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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p>(U) AE 158U</p> <p>(U) Defense Notice Regarding AE 158R and 158T</p> <p>28 October 2019</p>
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1. ~~(U)~~ **Timeliness**

~~(U)~~ This notice is timely-filed in accordance with AE 158T Order – Clarification and Extended Deadline for Relief Granted in AE 158R.

2. ~~(U)~~ **Background**

~~(U)~~ In AE 158R, this commission denied Mr. al-Tamir’s motion to dismiss (AE 158), but granted relief “in the form of reconsideration of any rulings and orders issued by Judge Waits specifically identified by the Defense as warranting review.”¹ The commission ordered the defense to identify the specific rulings for which the defense seeks reconsideration by 18 October 2019. In response, the defense notified the commission that it would not “identify rulings pursuant to the purported relief provide in AE 158R as [Mr. al-Tamir] is continuing to litigate the conflicts issues in the appellate courts.”² In addition, the defense explained that the relief afforded by AE 158R is illusory: R.M.C. 905(f) already permits Mr. al-Tamir to request reconsideration of any ruling at any time prior to authentication of the record of trial, and M.C.R.E. 505(f) statutorily prohibits Mr. al-Tamir from seeking reconsideration of any substitutions or redactions of classified

¹ ~~(U)~~ See AE 158R at 21.

² ~~(U)~~ AE 158S at 2.

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information. Thereafter, the commission issued a clarification, and ordered the defense to file a notice of the orders for which it sought reconsideration on pain of waiver.

~~(U)~~In addition, the commission issued 110V 5th Amended Litigation Schedule. That order, though lifting several of the imminent motions deadlines from AE 110S, does not include a proposed timeline for incorporating relief under AE 158R. Notably, there has been no adjustment to the trial schedule. Thus, the effect of that ruling has been to condense several years' worth of litigation into a ten-month trial schedule, effectively punishing Mr. al-Tamir for raising meritorious issues of judicial conflicts of interest.

3. ~~(U)~~ Notice of Objection to Procedure Outlined in AE 158R and AE 158T

~~(U)~~First, it remains the position of the defense that the military judge himself is laboring under an apparent conflict of interest, *see* AE 160, and therefore incapable of fashioning appropriate relief.

~~(U)~~Second, it is impossible to articulate and identify the impact of the appearance of bias on every order issued by a judge operating under an apparent conflict of interest.³ In that vein, by ordering Mr. al-Tamir to merely identify, rather than litigate, “any orders or rulings it desires the Commission reconsider,” the commission has read Mr. al-Tamir out of the remediation process entirely. This course of action invites a judicial rubber-stamp,⁴ particularly in light of the fact that the current litigation schedule—AE 110V—functionally bars meaningful review of the years' worth of rulings issued by Judge Waits.

³ ~~(U)~~ *See In re Al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) (“With apparent bias, ordinary appellate review fails to restore public confidence in the integrity of the judicial process—confidence that is irreparably dampened once a case is allowed to proceed before a judge who appears to be tainted.”)(internal citations and quotation marks omitted)

⁴ ~~(U)~~ *Cf.* AE 158R at 20 (“[T]his Commission is confident that the Accused has suffered no actual injustice.”).

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~~(U)~~ Third, this approach ignores changes in circumstances over the past five years. Mr. al-Tamir has an entirely new defense team, and theories of defense have evolved. By merely identifying orders “warranting review,” and not re-litigating them, the commission eliminates Mr. al-Tamir’s chosen defense counsel out of the remediation process.

~~(S)~~ Moreover, there have been dramatic changes in classification guidance, as well as developments in other commissions in the past five years that necessarily affect the litigation of this case. In pretrial litigation, Mr. al-Tamir seeks to show that there is no real distinction between his black site statements to the CIA and his later statements in Guantanamo, and that they are all equally inadmissible as “obtained by the use of torture or by cruel, inhuman, or degrading treatment” in violation of the Military Commissions Act (MCA).⁵ Indeed, the early and frequent



In a recent 9/11 hearing, the government admitted that it had recently changed the classification guidance for chronological information included on black site documents turned over in discovery.⁸ It is now able to provide more detailed information about the dates on which the

⁵ ~~(U)~~ 10 U.S.C. § 948r(a).

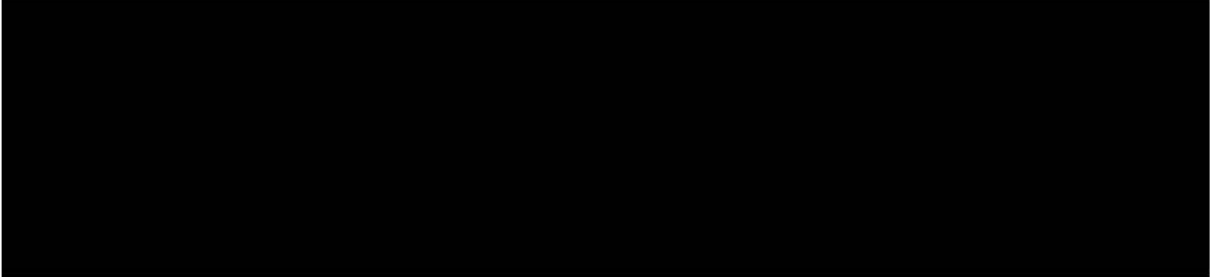


⁸ ~~(U)~~ *United States v. Mohammad*, et al. Unofficial/Unauthenticated Tr. (4/29/19) at p. 22770.

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documents were produced, even going so far as to retroactively “apply a more liberalized standard” to the discovery already produced.⁹ Every additional bit of information helps. Dates are critical to



~~(U)~~ *Fourth*, this purported relief ignores the cascading effect of Judge Waits’s rulings. The litigation in the AE 021 series provides an example. Two months after Judge Waits applied to be an immigration judge, the defense filed a motion grounded in Mr. al-Tamir’s sincerely held religious belief that men and women who are unrelated should not have physical contact. He sought emergency relief to prevent physical contact between him and female guards. More than two dozen pleadings were filed in that series, with at least five orders preceding the final ruling in AE 021DD. Judge Waits ultimately denied Mr. al-Tamir relief in late February 2015 (although he had granted

⁹ ~~(U)~~ *Id.*



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a short period of interim relief), in a ruling that describes two forced cell extractions¹² used against Mr. al-Tamir when he objected to physical contact with women.¹³

~~(U)~~ During the very first hearing over which Judge Rubin presided, Mr. al-Tamir objected to coming to court based on these same sincerely held religious beliefs. Defense counsel asked for Judge Rubin to either order an all-male guard force to attend to Mr. al-Tamir's movement or to allow reconsideration of AE 021DD.¹⁴ The government objected, explicitly referring to Judge Waits's ruling, stating that the AE 021 series was "vigorously fought by both the defense and the government," and that doing anything other than what AE 021DD contemplated would "gut the law of the case."¹⁵ The government then asked the military judge to enter an order to "forcefully bring Mr. Hadi to the table."¹⁶ Judge Rubin agreed and stated, "I am going to issue the order as requested by the government."¹⁷ The guards then executed a forced cell extraction and brought Mr. al-Tamir—bleeding—into court.¹⁸

¹² ~~(U)~~ A forced cell extraction is a brutal procedure whereby a tactical team of guards dons riot gear and beat a detainee into submission, then remove the detainee from the cell. See Erica Goode, When the Cell Door Opens, Tough Tactics and Risk, New York Times, July 29 2014, available at <https://www.nytimes.com/2014/07/29/us/when-cell-door-opens-tough-tactics-and-risk.html>. The procedure is so violent that, during a training exercise on forced cell extractions on Guantanamo Bay, the soldier who volunteered to act as the detainee was permanently injured with a traumatic brain injury causing seizures that ended his military career with a 100% medical disability. David Zucchini, Ex-Soldier Recalls Beating He Received in Guantanamo Drill, Los Angeles Times, June 16, 2004, available at <https://www.latimes.com/archives/la-xpm-2004-jun-16-na-baker16-story.html>.

¹³ ~~(U)~~ AE 021DD at pp 5, 12.

¹⁴ ~~(U)~~ Unofficial/Unauthenticated Transcript at P. 946.

¹⁵ ~~(U)~~ *id.*

¹⁶ ~~(U)~~ *id.* at 947.

¹⁷ ~~(U)~~ *id.* at 948.

¹⁸ ~~(U)~~ *id.* at 960.

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~~(U)~~ Judge Rubin’s first order—not a written ruling, but an order from the bench—directly stemmed from one of Judge Waits’s rulings. In fact, the parties specifically addressed and argued about Judge Waits’s decision the first morning that Judge Rubin took the bench. And that decision itself, to employ a forced cell extraction to bring Mr. al-Tamir into court, precipitated the accelerating decline of Mr. al-Tamir’s pre-existing spinal disease. Within months of that brutal forced cell extraction, Mr. al-Tamir was on the verge of permanent paralysis. This began the period during which Mr. al-Tamir endured five surgeries in less than one year, three of them emergent, and two of them to correct complications from previous surgeries. The military commissions lost years of litigation and Mr. al-Tamir is permanently injured.

4. ~~(U)~~ Identification of Rulings Requiring Review

~~(U)~~ The above-discussed legal and practical considerations render the process of identifying particular rulings that “warrant[] review” untenable. Indeed, “[i]f a judge ‘should have been recused from the . . . proceedings, then any work produced’ by that judge ‘must also be ‘recused’—that is, suppressed.’”¹⁹ This means of course that all of Judge Waits’s rulings must be scrubbed. The military commission’s invitation to Mr. al-Tamir to pick and choose among the rulings is an invitation for him to forfeit his arguments pending in the appellate courts. Moreover, as discussed above, it also means that all of Judge Rubin’s and all of the current military judge’s orders also must be scrubbed from the record. However, in an effort to comply with the parameters of AE 158T, the defense notices the following:

¹⁹ ~~(U)~~ *In re Al-Nashiri*, 921 F.3d 224, 238 (D.C. Cir. 2019) (quoting *In re Brooks*, 383 F.3d 1036, 1044, 363 U.S. App. D.C. 228 (D.C. Cir. 2004)),

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~~(S)~~ First, the defense hereby requests reconsideration of all written rulings issued by Judge Waits,²⁰ including AE 004B, AE 004E, AE 004F, AE 005A, AE 005B, AE 005F, AE 005I, AE 006A, AE 006B, AE 007I, AE 008, AE 013C, AE 013D, AE 013H, AE 013I, AE 013K, AE 013L, AE 014A, AE 015, AE 015C, AE 015D, AE 015E, AE 015F, AE 015G, AE 015H, AE 015I, AE 015J, AE 015M, AE 015N, AE 015R, AE 015S, AE 015V, AE 015W, AE 015X, AE 015Y, AE 016, AE 018C, AE 020B, AE 020D, AE 020G, AE 020I, AE 020N, AE 020O, AE 020W, AE 021B, AE 021D, AE 021L, AE 021T, AE 021Z, AE 021DD, AE 022, AE 023B, AE 023G, AE 023O, AE 023P, AE 023T, AE 023W, AE 023GG, AE 023HH, AE 024C, AE 029B, AE 031, AE 032C, AE 032G, AE 032J, AE 033, AE 044A, AE 045L, AE 046, AE 049A, AE 049C, AE 049G, AE 049I, AE 051, AE 051C, AE 051E, AE 053B, AE 053D, AE 053G, AE 053I, AE 054, AE 054B, AE 054D, AE 055, AE 055A, AE 055D, AE 055G, AE 056, AE 056B, AE 056F, AE 057, AE 058B, AE 059A, AE 061, and AE 063.²¹

~~(S)~~ Second, the defense also hereby requests reconsideration of all oral rulings issued by Judge Waits.

²⁰ ~~(S)~~ Mr. al-Tamir intends this list to encompass every one of Judge Waits's written rulings. Counsel has attempted to compile an exhaustive list. But to the extent any ruling is missing from this list, it is unintentional.

²¹ ~~(S)~~ This list is responsive to AE 158T and complies with this Commission's order. It does not, however, fully address the scope of the necessary relief in Mr. al-Tamir's case. All three military judges have labored under an apparent conflict of interest.

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5. ~~(U)~~ Attachments

- A. ~~(U)~~ Certificate of Service, dated 28 October 2019.

Respectfully submitted,

//s//
SUSAN HENSLER
Lead Defense Counsel

//s//
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~~(U)~~ ATTACHMENT A

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~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I certify that on **28 October 2019**, I filed **AE 158U – Defense Notice Regarding AE 158R and 158T**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
SUSAN A. HENSLER
Lead Defense Counsel

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