UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**Joint Defense Motion** to Dismiss the Charges and Specifications for Defective Referral due to Unlawful Influence 15 May 2008

1. **Timeliness:** This motion is filed in response to referral of charges in this case and in anticipation of arraignment. There has not been a docketing order issued in this case. The Defense does not waive, and hereby reserves the right, to raise further motions challenging the constitutionality of provisions of the Military Commissions Act, including provisions pertaining to the admissibility of certain evidence; jurisdiction over Defendants; and other procedural defects. The Defense does not waive and reserves the right to supplement this Motion based on the government's response and receipt of discovery materials and additional information.

2. **Relief Sought:** Defendants Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Bin al Shibh, Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi, move to dismiss the charges and specifications with prejudice. In the alternative, the Defendants move to disqualify the Legal Advisor to the Convening Authority from further participation in this case.

3. **Overview:** The Military Commissions Act (MCA) prohibits the unlawful influence of trial or defense counsel. 10 U.S.C. § 949b (2006). The Legal Advisor to the Convening Authority, and political appointees in positions of senior leadership in the military commission process, unlawfully influenced the former Chief Prosecutor and his subordinates. The Legal Advisor also unlawfully sought to influence the Chief Defense Counsel and Deputy Chief

Defense Counsel. If the Legal Advisor is permitted to direct the actions of the Chief Prosecutor, then he has so closely aligned himself with the prosecutorial function that he cannot continue to provide the requisite impartial advice to the Convening Authority. Impartial pretrial advice by the Legal Advisor to the Convening Authority is required before charges may be referred for trial by a military commission. R.M.C. 601(d); R.M.C. 406.

4. **Burden and Standard of Proof:** Under U.S. military law, the defense bears the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The defense meets this burden by showing facts, "which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

Importantly, "disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial." *Stoneman*, 57 M.J. at 42. Even in the absence of actual command influence, unlawful command influence may place an "intolerable strain on public perception of the military justice system." *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). Dismissal may be an appropriate remedy to cure the appearance of unlawful influence. *See, e.g.*, *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). These same rules should apply to military commissions, where Congress has afforded

detainees greater protections against unlawful influence than those that are found in the Uniform Code of Military Justice (UCMJ).

5. Facts:

i. On April 15, 2004, the General Counsel for the Department of Defense promulgated Military Commission Instruction No. 6. (Appendix A). Instruction No. 6 established reporting requirements for personnel involved in the military commission process. The Appointing Authority reported to the Secretary of Defense. The Legal Advisor to the Appointing Authority reported to the Appointing Authority. The Chief Prosecutor Reported to the Legal Advisor to the Appointing Authority. (Appendix A, at 2).

ii. Before Colonel Morris Davis was detailed to the position of Chief Prosecutor, he was interviewed by Department of Defense General Counsel William J. Haynes. During their conversation, Colonel Davis reminded Mr. Haynes that there had been acquittals at the Nuremberg tribunals. Mr. Haynes responded by saying, "acquittals, we can't hold these men for six years and have acquittals. We have to have convictions." (Appendix B).

iii. On September 29, 2006, Colonel Davis attended a meeting of the Special Detainee Follow-Up Group. The meeting was held in Deputy Secretary of Defense Gordon England's office and was attended by Mr. England and Mr. Haynes. During the meeting, Mr. England raised the issue of charging so-called high value detainees: "We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the election."

iv. The Department of Defense has consistently labeled the Defendants "high value detainees," at least since their detention at Guantanamo Bay, Cuba. This label has been used by the Legal Advisor in reference to Defendants and publicly-so.

v. The Special Detainee Follow-Up Group met three times every week. Stephen Cambone, then the Under-Secretary of Defense for Intelligence, also attended these meetings. Mr. Cambone repeatedly advocated for the Department of Justice to have a greater role in the military commission process. He stated that military attorneys did not have the sophistication to deal with the cases before the commissions and that, if they had skill, they would be in the private sector. Colonel Davis resisted involvement in the military commission process by the Department of Justice. No civilian attorney from the Department of Justice had made an appearance in or before any commission until Colonel Davis resigned.

vi. While these meetings were taking place, Congress was drafting the MCA. During that process, Colonel Davis met with Senators Lindsey Graham and John McCain. They asked him what he needed to accomplish the mission of the Chief Prosecutor. Colonel Davis advised them that both the Chief Prosecutor and Chief Defense

Counsel should be uniformed officers. He also told them that these positions must be insulated from influence outside of their office. He drafted the language found in 10 U.S.C. § 949b, which prohibits interference with the Chief Prosecutor.

vii. On January 9, 2007, Mr. Haynes called Colonel Davis and asked him how quickly he could charge David Hicks. Colonel Davis replied that the Secretary of Defense had not yet promulgated the Rules for Military Commissions or the Regulation for Military Commissions and that he could not charge Mr. Hicks before the Secretary of Defense had issued the Manual for Military Commissions.

viii. Within thirty minutes of this call with Mr. Haynes, Mr. Dell'Orto, the Principal Deputy General Counsel, called to assure Colonel Davis that Mr. Haynes had been out of line, and to disregard everything Mr. Haynes had said.

ix. Ten days later, the Pentagon announced the issuance of the Rules for Military Commissions and the Regulation for Military Commissions. That same day, Mr. Haynes called Colonel Davis. He told Colonel Davis that he now had the Manual for Military Commissions and again asked how quickly he could charge David Hicks. He also asked Colonel Davis to charge a few additional detainees along with Mr. Hicks.

x. On February 2, 2007, Colonel Davis had charges sworn against David Hicks, Omar Khadr, and Salim Hamdan to the Convening Authority. He was unable to forward the charges to the Convening Authority because there was no Convening Authority until February 7, 2007, when Mrs. Susan Crawford was appointed to her current position.

xi. On March 26, 2007, David Hicks pleaded guilty to one charge of material support for terrorism. Colonel Davis was not informed of the pre-trial agreement until he arrived at Guantanamo Bay to attend the scheduled arraignment of Mr. Hicks. After Colonel Davis spoke publicly about not being included on pre-trial negotiations, the Convening Authority privately counseled Colonel Davis about his having publicly broken ranks with the Office of the Convening Authority.

xii. On July 1, 2007, Brigadier General Thomas Hartmann became the Legal Advisor to the Convening Authority. He immediately began what Colonel Davis describes as "nanomanagement" of the Office of the Chief Prosecutor, amounting to "cruel and unusual punishment." General Hartmann wanted a training program to enhance the prosecutors' trial skills, detailed briefs on the witnesses and evidence in each case, including its weaknesses, who they were, and what they would say, and he wanted to know the details of the prosecutors' closing arguments. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel.

xiii. General Hartmann questioned Colonel Davis' leadership, the integrity of Colonel Davis' Deputy, and the quality of the prosecution shop's work. He gave specific direction about improving that office. Colonel Davis was sufficiently shaken that he offered to resign; General Hartmann backed off and indicated resignation would not

be necessary.

xiv. On July 18, 2007, General Hartmann informed members of the prosecution that *he* was going to select the next cases to go forward. He wanted cases that would be "sexy" enough to capture the imagination of the American public, or cases in which an accused might have blood on his hands, rather than cases involving low level actors transporting documents. He specifically liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter. At a meeting in the Prosecution conference room, on July 19, 2007, General Hartmann announced to all in attendance that he wore two hats: one as Legal Advisor to the Convening Authority, and one in charge of the prosecution.

xv. On August 15, 2007, there was a meeting between Colonel Davis, General Hartmann, and various representatives of other agencies. Anticipating a favorable decision from the Court of Military Commission Review (CMCR) in the near future, General Hartmann directed that three cases be ready to refer the day that decision was issued. Colonel Davis objected that three cases could not be ready by that date, and thought it odd that the Legal Advisor should be directing a particular number of cases to be referred on a date certain. General Hartmann stopped the discussion by saying "I said we are going to have three cases ready on that day. Does everyone understand me?"

xvi. Colonel Davis had a policy against using evidence obtained through torture. General Hartmann took the position that prosecutors should not make the decision about whether evidence was reliable. He insisted that such decisions be left to military judges. Months later, during testimony before the Senate Judiciary Committee, General Hartmann reiterated his position that the military judge—not the prosecutor—would be the gatekeeper for such evidence. In response to a question from Senator Feinstein as to the admissibility of evidence obtained from waterboarding, General Hartmann twice declined to answer because "the discretion of a prosecutor is inappropriate to be dealt with in public." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann)(Appendix C, pp. 9-10). When pressed, he responded "Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence. And the question that will be before the judge when that comes up is whether the evidence is reliable and probative, and whether it's in the best interest of justice to introduce the evidence." *Id.* at 10. Similarly, when Senator Feinstein asked him, "So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used?," General Hartmann replied, "If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow." *Id.*

xvii. In August 2007, Colonel Davis and General Hartmann traveled together, and General Hartmann expressed his disappointment with the speed at which the trials were moving. General Hartmann wanted the trials to get moving, even if it meant using

closed sessions to admit classified evidence, while Colonel Davis preferred the lengthy process of classification review and inter-agency coordination, so that the cases could be tried publicly, using declassified evidence.

xviii. In September 2007, Colonel Davis delivered a formal complaint to the Convening Authority regarding the interference of General Hartmann in his office. When he called the Convening Authority a week later to inquire as to the status of his complaint, she informed him that General Hartmann did not work for her and that the complaint had been forwarded to General Hartmann's boss, Mr. William Haynes. During that telephone call, she stated that it was important to move cases along so that the commission system did not come to a halt.

xix. Colonel Davis' complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA, which concluded that there had been no unlawful influence on the Chief Prosecutor by the Legal Advisor because the Legal Advisor was authorized by regulation to influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d). (Appendix D).

xx. On October 3, 2007, Mr. England issued a memorandum establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007 (Appendix E). Colonel Davis reported to the Legal Advisor to the Convening Authority. The Legal Advisor reported to the Deputy General Counsel who in turn reported to Mr. Haynes. Colonel Davis resigned the next day.

xxi. Charges against Mohammed Jawad were sworn five days later, on October 9, 2007.

xxii. On January 29, 2008, the Deputy Chief Defense Counsel, Mr. Berrigan, was erroneously included in an e-mail from Colonel Kelly, of the Office of Military Commissions. (Appendix F). The e-mail contained draft charges against the Defendants. No charges against the Defendants had yet been preferred to the Convening Authority. Mr. Berrigan informed the Chief Prosecutor that the e-mail had been sent to him. After Colonel Kelly attempted to get the charges back from Mr. Berrigan, General Hartmann wrote to Colonel David, the Chief Defense Counsel, demanding that the draft charges be returned, and claiming that three branches of service's ethics advice indicated Mr. Berrigan had to return them. (Appendix G). Mr. Berrigan, who had consulted his bar association ethics office, declined to return the draft charges. (Appendix H).

xxiii. On February 11, 2008, the Office of the Chief Prosecutor submitted preferred charges to the Convening Authority. The Legal Advisor to the Convening Authority, General Hartmann, conducted the press conference announcing the charges that had been preferred. (Appendix I). At this press conference, he claimed that he had just received the charges from the Office of the Chief Prosecutor, a statement belied by the e-mail Mr. Berrigan had received two weeks earlier.

xxiv. On April 16, 2008, detailed defense counsel were read on to a classified program pertaining to the treatment of information gained in contact with any so-called high value detainee. Concurrently with admission to this classified program, counsel were presented with a protective order and memorandum of understanding (MOU) from the Convening Authority. (Appendix J and K). These documents reiterated counsel's obligation regarding the treatment of classified information, and purported to bind counsel for a period of time. A representative of the Convening Authority, Mr. Chapman, specified, before all counsel, that the protective order and MOU were not part of the process of being admitted to the classified program. Mr. Chapman never stated that signing the MOU was a condition of meeting high value detainee clients. Defense counsel prepared a response to the protective order and MOU, detailing concerns that the MOU extended the Convening Authority's powers. (Appendix L).

xxv. On April 16, 2008, the Legal Advisor submitted his pretrial advice to the Convening Authority, recommending the charges against Defendants be referred, and that the case be referred as a capital case against the first five Defendants. (Appendix M, LA pretrial advice).

xxvi. On April 23, 2008, four Defense Counsels (CAPT Prince, CDR Lachelier, LCDR Mizer, and LT Federico) traveled to Guantanamo Bay to meet their "high-value detainee" clients for the first time. General Hartmann also traveled to Guantanamo Bay at that time, for a one day trip. Upon arriving at Guantanamo Bay, counsel were informed by representatives of the Staff Judge Advocate, Joint Task Force Guantanamo, that the scheduled meetings with clients would not take place unless counsel signed the MOU from the Convening Authority. The Convening Authority's office had provided copies of the MOU to the SJA's office, in preparation for detailed counsels' arrival. General Hartmann met with detailed counsel for Mr. Mohammed, CAPT Prince, and personally informed him that no defense counsel would be permitted to meet a high value client without signing the MOU as drafted by the Convening Authority. Defense counsel signed the MOU in order to meet their clients.

xxvii. On May 9, 2008, in the Commission case of *United States v. Hamdan*, the military judge granted a defense motion to disqualify the Legal Advisor to the Convening Authority. (Appendix N – CAPT Allred's opinion). Referencing the government's burden, the judge ruled: "The Commission is not persuaded, beyond a reasonable doubt, that the Legal Advisor to the Convening Authority retains the required independence from the prosecution function to provide fair and objective legal advice to the Convening Authority."

xxviii. The Hamdan Commission found that the Legal Advisor to the Convening Authority was too closely involved in the prosecution of commission cases. In support of this ruling, the judge noted the impropriety of General Hartmann's "public statements in which he aligned himself with the prosecution, took credit for their success and indicated that he is their leader." Appendix N at 11. The judge also expressed concern that General Hartmann's "'nanomanagement' of the Prosecutors' office to such an extent that it could be considered "cruelty and maltreatment' suggests a

greater level of involvement than a Legal Advisor can properly engage without becoming part of the prosecution." *Id.*

xxix. The military judge specifically found that General Hartmann's "telling the Chief Prosecutor (and other prosecutors) that certain types of cases would be tried, and that others would not be tried, because of political factors such as whether they would capture the imagination of the American people, be sexy, or involve blood on the hands of the accused, suggests that factors other than those pertaining to the merits of the case were at play." *Id.* The judge also ruled that "Appearing to direct, or attempting to direct, the Chief Prosecutor to use evidence that the Chief Prosecutor considered tainted and unreliable, or perhaps obtained as the result of torture or coercion, was clearly an effort to influence the professional judgment of the Chief Prosecutor. While it is true that the trial judge is ultimately the gatekeeper for each item of evidence, each Prosecutor also has an ethical duty not to present evidence he considers unreliable." *Id.* The judge's ruling also noted that "the national attention focused on this dispute has seriously called into question the Legal Advisor's ability to continue to perform his duties in a neutral and objective manner." *Id.* at 12.

xxx. On May 9, 2008, the Convening Authority referred the charges against the Defendants, adhering to the specific recommendations of the Legal Advisor. The same day Judge Allred issued his opinion in *Hamdan* disqualifying General Hartmann from further participation in that case. On May 12, 2008, the charges, the Legal Advisor's pre-trial advice, and several memorandums related to referral were provided to the Defense. The government has not yet provided the defense all the documents which accompanied the charges at referral.

6. <u>Law and Argument</u>:

I. THE UNIFORM CODE OF MILITARY JUSTICE REFLECTS AN ATTEMPT BY CONGRESS TO LIMIT THE INFLUENCE OF CONVENING AUTHORITIES OVER PARTICIPANTS OF COURTS-MARTIAL

The central focus of the framers of the Uniform Code of Military Justice was the elimination of "any influence of command control from a court-martial." *United States v. Goodwin*, 5 U.S.C.M.A. 647, 659 (C.M.A. 1955) (Quinn, C.J., dissenting). At the hearings before the House Armed Services Committee, the American Bar Association complained, "the instances in which commanding officers influenced courts is legion." *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcommittee of the Committee on*

Armed Services United States Senate, 81st Cong. 717-18 (1949). And, when interviewed by the Vanderbilt Committee, sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts." *Id.* Through the enactment of Article 37, UCMJ, Congress sought to put an end to this practice. *Id.* at 1019.

But before the House Armed Services Committee approved Article 37, Mr. Robert W. Smart, a professional staff member, noted: "[R]egardless of what you write into law...any smart CO can get through this section here or through this article 50 different ways if he really wants to influence a court...all [Congress] can do is to express its opposition in good plain words, as here, to such practices." *Id.* at 1021.

The framers of the Code were particularly concerned about so called "skin letters." *Id.* at 46. Skin letters were commonly used by convening authorities to reprimand the participants of courts-martial for actions that the convening authority disapproved of. *Id.* at 164-65. Professor Morgan, the principal architect of the Uniform Code of Military Justice, described the intent of the framers to eliminate command influence from courts-martial:

> On the question of command control, we have thought it was well enough to leave with the convening authority at present the appointment of the court and the officers as long as you have this kind of a review, *as long as you have lawyers in control of the trial, and a prohibition against any attempt to influence them unduly.*

Id. at 164-65. (emphasis added). But the power to appoint key members of the court did not remain with the convening authority for long. Congress stripped the convening authority of the power to appoint military judges in the Military Justice Act of 1968. 10 U.S.C. § 826 (Oct. 24, 1968). The convening authority lost the authority to detail trial and defense counsel in the Military Justice Act of 1983. 10 U.S.C. § 827 (Dec. 6, 1983).

The detailing of trial and defense counsel is now left to service regulations. *Id.* In the Navy, trial and defense counsel are detailed by the Commander Naval Legal Service Command. COMNAVLEGSVCCOMINST 5450.1E, Mission and Functions of Naval Legal Service Offices and Trial Service Offices (June 18, 1997). In the Air Force, trial counsel are detailed by a Staff Judge Advocate, the Chief Senior Trial Counsel, Senior Trial Counsel, or the Chief or Deputy Chief of Government Trial and Appellate Counsel Division. Air Force Instruction 51-201, *Administration of Military Justice*, dated 21 December 2007; Air Force Manual 51-204, *United States Air Force Judiciary and Air Force Trial Judiciary*, dated 18 January 2008. Defense counsel are detailed by the Chief or Deputy Chief of Trial Defense Division. *Id.* Army regulations delegate the authority to detail trial counsel to the command staff judge advocate. Army Regulation 27-10, Military Justice (Nov. 16, 2005). Army defense counsel are detailed through the Army Trial Defense Service. *Id.*

II. UNDER THE UNIFORM CODE OF MILITARY JUSTICE, A LEGAL ADVISOR TO A CONVENING AUTHORITY IS NOT A PROSECUTOR. HE MUST REMAIN NEUTRAL IF HE IS TO PROVIDE IMPARTIAL ADVICE ON THE STATUTORY FUNCTIONS OF THE CONVENING AUTHORITY

Although today's convening authority has less control over the participants at courts-martial than she did in 1947, she still controls critical aspects of courts-martial. She alone possesses prosecutorial discretion and determines if charges will be brought against an accused and in which forum. 10 U.S.C. §§ 822, 823, 830 (2006). She appoints the members who will decide the question of guilt or innocence and determine an appropriate sentence if an accused is convicted. 10 U.S.C. § 825 (2006). And, if an accused is convicted, she has the authority to approve, reduce, or set aside the findings and sentence of a court-martial. 10 U.S.C. § 860 (2006).

The Court of Appeals for the Armed forces has emphasized the importance of ensuring that the convening authorities and legal advisors who carry out these important statutory responsibilities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004) (*citing United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997); *United States v. Coulter*, 3 U.S.C.M.A. 657, 660 (C.M.A. 1954) ("However honest his intentions, an inherent conflict arises between a reviewer's duty to dispassionately advise the convening authority on the appropriateness of the sentence, and the prosecutor's innate desire to press for a substantial sentence as an accolade for his efforts in securing the conviction.")). The Court has disqualified legal advisors from performing statutory duties when they have not remained "neutral" in fact or in appearance. *Taylor*, 60 M.J. at 194. "A Staff Judge Advocate is not a prosecutor and is usually in a position to give neutral advice." *United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997) (*citing* 10 U.S.C. § 806(c) (2006)).

III. IN THE MILITARY COMMISSIONS ACT, CONGRESS BROADENED ARTICLE 37'S PROHIBITION AGAINST UNLAWFUL COMMAND INFLUENCE BY CREATING THE OFFICE OF CHIEF PROSECUTOR AND BY PROHIBITING INTERFERENCE WITH HIS PROFESSIONAL JUDGMENT

The congressional prohibition against unlawful command influence found in the UCMJ was also codified in the MCA. But Congress did not simply transplant the prohibition against unlawful influence found in Article 37, UCMJ, into § 949b of the MCA. Article 37, UCMJ, prohibits persons subject to the Code from coercing or unlawfully influencing "the action of a court-martial or any other military tribunal or any member thereof...." 10 U.S.C. § 837 (2006). Section 949b of the MCA is broader in scope and prohibits *any person* from coercing or unlawfully influencing "the exercise of professional judgment by trial counsel or defense counsel." 10 U.S.C. § 949b (2006). Colonel Davis has testified, and the Hamdan Commission

so-found, that Senators John McCain and Lindsey Graham inserted these provisions into the MCA at his request to secure the independence of the Chief Prosecutor from interference external to his office. Senator Graham later commented on Colonel Davis' service as Chief Prosecutor from the Senate floor: "There is no finer officer in the military than Colonel Davis. He is committed to render justice." 152 CONG. REC. S10394 (Sep. 28, 2006) (statement of Sen. Graham).

IV. THE SECRETARY OF DEFENSE CANNOT AUTHORIZE UNLAWFUL INFLUENCE OF THE CHIEF PROSECUTOR BY REGULATION

While Congress sought to create an independent Office of the Chief Prosecutor, and even recognized Colonel Davis by name from the floor of the Senate, it made no mention of the Legal Advisor to the Convening Authority. The Legal Advisor to the Convening Authority is solely a creation of the Secretary of Defense. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (Regulation) 8-6.

The secretarial creation of this position is particularly surprising given the fact that Congress appears to have deliberately omitted the position of legal advisor when it codified the MCA. As Steven Bradbury noted in his statement before the House Committee on Armed Services, the MCA "track[s] closely the procedures and structure of the UCMJ." *Hearing Before the House Armed Services Committee on the Military Commissions Act*, 109th Cong. 3 (2006) (statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice). But while Article 6 of the UCMJ addresses the function and role of staff judge advocates and legal officers, the MCA does not contain a single reference to either position. While Congress could have inserted Article 6 into the MCA, as it did with many other provisions of the UCMJ, it elected not to do so. Instead, Congress created an office entirely foreign to military justice: Chief Prosecutor.

Congress' failure to insert the UCMJ positions of staff judge advocate or legal advisor into the MCA was not an accident. One of the central purposes of the UCMJ was to strike a "delicate balance between justice and command discipline...." *United States v. Littrice*, 3 U.S.C.M.A. 487, 492 (C.M.A. 1953); Chief Judge Andrew S. Effron, Evolving Military Justice 172, Naval Institute Press (2002). During the congressional hearings on the UCMJ, "a sharp conflict arose between those who believed the maintenance of military discipline within the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from commanders military justice would always be a mockery." *Littrice*, 3 U.S.C.M.A. at 491. In the UCMJ, "Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws." *Littrice*, 3 U.S.C.M.A. at 491;*United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979) (The authority given to the staff judge advocate and the convening authority in military justice was intended to "establish the proper relationship between the legitimate needs of the military and the rights of the individual soldier").

In drafting the MCA, Congress did not have to strike the "delicate balance" between justice and command discipline. It was left to focus solely on justice and compliance with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Command discipline for the alleged members of the Taliban and Al Qaeda currently detained at Guantanamo was left to their commanders in the field. None of the five Defendants are in any chain of command within the U.S. military. Accordingly, all references to commanding officers were omitted, as were many of the powers retained for commanding officers under the UCMJ. While Congress retained a diminished convening authority in the MCA, it eliminated the legal officer entirely.

Despite the congressional declination to provide for a legal officer, the Secretary of

Defense has attempted to reinsert the legal officer into the military commission process. Section 8-6 of the Regulation states that the Chief Prosecutor shall report to the Legal Advisor to the Convening Authority. The Defense does not suggest that the Secretary of Defense could not have created a legal officer to advise the convening authority. But he cannot nullify the congressional intent to create an independent office of the chief prosecutor by subordinating the Chief Prosecutor to the Legal Advisor to the Convening Authority and ultimately to the Convening Authority herself. Nor can he circumvent the congressional prohibition against unlawfully influencing the Chief Prosecutor by cloaking such conduct in the purported legality of a regulation. The Tate Investigation concluded that General Hartmann did not unlawfully coerce or influence the Chief Prosecutor because regulation permitted him to coerce and influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d) (Appendix D).

Nothing in the plain language of § 949b or in the legislative history of the MCA suggests that Congress intended to subordinate the independent role and function of the Chief Prosecutor to functionaries later to be created by the Secretary of Defense. The creation of a Chief Prosecutor was itself a radical departure from the Uniform Code of Military Justice. And the congressional command that "no person" shall coerce or, without authorization, influence the Chief Prosecutor could not be plainer. If the Secretary of Defense can simply authorize coercion or influence of the Chief Prosecutor by regulation, what remains of the congressional prohibition against unlawful influence?

The attempt by the Secretary of Defense to authorize coercion and influence on the Chief Prosecutor is void *ab initio.* In cases of conflict, Manual provisions must yield to the statute. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000). Federal statutes prevail over

provisions of the Manual unless the Manual provision provides the accused with greater rights than the statute. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). The C.A.A.F. has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the statutory language of the UCMJ. *See e.g.*, *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). In this case, the Secretary of Defense cannot disregard the congressional command that "no person" coerce or, without authorization, influence the Chief Prosecutor by simply authorizing the statutorily prohibited conduct.

V. EVEN IF THE SECRETARY OF DEFENSE WAS WITHIN HIS AUTHORITY TO SUBORDINATE THE CHIEF PROSECUTOR TO THE LEGAL ADVISOR TO THE CONVENING AUTHORITY, THE LEGAL OFFICER HAS EXCEEDED HIS AUTHORITY AND HAS BECOME THE *DE FACTO* CHIEF PROSECUTOR

As addressed fully above, military courts have required that legal advisors to convening authorities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). The Legal Advisor to the Convening Authority in this case provides advice to the convening authority on whether or not to grant clemency, on the selection of members, and on whether charges should be referred for trial at all. 10 U.S.C. §§ 948h; 948i; 950b (2006). "A fair and impartial court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges." *United States v. Dowty*, 60 M.J. 163, 170 (C.A.A.F. 2004). A fair and impartial military commission is no less an equally fundamental protection for the Defendants in this case. Like the selection of members for courts-martial, the selection of members for service on military commissions "is not the convening authority's solitary endeavor." *Id.* at 169. She must "necessarily rely on" her staff, including her legal advisor. *Id.*; *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999).

Military courts have consistently disqualified staff judge advocates and convening

authorities from further participation in cases when their actions have called into question their impartiality. *United States v. Clisson*, 5 U.S.C.M.A. 277, 280 (C.M.A. 1954) ("[W]e do not doubt the personal integrity of trial counsel, but we cannot overlook the fact that his previous antagonistic role prevents his exercising that degree of impartiality required by the Code."); *United States v. Coulter*, 3 U.S.C.M.A. 657, 659 (C.M.A. 1954) ("[H]uman behavior is such, that when a person, interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter."); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); *United States v. Howard*, U.S.C.M.A. 187 (C.M.A. 1974); *United States v. Lacey*, 23 U.S.C.M.A. 334 (C.M.A. 1975).

Perhaps with these cases in mind, the Tate Investigation warned the Legal Advisor in this case to "avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as trial counsel." Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d) (Appendix D). General Hartmann appears to have disregarded this admonition.

At a press conference to announce the preferral of charges against the Defendants, General Hartmann announced that he had received sworn charges against these men on February 11, 2008. Transcript of Press Conference of General Hartmann of February 11, 2008 (Appendix I). In fact, his office had been internally circulating drafts of the charges two weeks earlier. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix F). Moments later, General Hartmann explained how he would review the charges that his office assisted in drafting: "I will evaluate the charges and all of the supporting evidence, along with

the Chief Prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the Convening Authority for the Military Commissions." Transcript of Press Conference of General Hartmann of February 11, 2008 (Appendix I).

In a February 22, 2008, interview with National Public Radio's Madeleine Brand, General Hartmann denied that there was political interference in the commission process. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008) (Appendix O). He compared himself with Colonel Davis: "I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months—and in the last four months since Colonel Davis has been gone we have moved 10 cases." *Id.* He then explained the recent surge in prosecutorial activity: "It's from me insisting that we move the process." *Id.* In a letter published in the *Los Angeles Times*, General Hartmann stated that he "directed [Colonel Davis] to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office." Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007 (Appendix P).

General Hartmann made similar statements while testifying before the senate judiciary committee in December 2007. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann) (Appendix C). "If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trial process, it has been my effort, and no one has directed me in that regard." *Id.* In response to a question from Senator Sessions, General Hartmann elaborated on his role in driving additional

prosecutions:

> Senator, the focus—my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material evidence, the most important evidence, the most significant evidence among the roughly 80-90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need—we needed to focus on the most material cases and bring those forward as rapidly as possible.

He testified that his focus "is on the 80 to 90 people we intend to try for war crimes trials with the military commissions process." *Id.* "The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record." *Id.*

If there was any doubt that General Hartmann was aligning himself too closely with the prosecutorial function when the Tate Investigation issued its findings on September 17, 2007, there can be none now. General Hartmann openly equates his achievements during his tenure as *Legal Advisor* with those of the former *Chief Prosecutor*, Colonel Davis. He also claims to have single-handedly energized the prosecutorial effort. He has done all of this while serving in an office requiring objectivity and neutrality. He has done all of this while the charges in this case have been preferred and referred. As he noted when testifying before the Senate Judiciary Committee, an accused "will also have the right to have his findings, if he's found guilty, and his sentence reviewed by the convening authority, impartially, impartially." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann) (Appendix C). But the man who will advise her, indeed, who has advised her in the referral of this case and who ostensibly is to advise her on issues such as funding for expert witnesses and the selection of

members, is no longer impartial.

VI. THE LEGAL ADVISOR TO THE CONVENING AUTHORITY HAS ALSO SOUGHT TO UNLAWFULLY INFLUENCE THE OFFICE OF CHIEF DEFENSE COUNSEL

On January 25, 2008, a member of the Convening Authority's staff, Colonel Wendy Kelly, inadvertently emailed a draft copy of the charges against Khaleed Sheikh Mohammed and five other detainees to Mr. Michael Berrigan, the Deputy Chief Defense Counsel. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix F). The draft charges were being circulated within the Office of the Convening Authority. *Id.* Mr. Berrigan immediately notified Colonel Kelly of the disclosure and ascertained it was inadvertent, but after seeking counsel from his state bar, refused to return the draft charges.

On February 1, 2008, the Legal Advisor to the Convening Authority wrote a memorandum to the Chief Defense Counsel, Colonel Steven David. Memorandum from B.G. Hartmann to Colonel David dated Feb. 1, 2008 (Appendix G). General Hartmann stated that he had contacted the professional responsibility offices for the Army, Navy, and Marine Corps and they had opined that Mr. Berrigan must return the draft charges in this case; charges which approximately two weeks later General Hartmann claimed to have just received. *See*, Facts, para. xxiii. He demanded the return of the draft charge sheet. *Id.* General Hartmann forwarded a copy of the letter to Colonel David's immediate supervisor, Mr. Paul S. Koffsky. At time Mr. Koffsky, who is the Deputy General Counsel for Personnel and Health Policy for the Department of Defense, reported to Mr. Haynes. General Hartmann's insistence on inserting himself into the preferral process provides a troubling indication of his influence upon the prosecutorial function. The fact that the Legal Advisor, rather than the Chief Prosecutor, sent the Memorandum to the Chief Defense Counsel illustrates the point that the Legal Advisor failed to retain the required

independence from the prosecution function and maintain his ability to provide independent, neutral, and impartial advice to the Convening Authority.

The MCA prohibits attempting to coerce or unlawfully influence the professional judgment of trial or defense counsel. 10 U.S.C. § 949b (2006). While the Secretary of Defense has attempted to circumvent the statutory prohibition against unlawful influence of trial counsel by regulation, he has not done so for defense counsel. When unlawful influence is directed against a defense counsel, it "affects adversely an accused's right to effective assistance of counsel." *Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

The charge sheet, which was being circulated within the Office of the Legal Advisor, indicates that the Legal Advisor and the Convening Authority are playing a much larger role in this particular military commission process than they will publicly admit, and certainly a vastly larger role than Congress envisioned. The Legal Advisor's attempt to coerce the Chief Defense Counsel into returning the draft charges by raising allegations of ethical misconduct was prohibited by statute. 10 U.S.C. § 949b (2006). Such conduct places an intolerable strain on the public perception of the military commissions system. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). The strain in this case is already readily apparent:

> Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in the media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008

(Appendix Q).

VII. THE REFERRAL OF CHARGES IS DEFECTIVE BECAUSE THE CONVENING AUTHORITY DID NOT RECEIVE IMPARTIAL ADVICE FROM THE LEGAL ADVISOR AS DEMONSTRATED BY HIS UNLAWFUL INFLUENCE

Before any charge may be referred for trial by a military commission, it shall be referred to the Legal Advisor of the Convening Authority for consideration and advice. R.M.C. 406; R.M.C. 601(d). The Convening Authority must receive the consideration and advice from an impartial and neutral Legal Advisor. *Taylor* 60 M.J. at 193. As properly demonstrated, General Hartmann failed to retain the required independence from the prosecution function to provide fair and objective legal advice to the Convening Authority regarding a referral decision. As such impartial advice was not received, the referral is defective. The charges should be dismissed with prejudice.

7. **Request for Oral Argument:** The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. R.M.C. 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. **Request for Witnesses:** The Defense believes the following witnesses will materially assist the commission in considering this motion:

A. Mr. Michael Chapman, OMC

B. CAPT Patrick McCarthy, JAGC, USN, Staff Judge Advocate, JTF-GTMO

The Defense reserves the right to call additional witnesses should the Government Response raise issues requiring rebuttal by live testimony.

9. **Conference with Opposing Counsel:** The Defense has conferred with the

Prosecution, which opposes this motion.

10. Attachments:

A. Military Commission Instruction No. 6.

B. Transcript of Testimony of Col Morris Davis, USAF, before Military Commission ICO *United States v. Salim Hamdan*, April 28, 2008 (to be provided once transcribed).

C. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann).

D. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d).

E. Memorandums for Legal Advisor and Chief Prosecutor for Military Commissions dated Oct. 3, 2007.

F. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008.

G. Memorandum from BG Hartmann to Colonel David dated Feb. 1, 2008.

H. Transcript of Testimony of Mr. Michael Berrigan, Deputy Chief Defense Counsel, before Military Commission ICO *United States v. Salim Hamdan*, April 29, 2008 (to be provided once transcribed).

I. Transcript of Press Conference of General Hartmann of February 11, 2008.

J. Protective Order for Defense Counsel, dated April 16, 2008 (the protective order was issued to individual Defense Counsel but was identical in content)

K. Memorandum of Understanding between Defense Counsel and the Convening Authority (the MOU was issued to individual Defense Counsel but was identical in content)

L. Memorandum to Convening Authority from Defense Counsels, dated April 21, 2008

M. Legal Advisor's Pretrial Advice, April 16, 2008

N. Ruling on Motion to Dismiss (Unlawful Influence), *United States v. Salim Hamdan*, May 9, 2008

O. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008).

P. Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007.

Q. Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008.

Respectfully submitted,

By: _____
CAPT PRESCOTT PRINCE, JAGC, USNR
LTCOL MICHAEL ACUFF, JAGC, USAR
Detailed Defense Counsel for
Khalid Sheikh Mohammed
Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]

By: _____
LCDR JAMES HATCHER, JAGC, USNR
Capt CHRISTINA JIMENEZ, USAF
Detailed Defense Counsel for
Walid Muhammad Salih Mubarak Bin 'Attash
Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]

By: _____
CDR SUZANNE LACHELIER, JAGC, USNR
LT RICHARD FEDERICO, JAGC, USN
Detailed Defense Counsel for

Ramzi Bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions

[redacted]

By: _____
LCDR BRIAN MIZER, JAGC, USN
MAJ AMY FITZGIBBONS, JAGC, USAR
Detailed Defense Counsel for
Ali Abdul Aziz Ali
Office of the Chief Defense Counsel
Office of Military Commissions

[redacted]

By: _____
MAJ JON JACKSON, JAGC, USAR
LT GRETCHEN SOSBEE, JAGC, USN
Detailed Defense Counsel for
Mustafa Ahmed Adam al Hawsawi
Office of the Chief Defense Counsel

[redacted]

UNITED STATES OF AMERICA **v.** **KHALID SHEIKH MOHAMMED;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED AL HAWSAWI**	**(D-001)** **Government's Response** to the Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence 22 MAY 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court.

2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence. The Defense fails to demonstrate how the Legal Advisor to the Convening Authority or senior political appointees improperly influenced the prosecution of this case in a manner that would render the Convening Authority's referral of the charges invalid. Similarly, the Defense fails to establish a proper basis to disqualify the Legal Advisor from further participation in this case.

3. **Overview:** There was no unlawful influence in this case. The Legal Advisor was authorized to take all of the actions the Defense claims constitute "unauthorized influence," consistent with his roles as supervisor of prosecutors and the independent legal advisor to the Convening Authority.

4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).[1]

[1] The decisions of the military courts interpreting the Uniform Code of Military Justice are not binding on this commission. *See* 10 U.S.C. § 948b(c). To the extent the court looks to the UCMJ for guidance, under court-martial practice, the Defense has the initial burden of producing sufficient evidence to show facts which, if true, would constitute unlawful influence, and that the alleged unlawful influence has a logical connection to courts-martial in terms of its potential to cause unfairness in the proceedings. *See Green v. Widdecke*, 19 U.S.C.M.A. 576, 579, 42 C.M.R. 178, 181 (1970) ("Generalized, unsupported claims of 'command control' will not suffice to create a justiciable issue."). The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (CMA 1986), *cert. denied*, 479 U.S. 1085, 94 L. Ed. 2d 146, 107 S. Ct. 1289 (1987); *United States v. Rosser*, 6 M.J. 267 (CMA 1979). After the burden shifts to the Prosecution, the Prosecution must address two distinct issues: (1) what must be proven? and (2) what is the quantum of proof required? *See United State v. Biagase*, 50 M.J. 143, 151 (1999) ("The [Prosecution] may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.").

5. Facts.

The following facts supplement or clarify assertions contained in the Defense motion (D-001) (and the numbering corresponds to the paragraphs in the Defense motion); the Prosecutionis prepared to support these facts with affidavits:

ii. Mr. Haynes did not say the words as quoted. He did tell Colonel Davis that the process would be under scrutiny and that the possibility of acquittals did not concern him. He made the decision to "hire" Colonel Davis for the position of Chief Prosecutor after this meeting. He spoke to trial and defense counsel several times during his tenure as Department of Defense General Counsel, always emphasizing their ethical duty to serve zealously and ethically in the roles they undertook.

iii. It was a meeting of the Special Oversight Group, not the Special Detainee Follow-Up Group (SDFG). The elections were on 7 November 2006. No charges had been sworn in any cases as of the meeting of 29 September 2006. Immediately after Deputy Secretary England made comments regarding the elections, Mr. Haynes, the DoD General Counsel, and one of about 16 persons present at the meeting, cautioned all in the group that the decisions on whom to charge and when to charge were the decisions of the Chief Prosecutor.

iv. The term "high value detainee" comes from The Office of the Director of National Intelligence, and refers to the program that included special safeguards and oversight for the questioning and processing of select detainees in U.S. custody. The Legal Advisor's use of this term reflects adoption of a term that he did not initiate, that precedes his tenure, and that has been used by many parties, including defense counsel. It reflects no prejudgment or lack of objectivity.

v. Mr. Cambone's comments were made, if at all, at the Special Oversight Group, not the SDFG. They drew no reaction from others at the meeting and had no impact on the commissions process. These comments are irrelevant.

vi. The defense statement that "the language found in 10 U.S.C. sec. 949b. . . prohibits interference with the Chief Prosecutor" is inaccurate. Section 949b reads as follows: "(2) No person may attempt to coerce or, by any unauthorized means, influence--
(C) the exercise of professional judgment by trial counsel or defense counsel." The unlawful influence section mentions neither the Chief Defense Counsel nor the Chief Prosecutor; it also does not use the words "interference" or "interfere."

viii. Mr. Dell'Orto does not recall having made such a phone call to Colonel Davis.

ix. Mr. Haynes asked Colonel Davis about charging detainee Hicks because Colonel Davis frequently had mentioned Mr. Hicks to him. Mr. Haynes did not at any time ask Colonel Davis

"to charge a few additional detainees along with Mr. Hicks."

xi. It is inaccurate that Colonel Davis did not know of the pretrial agreement until he arrived at Guantanamo Bay. He signed a document recommending approval of the pretrial agreement that Judge Crawford, the Convening Authority, considered before making her decision to approve the pretrial agreement. Colonel Davis's involvement in the negotiations was a sensitive matter because of the defense motion to disqualify him based on his public comments critical of defense counsel on the case.

Judge Crawford did not "privately counsel[] Colonel Davis about his having publicly broken ranks with the Office of the Convening Authority." She did not seek a meeting with him regarding his remarks, but in a later encounter with Colonel Davis the latter told her that he thought it was "healthy" that the press reported that he disagreed with her. She made no comment.

xii. General Hartmann did seek case briefs and orientation from prosecutors on cases they had in development.

xiv. The term "sexy" did not originate with BGen Hartmann but was a term used by Colonel Davis and others to signify cases that would capture public attention. Similarly, referring to cases with "blood" on them was understood by prosecutors, including Colonel Davis, as reflecting a case of sufficient gravity that it warranted expenditure of finite prosecutorial resources.

xvi. Colonel Davis told his staff that he would not push them to present evidence that was obtained in a manner that troubled them, though he did not use the terms "torture" or "waterboarding."

BGen Hartmann did not "insist[] that such decisions be left to military judges," but he did say, to the staff as well as in Congressional testimony, that reliability was properly the concern of the prosecutor while the judge, under the rules, had final call to evaluate the admissibility of the evidence "in the best interests of justice." BGen Hartmann never told Colonel Davis to have prosecutors present cases derived from torture or other questionable evidence; they had no conversations on this topic.

xvii. BGen Hartmann agreed with Colonel Davis's sentiment about trying cases in public to the maximum extent possible. The discussion regarding "closed sessions to admit classified evidence" refers to employing Military Commissions Rule of Evidence 505 to find a path to present in open court information for which the source or method by which it was obtained might be classified, a process with which Colonel Davis agreed.

xviii. Colonel Davis delivered his complaint to Judge Crawford's office on a Friday, and on Monday she called to tell him that she had presented it to Mr. Haynes, the DoD General Counsel, earlier that morning; she did not consider it a matter for the Inspector General, though Colonel Davis remained free to present it directly to the IG at any time. She also told Colonel Davis that she had directed that neither BGen Hartmann nor Mr. Michael Chapman, staff director for the

Office of Military Commissions (who also served as Acting Legal Advisor in the Legal Advisor's absence) would serve as legal advisor on any pending cases until the matters raised in Colonel Davis's complaint were resolved. She named Mr. Ron White, an attorney on her staff, to perform those functions in the meantime.

xx. The referenced memorandum does not mention that the Deputy General Counsel reports to Mr. Haynes (the General Counsel). It simply states that the Legal Advisor will report to the Deputy General Counsel who will supervise the Legal Advisor. In addition, Colonel Davis did not "resign;" Colonel Davis asked that he be relieved and on 5 October 2007 he was relieved of his duties.

xxii. BGen Hartmann's note did not "demand" the return of the draft; in fact (see the defense's own Appendix H), he wrote, "I believe that the clearest ethical guidance is that the Deputy should return the document and not use it in any fashion," concluding that "I am happy to discuss this matter further."

xxiii. BGen Hartmann said at his press conference that he had received sworn charges that morning – an accurate statement not "belied" by earlier circulation of draft charges.

xxiv. The last sentence mischaracterizes the defense response included as its own Appendix L. The counsel's principal concern was that the security advisors to the defense team be, in effect, walled off from the prosecution and that any communication with any other governmental agency be only for the purpose of making "need to know" determinations. It certainly does not complain that the MOU "extend[s] the Convening Authority's powers."

xxv. The Convening Authority took action contrary to the written advice of the Legal Advisor, who had recommended referring non-capital charges against detainee Qahtani; she dismissed charges against this detainee. The Convening Authority did not see the charges against these detainees in any form before they were sworn. The Legal Advisor's recommendation to the Convening Authority to refer the charges against Qahtani as non-capital was contrary to the recommendation of the Chief Prosecutor who recommended that the charges be referred as capital charges.

xxviii. The asserted concerns about BGen Hartmann's management style are inapplicable to and not substantiated with regard to the set of charges before this court.

xxix. No factors other than the merits of the case were involved in the decision of whom to charge and at what time. BGen Hartmann never directed Colonel Davis to use evidence derived from torture and never even discussed the topic of torture with him; moreover, BGen Hartmann was not "read-on" to the classified program dealing with High Value Detainees until four days after Colonel Davis filed his complaint, at which point substantive communication between the two had ceased. BGen Hartmann never directed Colonel Davis to use evidence obtained in a manner that either considered to have produced evidence that was tainted or unreliable.

Additional facts:

- The Convening Authority reports only and directly to The Secretary of Defense.

- Neither the Deputy Secretary of Defense nor the DoD General Counsel, nor the Under Secretary of Defense (Intelligence) has any supervisory relationship to the Convening Authority.

6. Law and Argument:

a. The Defense must prove the nexus between the actions of the Legal Advisor or senior political appointees and some legally cognizable harm to the accused.[2] The position of Chief Prosecutor is limited in its ability to affect the process; he need not swear charges – typically does not – and his judgments and recommendations are not final or conclusive.

b. Having failed to prove actual unlawful influence, the Defense has no basis for asserting apparent unlawful influence. The concept of apparent unlawful influence does not exist in the MCA, the MMC, or any of the regulations promulgated by the Secretary of Defense. To the extent, as a mater of judicial construction of the UCMJ, such decisions are expressly made not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the concerns upon which the unlawful command influence are based, have little applicability to the context of military commissions being used to prosecute our Nation's enemies. Whereas it may be appropriate to find apparent unlawful command influence even in the absence of prejudice to a member of our Armed Forces, such a broad and undefined concept is out of place when it can be used or easily manufactured by those at war with the United States.[3]

There is no basis for dismissing the charges or disqualifying the Legal Advisor in this case

c. Even if the facts were as represented by the Defense, they reflect the Legal Advisor's complementary role, one deeply rooted in military law, by which the Legal Advisor (Staff Judge Advocate) also supervises the prosecution effort.

d. The Secretary of Defense acted consistent with the Military Commissions Act (MCA) in fashioning the position of Legal Advisor, a lawful exercise of his authority as head of the Department of Defense, and consistent with the tradition and functions of the Staff Judge Advocate (SJA) in military practice.[4] The MCA empowers the Secretary of Defense to promulgate procedures for military commissions "so far as [he] considers practicable…[that] apply the principles of law…in trial by general court-martial." The role of the Staff Judge Advocate under the Uniform Code of Military Justice (UCMJ) is the precursor to and the equivalent of the Legal Advisor to the Convening Authority for the military commissions process. Just as the Manual for Courts-Martial requires the SJA to give independent legal advice on jurisdiction, sufficiency of the evidence and other factors[5], RMC 406 requires the Legal Advisor to make similar recommendations to the Convening Authority. Just as Article 36 of the UCMJ delegates the rule making authority to the President, Sec. 949a(a) of the MCA delegates rule-making authority to the Secretary of Defense.

---

[2] *United States v. Reynolds*, 40 M.J. 98, 202 (C.M.A. 1994).

[3] We note that even in the court-martial context, the burden for proving apparent unlawful command influence is high to guard against baseless allegations. *See, e.g., United States v. Lewis*, 63 M.J. 405, 415 (2006).

[4] 10 U.S.C. se9(a).

[5] See Rule for Courts-Martial 406(b)

e. There is nothing in BGen Hartmann's conduct, even as characterized by the Defense, that calls into question his ability to provide the "independent and informed appraisal of the charges" that the Discussion to RMC 406 suggests. His role as supervisor of the prosecution is complementary to, not in conflict with his role as the legal advisor to the Convening Authority ; the requirement to bring justice is present in both circumstances. The Defense adverts to decisions or recommendations that BGen Hartmann has made since assuming his role. An action as ministerial as seeking the retrieval of a missent document by someone on his staff should not be interpreted in a manner that calls into question his ability to perform his dual role. Not every recommendation or decision that is contrary to the Defense's wishes translates to the Legal Advisor's abandonment of his role; moreover, the Defense would agree that the Legal Advisor has no supervisory role over its operations, though his commitment to justice must include fair consideration of Defense submissions, requests, and legal arguments. Furthermore, the Defense fails to cite a single case where the Legal Advisor improperly pressured a trial or defense counsel.

f. For a Legal Advisor (SJA) to be disqualified, he must so thoroughly abandon any pretense of impartiality that his ability properly to give advice to the Convening Authority is unalterably compromised. In this case, the Defense complains simply that the Legal Advisor's supervision of the prosecution effort has been exacting and intensive, not that it has been unethical or in any sense inconsistent with the supervisory functions historically exercised by an SJA, who also serves as the legal advisor to a commander or convening authority.

Any influence the Legal Advisor had on this case was properly authorized by law

g. The Military Commissions Act (MCA) provides that no person may attempt to coerce or, by *any unauthorized* means, influence the exercise of professional judgment by trial counsel or defense counsel. 10 U.S.C. §949b(a)(2)(c). Of course, implicit within this section of the statute is the recognition that there may be persons who may influence both trial and defense counsel by *authorized* means. All of BGen Hartmann's actions, as averred by the Defense, were authorized by and consistent with the MCA, the Manual for Military Commissions (MMC), and well established principles of military jurisprudence,.

h. The MCA specifically gives the Secretary of Defense the authority to draft *pre-trial* procedures that apply the principles of law in trial by general courts-martial. See 10 U.S.C. §949a(a). Such pre-trial procedures would entail the Legal Advisor's responsibilities for supervision over the Prosecution, as well as the Legal Advisor's responsibilities to draft pre-trial advice on the sufficiency of the sworn charges; both common responsibilities of Staff Judge Advocates.

i. We note at the outset that the decisions of the military courts interpreting the Uniform Code of Military Justice are not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the positions of the SJA and the Legal Advisor, as they relate to the specter of unlawful command influence, differ in significant respects. For example, in typical military justice matters a court-martial convening authority's primary responsibility is for the good order and discipline of his subordinate troops; to assist him in these duties he has a "core s*taff*" which is often composed of a Chief of Staff, functional staff officers, and, among others, a Staff Judge Advocate. In contrast, the Convening Authority for Military Commissions has only the limited authority to make determinations on certain matters regarding military commissions, and has other military role. The Convening Authority possesses no "core staff" in the military sense of the term, and as such was not given a "Staff Judge Advocate." However, the Legal Advisor to the Convening Authority operates in a nearly identical manner to a Staff Judge Advocate on matters relating to justice.

j. The role of the Staff Judge Advocate under the Uniform Code of Military Justice is the precursor to and the equivalent of the Legal Advisor to the Convening Authority for the military commissions process. Just as the Manual for Courts-Martial requires the SJA to give independent legal advice on jurisdiction, sufficiency of the evidence and other factors[6], RMC 406 requires the Legal Advisor to make similar recommendations to the Convening Authority. Just as Article 36 delegates the rule making authority to the President, Sec. 949a(a) delegates rule making authority to the Secretary of Defense. Any analysis of BGen Hartmann's actions as Legal Advisor to the Convening Authority is best accomplished by evaluating whether an SJA to a General Court-Martial Convening Authority would have been authorized to take such action.

[6] See Rule for Courts-Martial 406(b)

k. Even assuming, for purposes of this motion, that everything the defense counsel alleged against BGen Hartmann is true, his actions were consistent with the role envisioned by the Secretary of Defense in the Manual for Military Commissions, and in accordance with generally accepted principles governing the role of a Staff Judge Advocate in the court-martial process. Contrary to the Defense claim, BGen Hartmann did not become the de facto Chief Prosecutor in this case. While the defense is correct that BGen Hartmann held a press conference after receiving a copy of the *sworn* charges, the press conference he gave was informational only, and expressed no opinion as to the guilt or innocence of the accused (and in fact emphasized that they were to be considered innocent at this stage).[7] In this press conference BGen Hartmann announced that *the Chief Prosecutor* had forwarded charges in a case of intense interest to the American public, and explained the process of how the charges would proceed under a legal system that was still relatively new to the American public. The need for factual and objective explanations about the military commission process, and the robust protections it affords to those accused, is an important and proper role for the Legal Advisor. While the Legal Advisor's Office reviewed draft charges in advance of the press conference, as might an SJA for a potential court-martial, his announcement that he had just received *sworn* charges the morning of the press conference was true. The defense motion suggests that BGen Hartmann gave a false official statement about when his office received sworn charges, an assertion it should realize is baseless, since the Defense admits that BGen Hartmann used the word "sworn" on page 16 of its brief.

l. Furthermore, it was completely reasonable for the Legal Advisor to believe drafts of the charge sheet circulating in his office were privileged attorney work product and to seek to recover any such material that was inadvertently disclosed to an outside party by a member of *his* staff. As the Legal Advisor is ultimately mandated by law to give legal advice regarding whether there is jurisdiction over an accused, as well as the sufficiency of the charges and the evidence, it was entirely proper for him to evaluate draft charges. To characterize BGen Hartmann's attempt to recover attorney work product as an attempt to "improperly influence" the Chief Defense Counsel's Office is a groundless distortion.

---

[7] The Defense cites an article (Defense Brief pg 20) by Scott Horton entitled "The Great Guantanamo Puppet Theatre" as "proof" that there is an intolerable strain on the public perception of the military commissions system. In this article, the author claims that BGen Hartmann denounced the defendants as "terrorist murderers who are finally seeing a glimpse of justice." The Prosecution challenges the Defense to present one shred of evidence that BGen Hartmann ever made such a statement. The article goes on to suggest that the *any* decisions in the case are to be referred to BGen Hartmann, and even cites to his role as "a sort of appellate authority" (both of which are either patently incorrect or, at the very minimum, misleading). While there very well may be a strain on the public perception of the military commission system, it is in no small part caused by reckless insinuation and falsehoods spread by such articles. While the authors clearly have the right to publish such articles, regardless if they are actually true, the Defense is surely aware of the inaccuracies in the article. Such evidence to support their argument that there is a strain on the public perception of the military justice system should carry zero weight with this commission.

Distinctions between the instant case and the case of *United States v Hamdan*

m. The Defense cites to findings of fact and conclusions of law by Judge Allred in *United States v Hamdan*. Notwithstanding the fact that such findings and rulings of law are not binding precedent on another, there are many distinctions in the alleged involvement of the Legal Advisor in the two cases that warrant denial of the defense motion in this case.

n. In the *Hamdan* case the Military Judge was specifically concerned about BGen Hartmann's intention to enter into pretrial negotiations with the defense counsel. No such allegation has been made in the instant case. Judge Allred also was concerned with BGen Hartmann's supposed direction that certain cases be tried; no such allegation arises in this case, as the prosecution of these individuals had been in preparation long before the BGen Hartmann's arrival. Finally, Judge Allred was concerned that the Chief Prosecutor and the two prosecutors on the *Hamdan* case felt they were being "nano-managed" and one even requested an ethical opinion due to BGen Hartmann's involvement *in that case*. No such allegations exist for this case.

The remedy requested by the Defense offends notions of justice.

o. Two thousand nine hundred seventy three people were killed on September 11th, 2001. The Prosecution has alleged that the five accused in this case were principal architects of this crime. Defense counsel claim that the proper remedy for BGen Hartmann's involvement in this case, a case that was well into its preparations prior to his arrival, is to dismiss the charges with prejudice, ensuring that these individuals may never be tried by the United States for their actions. Were there any cause for relief, it would not warrant such an disproportionate and ludicrous remedy.

p. There are a host of lesser remedies, well developed in military case law, that fall well short of the Draconian measure of dismissal of charges or disqualification of a participant. While none is warranted in this case, the Prosecution would urge the opportunity to address such options should the Military Judge find it appropriate to do so.

.

7. Request for Oral Argument: The Government requests oral argument and intends to present evidence in support of this response.

8. Witnesses for the motion:

a. Brigadier General Thomas Hartmann, USAF
b. Colonel Morris Davis, USAF

9. Other Evidence:

a. Affidavit of the Honorable Susan J. Crawford, Convening Authority
b. Affidavit of Mr. Jim Haynes

Respectfully submitted,

ROBERT SWANN
DEPARTMENT OF DEFENSE

for ED RYAN
DEPARTMENT OF JUSTICE

TOM SWANTON
DEPARTMENT OF JUSTICE

MAJOR JEFF GROHARING
UNITED STATES MARINE CORPS

CLAYTON TRIVETT
DEPARTMENT OF DEFENSE

AFFIDAVIT OF THE HONORABLE SUSAN J. CRAWFORD

Judge Susan J. Crawford, being duly sworn, deposes and says,

I became the Convening Authority for the Office of Military Commissions on February 4, 2007. I was appointed by the Secretary of Defense, and ordinarily report to the Deputy Secretary of Defense (DSD), in his capacity as the Secretary's alter ego. The DSD signs my Senior Executive Service rating.

I am the only person in this organization who is directly in the supervisory chain of the Secretary of Defense, rather than the Office of General Counsel, Department of Defense. I do not supervise any personnel in the Office of Military Commissions.

As Convening Authority, I am in a 3-year term position as a member of the Senior Executive Service (SES), not part of the career SES. I previously served for 15 years as a judge and chief judge on the Court of Appeals for the Armed Forces, and have served, among other positions, as the General Counsel, Department of the Army, and Inspector General, Department of Defense.

I have never received input, orders, instructions, or suggestions from the Secretary of Defense, Deputy Secretary of Defense, or any other person regarding anything having to do with the trial of detainees by military commissions. My rare conversations with the Deputy Secretary have concerned matters such as whether to permit sketch artists to operate in the military commissions courtroom and the funding of the new courtroom in Guantanamo Bay – never about particular cases, the pace of trials, types of cases charged, or anything having to do with the selection, charging and trial of any of the detainees.

I became aware of Colonel Morris Davis's concerns about his relationship with Brigadier General Hartmann some time after July 2007, perhaps in August. I believed that Colonel Davis misunderstood the supervisory chain and misunderstood the role of legal advisor, which I believe is analogous to a staff judge advocate in military practice. Colonel Davis never raised any concerns about the military commissions process, substantive or procedural, before that point. He already was the Chief Prosecutor when I assumed my duties.

Colonel Davis delivered a complaint about office operations, mainly dealing with BGen Hartmann's interaction with the prosecution, to my office on Friday, August 24, 2007. I was not present in the office at the time, (for the record, I was not attending a Johnny Mathis concert as alleged by Colonel Davis in his testimony – the concert was the evening of August 23 at Wolf Trap Park for the Performing Arts) but became aware of the substance of his complaint that afternoon and set up an appointment with William J. Haynes, General Counsel of the Department of Defense for the following Monday

morning. I consulted Mr. Haynes because both Brigadier General Hartmann and Colonel Davis worked for him, and I thought it appropriate that their supervisory chain address the issue rather than the Convening Authority or the IG (I well recognized that Colonel Davis had an independent right to present matters to the IG at any time and did not have to go through me or anyone else to do so). Following the meeting with Mr. Haynes, I sent a memorandum to Mr. Haynes referring the complaint to him for appropriate action and to Colonel Davis informing him that I had referred his complaint to the DOD General Counsel. Before he received the memo, Colonel Davis called me that same afternoon to inquire as to the status of the matter and I advised him of my referral action.

On Friday, September 21, 2007, I met with Colonel Davis in my office at his request. Colonel Wendy Kelly was also present. At that meeting Colonel Davis informed me of the details of an amendment to his complaint against Brigadier General Hartmann. Since the matter had not yet been resolved, I did not comment. Colonel Davis also informed me that his office would not swear charges in any future cases until the matter was resolved. I advised him that I had removed BGen Hartmann and Mr. Michael Chapman (Office of Military Commissions Staff Director, who also served as Deputy Legal Advisor) from involvement in providing legal advice to me until the matters that Colonel Davis raised were resolved; I intended to ask the General Counsel to appoint Mr. Ron White, also on the staff, to serve in that capacity in the meantime. Thus, and especially since the Court of Military Commission Review had already ruled in favor of the government on the issue of jurisdiction in United States v. Khadr, I advised Colonel Davis that there was no reason for his office not to charge cases if those cases were prepared.

I had very few conversations with Mr. Haynes about the commissions process, and no conversations regarding particular cases, types of cases, charging decisions or outcomes. I never met Mr. Stephen Cambone and have never had any communications with him. I have not spoken to the Vice President or anyone in his office regarding military commissions at any time.

I received a recommendation for approval of a pretrial agreement in the case of United States v. Hicks signed by BGen Hemingway, then the legal advisor, as well as Colonel Davis. At no time did Colonel Davis ever contact me personally to inform me that he did not agree with the terms of the pretrial agreement or had any complaints about the process of negotiation of the pretrial agreement. Colonel Davis later approached me about his comments to the press in which he criticized the process by which the pretrial agreement was accomplished. He told me that he thought it was "healthy" that he spoke publicly and critically about the decision. Contrary to Colonel Davis' allegations, I did not counsel him privately about his public remarks. One of the reasons that he was not primarily involved in the final Hicks negotiations is that the defense had filed a motion to disqualify Colonel Davis based on claims that he conducted his office inappropriately because of public and critical comments he made regarding defense counsel in the case.

The Joint Defense Motion to Dismiss in the case of United States v. Khalid Sheikh Mohammed, et al, implies that as Convening Authority I saw or received a draft of the charge sheet prior to the swearing of charges on February 11, 2008. I did not see, review, discuss, or receive a briefing on the charge sheet or any charges in the case until after the swearing of charges.

Further deponent saith not.

Hon. Susan J. Crawford
Convening Authority
Office of Military Commissions

The foregoing instrument was acknowledged before me, this 22d[rd] day of May, 2008. I do further certify that I am a person in the service of the U.S. Armed Services authorized the general powers of a notary public under Title 10 U.S.C. 1044a.

RUDOLH P. GIBBS, Jr., TSgt, USAF

[redacted]