Ahmed Nasser Al Bahri**

Abu Habib

Abu Jandal

Abu Jandal Al Gharbi

Abu Jandal Al Jadawi

Abu Jandal Al Yemeni

Nasser Ahmad Nasser Al-Bahri

(Variant: Al-Bahri)

**Khalid Ibn Muhammad Al Juhani**

Abu Muawiya Al-Madani

(Variants: Mou'awiya Al-Madani, Muawiyah Al-Madani,

Mu'awiya, Mu'awiyah)

**Khalid Ibn Muhammad Al-Juhani**

(Variant: Khalid Al-Juhani)

Saif Al Shahrani

Salman



**Appendix C**

**Fawzi Muhammad 'Abd-al-Qawi Al-Wajih**

Basam Waji

(Variant: Basam Wajee)

Fawzi Muhammad 'Abd-al-Qawi Al-Wajih

(Variant: Fawiz Al Wajih)

Mus'ab Al-Ta'zi

**Fawzi Yahya Qaim Al-Hababi**

Abu-al-Shahid Al-San'ani

(Variant: Abu Shahid)

Fayiz Husayn Ali al Najar

(Variant: Fayiz Al-Najjar)

Fawzi Yahya Yahya Qasim Al-Hababi

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

**Muneer Al-Sharabi**

Bashir Nu'man Sa'id al Safari

(Variant: Bashir Al-Safari)

Muneer Ali Saeed Al-Sharabi

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

Nashir Al Safari Al Muqtari

Salman Al Tazi

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

**Walid Al-Shaybah**

Abd Al Raziq Muhammed Nasir Al Uthmali

Ahmad Qa'id

(Variant: Ahmad Qayid)

Al Jabiri

Muhammed Abd Al Khaliq Saeed Al Garibi

Rahman Hadi Hamoud Al-Ruda'ai

Walid Al-Shaybah

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

**Mohammad Rashed Daoud Al-Owhali**

Abdel-Jabbar Al-Baloushi

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

Abdul Jabbar Ali Abdul Latif

Al-Mutaw'a

Khaled Salem Saleh Bin Rashed

(Variant: Khalid Salim Saleh Bin Rashid)

M'aad

Mis'ab Al-Faqeer

Mo'ath Al-Balushi (Al-Awhali)

(Variant: Moath)

Mohammad Al Qatari

**Appendix C**

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

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

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

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

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

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

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

**Appendix C**

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

**Muhammad Sa'id Ali Hasan Al-Amari**

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

# ATTACHMENT K



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

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

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ALI HAMZA AHMAD SULIMAN AL BAHLUL,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

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

---

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

---

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(Counsel of Record)  
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202-588-0302  
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Dated: November 2, 2015

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

**A. PARTIES AND *AMICI***

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

**B. RULINGS UNDER REVIEW**

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

**C. RELATED CASES**

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

/s/ Richard A. Samp  
Richard A. Samp

Counsel for *amici curiae*

November 2, 2015

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

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

/s/ Richard A. Samp  
Richard A. Samp



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## GLOSSARY

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

**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

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

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

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

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

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

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

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

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



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

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

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



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

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

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

#### STATEMENT OF THE CASE

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

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

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

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



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

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

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

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

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

On June 12, 2015, a divided panel overturned the conspiracy conviction, holding that trying conspiracy charges before a military commission "violated the separation of powers enshrined in Article III, § 1" of the Constitution. *al Bahlul v. United States*, 792 F.3d 1, 22 (D.C. Cir. 2015). The panel majority recognized that Article I of the Constitution authorizes Congress to "define and punish . . . Offences against the Law of Nations,"<sup>3</sup> and that Congress may provide that trials of enemy combatants for law-of-war offenses may be conducted by military commissions. *Id.* at 14-15.<sup>4</sup> The panel nonetheless held that Congress exceeded its constitutional authority when it purported to authorize military commissions to

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

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



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

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

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

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

### SUMMARY OF ARGUMENT

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

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

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

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



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

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

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

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

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

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



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

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

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

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



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

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

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



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

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

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

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

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

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

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



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

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



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

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

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

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

The defendant, the commander of Japanese forces in the Philippines at the conclusion of World War II, was convicted by a military commission of “breach of a duty . . . as an army commander to control the members of his command,” thereby allowing them to commit atrocities against civilian populations. *Yamashita*, 327 U.S. at 14. The majority did not dispute the assertion of Justice Murphy (in dissent) that “the charge made against [the Japanese commander] is clearly without precedent in international law or in the annals of recorded military history.” *Id.* at 40 (Murphy, J., dissenting). The majority upheld the military commission’s jurisdiction over the failure-to-control charge based not on an assertion that the charge had ever been accepted by the international community as a violation of international law, but rather on a finding that the charge was consistent with “the purpose of the law of war”:

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



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

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

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

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



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

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

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

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

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

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



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

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

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



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

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

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

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

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

In neither *Quirin* nor *Yamashita* had Congress adopted legislation expressly granting military commissions jurisdiction over the offenses charged. Only after noting the absence of such express authorization<sup>7</sup> did the Court seek other indicia that the commissions possessed the requisite jurisdiction—*e.g.*, recognition of the charges under the international law of war or the historical practice of the American military. *Quirin*, 317 U.S. at 28-38; *Yamashita*, 327 U.S. at 13-18. The Court made clear in *Yamashita* that it was relying on the international law of war (as its basis for upholding the commission’s verdict) only in the absence of an express directive from Congress. *Id.* at 16 (“We do not make the laws of war but

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



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

In sum, Congress has determined that conspiracy to commit war crimes is an offense against the law of nations and is triable before military commissions. Congress acted within the powers granted to it under the Define and Punish Clause in making that determination. That determination is entitled to deference from the courts, particularly because it advances the purposes of the law of war.

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

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

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



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

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

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

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

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

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

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



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

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

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



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

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

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

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

### CONCLUSION

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

Respectfully submitted,

/s/ Richard A. Samp

Richard A. Samp

Mark S. Chenoweth

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave., NW

Washington, DC 20036

(202) 588-0302

rsamp@wlf.org

Dated: November 2, 2015

USCA Case #11-1324 Document #1581562 Filed: 11/02/2015 Page 41 of 42

**CERTIFICATE OF COMPLIANCE**

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

/s/ Richard A. Samp  
Richard A. Samp



USCA Case #11-1324

Document #1581562

Filed: 11/02/2015

Page 42 of 42

**CERTIFICATE OF SERVICE**

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

/s/ Richard A. Samp  
Richard A. Samp

# ATTACHMENT L

## CHARGE SHEET

## I. PERSONAL DATA

## 1. NAME OF ACCUSED:

Ali Hamza Ahmad Suliman al Bahlul

## 2. ALIASES OF ACCUSED:

Abu Anas al Makki; Ali Hamza Ismael; Abu Anas al Yemeni; Muhammad Anis Abdullah Khalidi

## 3. ISN NUMBER OF ACCUSED (LAST FOUR):

[REDACTED]

## II. CHARGES AND SPECIFICATIONS

## 4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

10 U.S.C. § 950v(b)(28), Conspiracy

## SPECIFICATION:

In that Ali Hamza Ahmad Suliman al Bahlul, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, at various locations in Afghanistan and elsewhere, from in or about February 1999 through in or about December 2001, join al Qaeda, an enterprise of persons who shared a common criminal purpose, that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission, and did conspire and agree with Usama bin Laden, Saif al 'Adi, and other members and associates of al Qaeda, known and unknown, to commit one or more substantive offenses triable by military commission, to wit: Murder of Protected Persons; Attacking Civilians; Attacking Civilian Objects, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Terrorism, and Providing Material Support for Terrorism, and with knowledge of the common criminal purpose of the al Qaeda enterprise and of the unlawful purposes of the agreement,

(See Continuation)

## III. SWEARING OF CHARGES

## 5a. NAME OF ACCUSER (LAST, FIRST, MI)

Treanor, J. V.

## 5b. GRADE

06

## 5c. ORGANIZATION OF ACCUSER

OMC-P

## 5d. SIGNATURE OF ACCUSER



## 5e. DATE (YYYYMMDD)

2008/02/08

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 8 day of FEBRUARY, 2008, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

S. Maher

Typed Name of Officer

OMC-P

Organization of Officer

05

Grade



Signature

Trial Counsel

Official Capacity to Administer Oath  
(See R. M. C. 307(b) must be commissioned officer)

MC FORM 458 JAN 2007


AE 1 (al Bahlul)



## IV. NOTICE TO THE ACCUSED

6. On 8 February, 2008 the accused was notified of the charges against him/her (See R.M.C. 308).

Lt Col S. Maher  
 Typed Name and Grade of Person Who Caused  
 Accused to Be Notified of Charges

  
 Signature

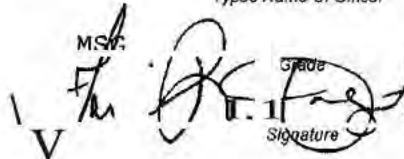
OMC-P  
 Organization of the Person Who Caused  
 Accused to Be Notified of Charges

## V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1650 hours, on 8 February 2008 at Arlington, Virginia

Location

For the Convening Authority: Tami R. Knight  
 Typed Name of Officer

  
 MSgt. Grade  
 Signature

## VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

8b. PLACE

8c. DATE (YYYYMMDD)

Convening Authority 10 USC §948h  
 Appointed on 6 Feb 2007

Arlington, VA

20080226

Referred for trial to the (non)capital military commission convened by military commission convening order 07-01 dated  
1 March 2007, as amended by MCCO 07-05 dated 29 May 2007

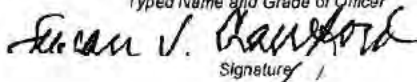
subject to the following instructions: this case is referred

non-capital

XX Command, Order, or Direction XX

Susan J. Crawford

Typed Name and Grade of Officer

  
 Signature

Convening Authority 10 USC §948h

Official Capacity of Officer Signing

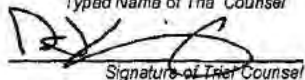
## VII. SERVICE OF CHARGES

9. On 26 February, 2008 I (caused to be) served a copy these charges on the above named accused.

DANIEL COWHIG.  
 Typed Name of Trial Counsel

Major

Grade of Trial Counsel

  
 Signature of Trial Counsel

## FOOTNOTES

<sup>1</sup>See R.M.C. 601 concerning instructions. If none, so state.

Me FORM 458 JAN 2007

AE 1 (al Bahlul)

Continuation to Military Commissions Form 458

Ali Harnza Ahmad Suliman al Bahlul  
Internment Serial Number\_\_

[REDACTED]

the said al Bahlul willfully joined the al Qaeda enterprise and willfully entered into the agreement with the intent to further those unlawful purposes, and knowingly committed the following overt acts in order to accomplish some objective or purpose of the enterprise and the agreement:

- a. traveled to Afghanistan with the purpose and intent of joining al Qaeda;
- b. met with Saif al 'Adl, the head of the al Qaeda Security Committee, as a step toward joining the al Qaeda organization;
- c. underwent military-type training at an al Qaeda sponsored training camp then located in Afghanistan near Mes Aynak;
- d. pledged fealty, or "bayat," to the leader of al Qaeda, Usama bin Laden, joined al Qaeda, and provided personal services in support of al Qaeda;
- e. prepared and assisted in the preparation of various propaganda products, including the video "The Destruction of the American Destroyer *U.S.S. Cole*," to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit, incite and advise persons to commit Terrorism;
- f. acted as personal secretary and media secretary of Usama bin Laden in support of al Qaeda;
- g. arranged for Muhammed Atta, also known as Abu Abdul Rahman al Masri, and Ziad al Jarrah, also known as Abu al Qa'qa al Lubnani, to pledge fealty, or "bayat," to Usama bin Laden;
- h. prepared the propaganda declarations styled as martyr wills of Muhammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by the said Muhammed Atta, Ziad al Jarrah and others at various locations in the United States on September 11, 2001;

Page 1 of 4 of the Continuation

AE 1 (al Bahlul)  
Page 2 of 13

Continuation to Military Commissions Form 458

Ali Hamza Ahmad Suliman al Bahlul  
Internment Serial Number \_\_\_\_\_

i. at the direction of Usama bin Laden, researched the economic effect of the September 11, 2001 attacks on the United States, and provided the result of that research to Usama bin Laden;

j. operated and maintained data processing equipment and media communications equipment for the benefit of Usama bin Laden and other members of the al Qaeda leadership, and;

k. armed himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden.

Charge II: 10 U.S.C. § 950u, Solicitation to commit Murder of Protected Persons, in violation of 10 U.S.C. § 950v(b)(1), to Attack Civilians, in violation of 10 U.S.C. § 950v(b)(2), to Attack Civilian Objects, in violation of 10 U.S.C. § 950v(b)(3), to commit Murder in Violation of the Law of War, in violation of 10 U.S.C. § 950v(b)(15), to Destroy Property in Violation of the Law of War, in violation of 10 U.S.C. § 950v(b)(16), to commit acts of Terrorism, in violation of 10 U.S.C. § 950v(b)(24), and to Provide Material Support for Terrorism, in violation of 10 U.S.C. § 950v(b)(25)

Specification: In that Ali Hamza Ahmad Suliman al Bahlul, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, from in or about February 1999 through in or about December 2001, at various locations in Afghanistan, Pakistan and elsewhere, wrongfully solicit, order, induce and advise Jaralla Saleh Mohammad Kahla al Marri, \_\_\_\_\_, \_\_\_\_\_, Faysal Hussein Galab, Shafal Mosed, \_\_\_\_\_, and other persons, known and unknown, to commit substantive offenses triable by military commission to wit: Murder of Protected Persons; Attacking Civilian Objects; Murder in Violation of the Law of War; Destruction of Property in Violation of the Law of War; Terrorism, and Providing Material Support for Terrorism, by preparing and assisting in the preparation of various propaganda products, including but not limited to the video "The Destruction of the American Destroyer *U.S.S. Cole*," said propaganda products being intentionally designed, made, distributed and shown in order to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, an international terrorist organization, and to solicit, order, induce and advise said persons to commit Murder of Protected Persons, to Attack Civilians, to Attack Civilian

Page 2 of 4 of the Continuation

AE 1 (al Bahlul)  
Page 4 of 13



Continuation to Military Commissions Form 458

Ali Hamza Ahmad Suliman al Bahlul  
Internment Serial Number \_



Objects, to commit Murder in Violation of the Law of War, to Destroy Property in Violation of the Law of War, to commit acts of Terrorism, and to Provide Material Support for Terrorism, with the intent that said offenses actually be committed.

Charge III: 10 U.S.C. § 950v(b)(25), Providing Material Support for Terrorism


Specification: In that Ali Hamza Ahmad Suliman al Bahlul, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, from in or about February 1999 through in or about December 2001, at various locations in Afghanistan and elsewhere, intentionally provide material support and resources to al Qaeda, an international terrorist organization then engaged in hostilities against the United States, including violent attacks on the United States' embassies at or near Nairobi, Kenya and Dar es Salaam, Tanzania on or about August 7, 1998; on the U.S.S. COLE at or near Aden, Yemen, on or about October 12, 2000, and; at various locations in the United States on or about September 11, 2001, knowing that al Qaeda has engaged or engages in terrorism, by:

- a. traveling to Afghanistan with the purpose and intent of joining al Qaeda;
- b. meeting with Saif al 'Adl, the head of the al Qaeda Security Committee, as a step toward joining the al Qaeda organization;
- c. undergoing military-type training at an al Qaeda sponsored training camp then located in Afghanistan near Mes Aynak;
- d. pledging fealty, or "bayat," to the leader of al Qaeda, Usama bin Laden, joining al Qaeda, and providing personal services in support of al Qaeda;
- e. preparing and assisting in the preparation of various propaganda products, including the video "The Destruction of the American Destroyer *U.S.S. Cole*," to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit, incite and advise persons to commit terrorism;
- f. acting as personal secretary and media secretary of Usama bin Laden in support of al Qaeda;

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AE 1 (al Bahlul)  
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Continuation to Military Commissions Form 458

Ali Hamza Ahmad Suliman al Bahlul  
Internment Serial **Number** 

g. arranging for Muhammed Atta, also known as Abu Abdul Rahman al Masri, and Ziad al Jarrah, also known as Abu al Qa'qa al Lubnani, to pledge fealty, or "bayat," to Usama bin Laden;

h. preparing the propaganda declarations styled as martyr wills of Muhammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by the said Muhammed Atta, Ziad al Jarrah and others at various locations in the United States on September 11, 2001;

i. at the direction of Usama bin Laden, researching the economic effect of the September 11, 2001 attacks on the United States, and providing the result of that research to Usama bin Laden;

j. operating and maintaining data processing equipment and media communications equipment for the benefit of Usama bin Laden and other members of the al Qaeda leadership, and;

k. arming himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden.

Page 4 of 4 of the Continuation

AE 1 (al Bahlul)  
Page 6 of 13  


# ATTACHMENT M



**From:** [Toole, Mark W CIV OSD OMC CA \(USA\)](#)  
**To:** [Meusch, Jacob E LCDR USN NAVY JAG WASH DC \(USA\)](#)  
**Cc:** [Skelton, Meghan S CIV \(US\)](#); [Engling, Morgan N Maj USAF DLSA \(USA\)](#); [Ball, Charles D LT USN OSD OMC \(USA\)](#); [Danielson, Mishaal A LT USN \(USA\)](#)  
**Subject:** RE: Request to Interview CA  
**Date:** Friday, June 28, 2019 11:41:28 AM

---

LCDR Meusch,

Thank you for your note. The CA respectfully denies your request.

V/R,  
Mark Toole

MARK L. TOOLE  
Deputy Legal Advisor  
Office of Military Commissions

[REDACTED]

[REDACTED]

Note: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without approval from the Office of the Convening Authority, Office of Military Commissions.

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

From: Meusch, Jacob E LCDR USN NAVY JAG WASH DC (USA) [REDACTED]  
Sent: Thursday, June 27, 2019 10:29 AM  
To: Toole, Mark W CIV OSD OMC CA (USA) [REDACTED]  
Cc: Skelton, Meghan S CIV (US) [REDACTED]; Engling, Morgan N Maj USAF DLSA (USA) [REDACTED]; Ball, Charles D LT USN OSD OMC (USA) [REDACTED]; Danielson, Mishaal A LT USN (USA) [REDACTED]  
Subject: Request to Interview CA

Mr. Toole,

Good morning, sir. I was recently assigned to the defense team for Mr. al-Tamir (charged as Hadi al Iraqi) and am emailing you to respectfully request to interview the CA as a potential witness in Mr. al-Tamir's case. From 2012 to 2015, while serving as the Chief Judge, Department of the Navy, the CA had administrative oversight of CAPT Waits, an earlier military judge in Mr. al-Tamir's case. Recently, it came to our attention that CAPT Waits applied for jobs with the Department of Justice and the Department of the Navy while serving as the judge in Mr. al-Tamir's case. Therefore, the defense would like to interview the CA about his knowledge of (or involvement in) CAPT Waits's pursuit of post-military employment.

Thank you in advance for your time and attention to this matter.

Very Respectfully,

Jacob E. Meusch  
LCDR, JAGC, USN

Military Commissions Defense Organization

A large black rectangular redaction box covering several lines of text.

# ATTACHMENT N





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

24 June 2019

From: Defense Counsel ICO *United States v. Abd Al Hadi Al-Iraqi*

To: Trial Counsel

Ref: (a) 10 U.S.C. §949j(a); 10 U.S.C. §949b(a)(2); RMC 701;  
(b) Military Commissions Rules of Evidence (MCRE);  
(c) U.S. Const., Amend. 5;  
(d) U.S. Const., Amend. 6;  
(e) *Strickland v. Washington*, 466 U.S. 668 (1984); and  
(f) Common Articles 3 and 4, and Article 75 of Additional Protocol I to the Geneva Conventions.

SUBJ: Fifty-Sixth Supplemental Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*

1. In accordance with references (a) through (f), the Accused, Nashwan al-Tamir (ISN 10026), through defense counsel, respectfully requests that the government produce and permit the defense to inspect, copy, or photograph each of the requested items listed in the sections below. This request includes a demand that the government preserve all information that may fall within the scope of discovery sought below but that the government either does not intend to produce or believes is not discoverable.

2. The Defense further requests that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery.

3. The requested evidence is material to the preparation of the defense and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested.

4. The requested information is known or, with the exercise of due diligence, should be known to the United States or its agents.

5. If the government does not intend to provide defense with copies of documents or tangible objects, the defense requests a reasonable opportunity to inspect, photograph and photocopy such documents or objects.

6. This discovery request is continuing, and shall apply to any additional charges or specifications, in addition to those referred after the date of this discovery request is served upon the government. The defense reserves the right to supplement this request for discovery at any time, as new information becomes available.



7. Due to our current compressed litigation schedule, the defense requests a response to this discovery request no later than Monday, 1 July 2019.

8. All references to Mr. al-Tamir includes the “also known as” names to include but not limited to: Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) and all aliases of Abd al Hadi al-Iraqi listed in Appendix A of the charge sheet referred on 2 June 2014.

9. On 23 May 2019 the Acting Secretary of Defense designated “Rear Admiral Christian L. Reismeier, USN (Ret) as Convening Authority for Military Commissions.” On 28 May 2019 the Department of Defense issued a news release (NR-131-19) announcing RDML Reismeier as the Convening Authority for Military Commissions and Director of the Office of the Convening Authority for Military Commissions. The news release also described RDML Reismeier’s background, noting that he is a retired rear admiral in the U.S. Navy who had served as both an Assistant Judge Advocate General of the Navy and Chief Judge, Department of the Navy.

10. On 14 June 2019 RDML Reismeier issued a Memorandum For Secretary of Defense in two cases—*United States v. al Nashiri* and *United States v. Bahlul*. In the memorandum for each case, RDML Reismeier recused himself “from serving as the Convening Authority.” In both cases, RDML Reismeier explained that recusal was “appropriate in order to avoid even the appearance of partiality,” and cited several facts that could give rise to such appearance. In *al Nashiri*, RDML Reismeier “provided assistance” to the prosecution in 2014 and 2016 “on certain legal issues” and mentored a prior member of the prosecution team. In *Bahlul*, RDML Reismeier “joined several retired military flag officers . . . in signing an *amicus* brief . . . when the case was before the United States Court of Appeals for the District of Columbia Circuit” and “attended a prosecution sponsored briefing on the appeal.”

11. RDML Reismeier attached a “Memorandum for File” dated 14 June 2019 to each Memorandum for Secretary of Defense. In the Memorandum for File, he described his “[i]nvolvement in Military Commissions” and disclosed that he was “involved in assigning people” from the Navy “from 2006 to 2009, and again from 2012 to 2015.” RDML Reismeier stated that he served as the “Assistant Judge Advocate General, Chief Judge, Department of the Navy” from 2012 to 2015.

12. JAG/CNLSCINST 5400.1C states that the Assistant Judge Advocate General, Chief Judge, Department of the Navy (AJAG 05) “is the senior supervisory jurist of the Department of the Navy with primary administrative oversight responsibility of the judiciary at both the trial and appellate levels.” It further states that AJAG 05 “is the principal strategic planner for the professional development, selection, training, and deployment of the judiciary” and “is designated Rules Counsel for judicial misconduct and for professional responsibility matters involving military judges . . . .”

13. JAGNOTE 5450 states that AJAG 05’s “principal duties include supervision and management of the trial and appellate judiciary organizations within the Department of the Navy . . . .” To that end, AJAG 05 serves as the “reporting senior for the Chief Judge of the Trial Judiciary . . . [and] any judge requiring second-level review in accordance with governing fitness report instructions, including military judges in the paygrade of O-6 . . . .” JAGNOTE 5450 further states that AJAG 05 is “the Judge Advocate General’s principal advisor on the



assignment of officers to positions within the trial and appellate judiciaries,” which includes “officers to be nominated for duty under the Department of Defense as military commission trial or appellate judges.”

14. JAGINST 5813.4I, which was in effect from 2011 to 2017, and its successor, JAGINST 5813.4J, provide guidance on the structure of the trial judiciary in the Navy and Marine Corps. Both instructions make clear that AJAG 05 is the “reporting senior for the Chief Trial Judge” and provided all necessary “second-level” or “flag review” for military judges, “including flag review of fitness reports for Navy trial judges in pay grade 0-6 . . . .” The instructions further state that the Chief Trial Judge is the “Officer-in-Charge of the Trial Judiciary and shall exercise direct supervisory authority over the Trial Judiciary.”

15. On 3 June 2014, the Chief Judge, Military Commissions Trial Judiciary detailed CAPT John K. Waits, JAGC, USN as the military judge in Mr. al-Tamir’s case. (AE 001.) Pursuant to the 2012 version of R.M.C. 503(b)(1), the Chief Judge detailed CAPT Waits “from a pool of certified military judges nominated for that purpose by” the Judge Advocate General of the Navy. At the time of CAPT Waits’s nomination, RDML Reismeier was serving as AJAG 05. Additionally, Colonel Daniel Daugherty, USMC was serving as the Chief Trial Judge. Colonel Daugherty retired from active-duty in 2015 and shortly afterwards became an Assistant Chief Immigration Judge within the United States Department of Justice.<sup>1</sup>

16. Starting in 2013, before he was detailed as the judge in Mr. al-Tamir’s case, CAPT Waits served as the Circuit Military Judge, Navy-Marine Corps Trial Judiciary, Europe, Africa, and Southwest Asia Circuit (Naples, Italy). (AE 010.) From 2009 to 2013 CAPT Waits served as the Circuit Military Judge, Navy-Marine Corps Trial Judiciary, Southern Circuit (Naval Air Station, Jacksonville, FL). (AE 010.) As a member of the Navy’s trial judiciary between 2012 and 2015, CAPT Waits fell under the “administrative oversight” of RDML Reismeier and “supervisory authority” of Colonel Daugherty. Moreover, RDML Reismeier served as the second-level reviewing authority for CAPT Waits’s fitness report.

17. On 16 April 2019 the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion *In Re: Abd Al-Rahim Hassein Muhammed Al-Nashiri*, No: 18-1279 explaining that, in that Military Commission’s case, the Military Judge’s job application to the Justice Department created a disqualifying appearance of partiality. Consequently, the D.C. Circuit vacated all of the Military Judge’s orders issued after his job application.

18. On 25 April 2019 the government informed defense counsel via email that CAPT Waits applied for employment with both the Department of Justice and the Department of the Navy. On information and belief, CAPT Waits currently works for the Department of the Navy as a civilian employee, having retired from active-duty.

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<sup>1</sup> United States Department of Justice, Office of the Chief Immigration Judge, Biographical Information, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios#DanielJ.Daugherty>.



19. On 29 April 2019 AE 151 was filed under seal, noting there was at least one instance of CAPT Waits's submitting an application.

20. On 30 April 2019 the defense filed the Fifty-Fourth Supplemental Request for Discovery, which pertained to CAPT Waits's and his pursuit of employment with the executive branch of the U.S. government. On 14 May 2019 the government responded. The government has also provided additional discovery concerning CAPT Waits's pursuit of employment while serving as the military judge in Mr. al-Tamir's case.

21. Given CAPT Waits's pursuit of employment with both the Department of Justice and the Department of the Navy, there is now a conflict-of-interest issue concerning his time as the military judge in Mr. al-Tamir's case. Addressing this issue will require litigation before the Commission. Given that RDML Reismeier occupied a supervisory role over CAPT Waits, was involved in the nomination and detailing process of Navy personnel to the Military Commissions, which would have included the detailing of CAPT Waits, and served as the designated Rules Counsel for professional responsibility matters involving the Navy's military judges during a period of time when CAPT Waits potentially labored under a conflict-of-interest as the military judge in Mr. al-Tamir's case, information concerning the nature and extent of RDML Reismeier's role and involvement on the issue is relevant. Accordingly, the information requested below is relevant and material to the preparation of the defense.

22. The defense requests any and all correspondence, meeting minutes, reports, memos, briefs, emails, or documents of any kind relating to and/or discussing the nomination and/or detailing of CAPT Waits to the Military Commissions Trial Judiciary. This request includes, but is not limited to, communication between and among CAPT Waits and/or RDML Reismeier and any of the following:

- a. the Judge Advocate General of the Navy;
- b. the Deputy Judge Advocate General of the Navy;
- c. the Assistant Judge Advocate General of the Navy (AJAG 01);
- d. the Assistant Judge Advocate General of the Navy (AJAG 02);
- e. the Assistant Judge Advocate General of the Navy (AJAG 05);
- f. the Assistant Judge Advocate General of the Navy (AJAG 06);
- g. the Chief Judge of the Trial Judiciary;
- h. personnel serving as detailers for members of the Navy JAG Corps; and/or
- i. personnel serving in direct support of the people listed in 22(a)-(h) or otherwise serving in their place in an acting capacity.

23. The defense requests any and all correspondence, reports, memos, briefs, emails, or documents of any kind relating to and/or discussing CAPT Waits's pursuit of employment with

any organization within the executive branch of the U.S. government and/or his retirement from active-duty military service, to include, but not limited to, pursuit of employment within the Department of Justice as an immigration judge. This request includes, but is not limited to, communication between and among CAPT Waits and/or RDML Reismeier and the following:

- a. the Judge Advocate General of the Navy;
- b. the Deputy Judge Advocate General of the Navy;
- c. the Assistant Judge Advocate General of the Navy (AJAG 01);
- d. the Assistant Judge Advocate General of the Navy (AJAG 02);
- e. the Assistant Judge Advocate General of the Navy (AJAG 05);
- f. the Assistant Judge Advocate General of the Navy (AJAG 06);
- g. the Chief Judge of the Trial Judiciary;
- h. personnel serving as detailers for members of the Navy JAG Corps; and/or
- i. personnel serving in direct support of the people listed in 23(a)-(h) or otherwise serving in their place in an acting capacity.

24. The defense requests any and all correspondence, meeting minutes, reports, memos, briefs, emails, or documents of any kind relating to and/or discussing the approval of CAPT Waits's retirement and/or any opinion issued on any potential conflict of interest that could arise as a result of his seeking or obtaining post-retirement employment. This request includes, but is not limited to, communication between and among CAPT Waits and/or RDML Reismeier and any of the following:

- a. the Judge Advocate General of the Navy;
- b. the Deputy Judge Advocate General of the Navy;
- c. the Assistant Judge Advocate General of the Navy (AJAG 01);
- d. the Assistant Judge Advocate General of the Navy (AJAG 02);
- e. the Assistant Judge Advocate General of the Navy (AJAG 05);
- f. the Assistant Judge Advocate General of the Navy (AJAG 06);
- g. the Chief Judge of the Trial Judiciary;
- h. personnel serving as detailers for members of the Navy JAG Corps; and/or
- i. personnel serving in direct support of the people listed in 24(a)-(h) or otherwise serving in their place in an acting capacity.



25. The defense requests any and all written opinions, guidance, instructions or related material or correspondence issued by or on behalf of the Navy Rules Counsel, the Office of the Judge Advocate General of the Navy, the Judge Advocate General of the Navy, the Deputy Judge Advocate General of the Navy, the Department of the Navy, the Department of Defense, and/or RDML Reismeier regarding the authorization for a military judge serving as a member of the Military Commissions Trial Judiciary to seek employment with the Department of Justice, the Department of Defense, the Department of the Navy, the Office of the Judge Advocate General of the Navy or any other organization within the executive branch of the U.S. government.

26. The defense requests any and all written guidance or instructions pertaining to the Judge Advocate General of the Navy's policy and procedure from 2012 to 2018 for addressing reports of professional responsibility issues against a military judge or a law clerk from the Department of the Navy who was serving as a member of the Military Commissions Trial Judiciary, including any and all written guidance or instruction that RDML Reismeier assisted in drafting or creating or that he implemented in his role as the Rules Counsel for professional responsibility matters involving military judges.

27. The defense requests any and all written guidance or instructions pertaining to the Judge Advocate General of the Navy's policy and procedure from 2012 to 2018 for nominating and detailing military judges to the Military Commissions Trial Judiciary, including any and all written guidance or instruction that RDML Reismeier assisted in drafting or creating or that he implemented through his administrative oversight of the Department of the Navy's military judges.

28. The defense requests any and all email, text messages, or communication of any kind, written or electronic, between CAPT Waits and RDML Reismeier relating to Mr. al-Tamir's case and/or CAPT Waits's status as a member of the Military Commissions Trial Judiciary.

29. The defense requests any and all notes, memos, reports, emails, or other written communications generated, received, or sent by RDML Reismeier relating to Mr. al-Tamir's case.

30. The defense requests copies of CAPT Waits's fitness reports from 2012 to 2017, any retirement connected performance evaluations, and any and all notes, comments, memos, reports, emails, or other written communications made or received by RDML Reismeier that relate to CAPT Waits's fitness reports.

31. The defense requests any and all notes, memos, reports, emails, or other written communications generated, received, sent, or reviewed by RDML Reismeier relating to CAPT Waits's pursuit of employment with the Department of Justice, the Department of Defense, the Department of the Navy, the Office of the Judge Advocate General of the Navy or any other organization within the executive branch of the U.S. government. This request includes, but is not limited to, any record where RDML Reismeier was listed or otherwise served as a reference for CAPT Waits and all related records.



32. On 2 November 2015, RDML Reismeier joined an *amicus* brief in *Ali Hamza Ahmad Suliman al Bahlul v. United States* filed by the Washington Legal Foundation in support of the respondent, the United States, and advocated for the affirmance of Mr. al Bahlul's conspiracy conviction. Like Mr. al Bahlul, the government has charged Mr. al Tamir with a conspiracy offense under the Military Commissions Act for conspiring with the same person in the same time period as Mr. al Bahlul.

33. In joining the Washington Legal Foundation, RDML Reismeier aligned himself with an organization whose self-described purpose is to "ensure the federal government possesses the tools necessary to protect [the United States] from those who would seek to destroy it and/or harm its citizens." Brief of *Amici Curiae* at 3, *Bahlul v. United States*, 840 F.3d 757 (2016) (No. 11-1324). To that end, the *amici*, which included RDML Reismeier, sought to avoid a decision from the D.C. Circuit that "would impose unwarranted restrictions on the authority of the elected branches of government to convene military commissions to conduct trials of law-of-war offenses." *Id.* at 4. In the view of RDML Reismeier and the *amici*, it was "inappropriate for the courts to second-guess the considered judgments of the political branches regarding how to best conduct an armed conflict." *Id.*

34. Before agreeing to support the government in *Bahlul*, arguing that conspiracy is an offense triable by a military commission and advocating for the affirmance of Mr. al Bahlul's conspiracy conviction, RDML Reismeier met with the Chief Prosecutor, Office of Military Commissions, Brigadier General Mark. S. Martins, USA to discuss the matter. At the request of Brig. Gen. Martins, RDML Reismeier agreed to meet in the offices of the Office of the Chief Prosecutor to attend a briefing on the issue. RDML Reismeier then agreed to publicly support the government in *Bahlul*.

35. Brigadier General Martins also contacted RDML Reismeier to discuss the prosecution of Mr. al Nashiri. First, in 2014, while RDML Reismeier was serving as AJAG 05, he discussed a jurisdiction issue with Brig. Gen. Martins and provided guidance on the timing of proof of jurisdiction. In 2015, after RDML Reismeier retired, Brig. Gen. Martins contacted RDML Reismeier again, asking him to participate in a moot argument as an expert on an evidentiary issue. RDML Reismeier agreed, and in doing so, provided assistance and guidance to attorneys in the Office of the Chief Prosecutor.

36. Before agreeing to Brig. Gen. Martins's requests for assistance in the prosecution of cases before a military commission, RDML Reismeier also served with Brig. Gen. Martins on the Detention Policy Task Force. As RDML Reismeier stated in his Memorandum for File, he served with Brig. Gen. Martins in 2009 and maintained professional contact with him until 2016.

37. Before serving with Brig. Gen. Martins in 2009, RDML Reismeier served as the Navy representative on a working group to develop the procedural and evidentiary rules for military commissions practice under the Military Commissions Act (MCA) of 2006. In 2008, he again participated in a working group focused on "rules/regulatory changes that could be made swiftly to the MCA without statutory change and . . . changes to the MCA itself." Following his service on the working group, he was assigned as the Chair of the Military Commissions Sub-Working Group for the Detention Policy Task Force (DPTF) and a staff member of the DPTF.



38. While working on the DPTF, RDML Reismeier was involved in drafting legislative proposals and articulating options for changes to the MCA. In coordination with another attorney, he personally participated in a rewrite of the MCA entirely. Congress eventually passed the Military Commissions Act of 2009 (MCA 2009), and working up to the passage of MCA 2009, RDML Reismeier prepared the Judge Advocate General of the Navy for testimony before the Senate and House Armed Services Committees regarding his views on military commissions. Later in 2009, RDML Reismeier served as the Co-Chair of the DPTF, which was a responsibility he shared with a Department of Justice representative.

39. 10 U.S.C. § 948h authorizes a designee of the Secretary of Defense to convene a military commission. R.M.C. 504 provides that a designee who is “an accuser may not convene a military commission for the trial of the person accused,” and instead, he or she must forward the charges to the Secretary of Defense for disposition. Under R.M.C. 103(a)(31), an accuser includes any person who has an interest other than an official interest in the prosecution of the accused.

40. As stated in 10 U.S.C. § 949b, some of the actions of a convening authority are “judicial” in nature. Under 10 U.S.C. § 950b(c), a convening authority is required to act in a judicial capacity and is authorized to, among other things, “modify the findings and sentence of a military commissions,” which includes the statutory authority to “dismiss any charge or specification by setting aside a finding of guilty” and “approve, disapprove, commute, or suspend the sentence in whole or in part.” The convening authority also has the authority to order a rehearing. 10 U.S.C. § 950b(d).

41. Given the judicial duties of a Military Commissions Convening Authority and RDML Reismeier’s past alignment with the Washington Legal Foundation, support of the government in *Bahlul*, support for the affirmance of a conspiracy conviction that is related to one of the charges against Mr. al Tamir, repeated guidance to attorneys in the Office of the Chief Prosecutor regarding the prosecution of individuals before a military commission, involvement in the drafting of both the MCA of 2006 and the MCA of 2009, involvement in the drafting of procedural rules for the military commissions, and work on the DPTF in coordination with the Department of Justice and other members of the executive branch, the following requests are relevant and material to the preparation of the defense and of particular significance since RDML Reismeier now serves as the first post-trial reviewing authority in Mr. al-Tamir’s case.

42. The defense requests any and all correspondence, meeting minutes, reports, memos, briefs, emails, records of meetings, or documents of any kind that were sent, received, reviewed, or created by RDML Reismeier and relate to and/or discuss the charge of conspiracy under MCA 2006 and/or MCA 2009, both in connection with specific cases before the military commissions and in general. This request includes, but is not limited to, communication between and/or among RDML Reismeier and any of the following:

- a. members of the Department of Justice;
- b. the Judge Advocates General (and the Staff Judge Advocate to the Commandant of the Marine Corps);

- c. uniformed or civilian members of the Department of Defense, Department of the Army, Department of the Air Force, Department of the Navy, and/or Department of Homeland Security;
- d. members of the Washington Legal Foundation;
- e. members of the Detention Policy Task Force;
- f. members in the Office of the Chief Prosecutor for Military Commissions; and/or
- g. named *amici* in the Washington Legal Foundation's brief in *Bahlul*.

43. The defense requests any and all correspondence, meeting minutes, reports, memos, briefs, emails, records of meetings, or documents of any kind that were sent, received, reviewed, or created by RDML Reismeier and relate to and/or discuss the MCAs of 2006 and 2009, the drafting of the MCAs of 2006 and 2009, proposed changes to the MCAs of 2006 and 2009, the Rules for Military Commissions (RMCs), the drafting of the RMCs, proposed changes to the RMCs, the Military Commission Rules of Evidence (MCREs), the drafting of the MCREs, proposed changes to the MCREs, the President's detention policy, and responses to Congressional inquiries concerning military commissions or detention at Guantanamo Bay. This request includes, but is not limited to, communication between and/or among RDML Reismeier and any of the following:

- a. members of a past or present President's administration;
- b. members of the Office of the Counsel of the President;
- c. members of the Department of Justice;
- d. the Judge Advocates General (and the Staff Judge Advocate to the Commandant of the Marine Corps), their deputies, and their staff;
- e. uniformed or civilian members of the Department of Defense, Department of the Army, Department of the Air Force, Department of the Navy, and/or Department of Homeland Security;
- f. members of the Washington Legal Foundation;
- g. members of the Detention Policy Task Force;
- h. members in the Office of the Chief Prosecutor for Military Commissions;
- i. named *amici* in the Washington Legal Foundation's brief in *Bahlul*; and/or
- j. members of Congress and/or their staff and/or the staff of the Senate and House Armed Services Committees.

44. The defense requests any and all meeting minutes, reports, secretarial notes, correspondence, meeting records, or documents of any kind that were produced in connection



with the Detention Policy Task Force and its sub-working groups while RDML Reismeier was involved in the DPTF in any capacity, to include his time as a working group participant, Chair of the Military Commissions Sub-Working Group for the Detention Policy Task Force, and Co-Chair of the DPTF, as well as his ad hoc consultations from the 2010-2015 timeframe.

45. The defense requests any and all correspondence, meeting minutes, applications, reports, memos, briefs, emails, records of meetings, or documents of any kind that relate to RDML Reismeier's application, selection, and designation as Military Commissions Convening Authority. This request includes, but is not limited to, any communication that may be evidence of unlawful influence or the appearance of unlawful influence in violation of 10 U.S.C. § 949b. It further includes, but is not limited to, any communication between and/or among RDML Reismeier and any of the following:

- a. the President and/or any members of his administration;
- b. the Secretary of Defense, Acting Secretary of Defense, the Department of Defense General Counsel's Office, or any member of the Office of the Secretary of Defense;
- c. any member of the Department of Justice;
- d. the Judge Advocates General (and the Staff Judge Advocate to the Commandant of the Marine Corps), their deputies, and their staff;
- e. members of Congress and/or their staff and/or the staff of the Senate and House Armed Services Committees.

46. If the requested items are not in the possession of the government, the defense requests the government seek their production.

47. If the government believes that it has provided any of the *specific* items, information or evidence in the course of the discovery process, the defense requests that the government identify in writing those items, information or evidence by Bates number and production date.

48. If the above requested items have been lost or destroyed, the defense requests a list and description of the destroyed records; all summaries, transcripts, reconstructions, and memoranda regarding the destroyed records; the names and contact information for all persons who read or viewed the records before they were destroyed; the date and reason for their loss or destruction; and copies of any investigations pertaining to their loss or destruction.

49. The defense reserves the right to make additional discovery requests.

Respectfully submitted,

//s//  
SUSAN HENSLER  
Lead Defense Counsel

//s//  
CHARLES BALL  
Lieutenant, U.S. Navy  
Detailed Defense Counsel



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

26 June 2019

From: Defense Counsel ICO *United States v. Abd Al Hadi Al-Iraqi*

To: Trial Counsel

Ref: (a) 10 U.S.C. §949j(a); 10 U.S.C. §949b(a)(2); RMC 701;  
(b) Military Commissions Rules of Evidence (MCRE);  
(c) U.S. Const., Amend. 5;  
(d) U.S. Const., Amend. 6;  
(e) *Strickland v. Washington*, 466 U.S. 668 (1984); and  
(f) Common Articles 3 and 4, and Article 75 of Additional Protocol I to the Geneva Conventions.

SUBJ: Supplement to Fifty-Sixth Supplemental Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*

1. In accordance with references (a) through (f), the Accused, Nashwan al-Tamir (ISN 10026), through defense counsel, respectfully requests that the government produce and permit the defense to inspect, copy, or photograph each of the requested items listed in the sections below. This request is a supplement to the Fifty-Sixth Supplemental Request for Discovery and includes a demand that the government preserve all information that may fall within the scope of discovery sought below but that the government either does not intend to produce or believes is not discoverable.

2. The defense further requests that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery.

3. The requested evidence is material to the preparation of the defense and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested.

4. The requested information is known or, with the exercise of due diligence, should be known to the United States or its agents.

5. If the government does not intend to provide defense with copies of documents or tangible objects, the defense requests a reasonable opportunity to inspect, photograph and photocopy such documents or objects.

6. This discovery request is continuing, and shall apply to any additional charges or specifications, in addition to those referred after the date of this discovery request is served upon the government. The defense reserves the right to supplement this request for discovery at any time, as new information becomes available.



7. Due to our current compressed litigation schedule, the defense requests a response to this discovery request no later than Wednesday, 3 July 2019.

8. All references to Mr. al-Tamir includes the “also known as” names to include but not limited to: Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) and all aliases of Abd al Hadi al-Iraqi listed in Appendix A of the charge sheet referred on 2 June 2014.

9. The defense incorporates, by reference, the background listed in paragraphs 9 through 11 and 32 through 41 of the Fifty-Sixth Supplemental Request for Discovery *ICO United States v. Abd Al Hadi Al-Iraqi* dated 24 June 2019.

10. The defense requests any and all correspondence, memos, notes, briefs, emails, records of meetings, text messages, call logs, or documents involving communication between RDML Reismeier and a prosecutor in any case before a military commission. This includes communication with any prosecutor in Mr. al-Tamir’s case, as well as RDML Reismeier’s mentee who served as a prosecutor in Mr. al-Nashiri’s case. The requested communication includes anything that was sent, received, reviewed, or created by RDML Reismeier.

11. If the requested items are not in the possession of the government, the defense requests the government seek their production.

12. If the government believes that it has provided any of the *specific* items, information or evidence in the course of the discovery process, the defense requests that the government identify in writing those items, information or evidence by Bates number and production date.

13. If the above requested items have been lost or destroyed, the defense requests a list and description of the destroyed records; all summaries, transcripts, reconstructions, and memoranda regarding the destroyed records; the names and contact information for all persons who read or viewed the records before they were destroyed; the date and reason for their loss or destruction; and copies of any investigations pertaining to their loss or destruction.

14. The defense reserves the right to make additional discovery requests.

Respectfully submitted,

//s//

SUSAN HENSLER  
Lead Defense Counsel

//s//

CHARLES BALL  
Lieutenant, U.S. Navy  
Detailed Defense Counsel



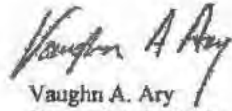
# ATTACHMENT O

ACTION

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

January 9, 2015

In the military commission of Noor Uthman Muhammed, in light of decisions of the Court of Appeals for the D.C. Circuit in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) and *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), it appears that it was legal error to try the offenses of providing material support for terrorism and conspiracy to provide material support for terrorism before the military commission. Accordingly, the findings of guilty are set aside and the sentence is disapproved. The charges are dismissed.



Vaughn A. Ary  
Convening Authority  
for Military Commissions

No Military Commission Orders were issued in 2014

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

MILITARY COMMISSION ORDER  
NUMBER 1-15

January 9, 2015

Noor Uthman Muhammed, a/k/a "Abu Al-Hareth;" "Farouq;" "Farouk;" "Ikramah;" "Ekrima;" "Akrama;" "Muhammed Nor Usman;" Muyammed Nor Uthman;" "Samir;" "Zamir Muhammed;" "Abu Haris", was arraigned and tried before a non-capital military commission convened at United States Naval Station, Guantanamo Bay, Cuba, pursuant to Military Commission Convening Order Number 07-04, dated 1 May 2007, as amended by Convening Orders 07-07, dated 19 December 2007; 09-03, dated 7 January 2009; 10-01, dated 24 June 2010; 10-03, dated 6 August 2010; 10-05, dated 15 November 2010; and 11-01, dated 27 January 2011.

The accused was arraigned and tried on the following offenses and the following findings were reached:

Charge I: Violation of 10 U.S.C. § 950t(25) – Providing Material Support to International Terrorist Organizations – including but not limited to al Qaeda

Plea: Guilty; Finding: Guilty

Charge II: Violation of 10 U.S.C. § 950t(29) – Conspiracy to Provide Material Support to an International Terrorist Organization and Terrorism

Plea: Guilty; Finding: Guilty

**SENTENCE**

The following sentence was adjudged by the members on 18 February 2011: confinement for 14 years.

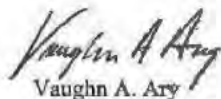
**PREVIOUS ACTIONS**

On November 1, 2013, a previous Convening Authority took action to defer Mr. Muhammed's confinement effective December 3, 2013, but delayed taking action on the findings and sentence pending appellate resolution of fundamental legal issues impacting this military commission. Subsequently, the D.C. Circuit ruled that providing material support to terrorism was not a cognizable law of war offense under the Military Commissions Act and, consequently, could not be tried by a military commission. The Court's ruling is also dispositive on the issue of whether the offense of conspiracy to provide material support to terrorism could be tried before a military commission. Recognizing the binding effect of the D.C. Circuit's rulings, an Action consistent with those decisions is required in this case.



ACTION

In the military commission of Noor Uthman Muhammed, in light of decisions of the Court of Appeals for the D.C. Circuit in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) and *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), it appears that it was legal error to try the offenses of providing material support for terrorism and conspiracy to provide material support for terrorism before the military commission. Accordingly, the findings of guilty are set aside and the sentence is disapproved. The charges are dismissed.



Vaughn A. Ary  
Convening Authority  
for Military Commissions

DISTRIBUTION:

- 1-Accused (Mr. Muhammed)
- 1-Military Judge (CAPT Modzelewski)
- 1-Trial Counsel (LtCol Weirick)
- 1-Defense Counsel (MAJ Fitzgibbons,  
CDR McCormick, CAPT Kannady)
- 1-Chief, Office of Court Administration, OMC
- 1-Clerk of Court, CMCR
- 1-OSD (OGC)
- 1-JTF GTMO (Detention Facility)
- 1-SJA, JTF GTMO
- 5-Original Record of Trial
- 1-Each Copy of the Record of Trial