

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA****UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN ATTASH,  
RAMZI BINALSHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL  
HAWSAWI****AE008NNN****ORDER**Defense Motion to Dismiss for Defective  
Referral

29 December 2015

**1. Procedural Background.**

a. The Accused moved to have the charges and specifications against them dismissed based on alleged defects in the referral process. In the alternative, they moved this Commission to direct the Legal Advisor to the Convening Authority (CA) to prepare a new pretrial advice, but only after counsel were afforded adequate time, resources, and access to their respective clients to provide meaningful input to the CA as to his decision to refer the charges as capital offenses. Each of the accused filed individual supplements to Mr. Hawsawi's motion describing the unique circumstances believed to warrant the requested relief. In general their complaints centered on their belief they did not have the resources or time to adequately respond to the CA's invitation to provide information concerning his determination to refer the charges as capital offenses. Counsel for Mr. Hawsawi raised the additional issue of their client's inability to communicate in English and the failure of the Government to provide adequate interpreter resources.<sup>1</sup> The Government response<sup>2</sup> requested this Commission deny the motion, asserting

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<sup>1</sup> AE 008 (MAH), Defense Motion to Dismiss For Defective Referral, filed 19 April 2012; AE 008 (AAA), Mr. al Baluchi's (Ali Abdul Aziz Ali) Supplement to AE 008 Defense Motion to Dismiss for Defective Referral, filed 20 April 2012; AE 008 (WBA), Walid bin 'Attash Joinder of Supplement to Defense Motion to Dismiss For Defective Referral, AE 008 filed 20 April 2012; AE 008 (RBS), Defense Supplemental Statement of Facts on Behalf of Mr.

both the time and resources were adequate to provide mitigation; moreover the Accused had no enforceable right to provide mitigation during the referral process. Mr. Aziz Ali's reply, joined by Mr. bin 'Attash,<sup>3</sup> emphasized the restrictions placed on attorney-client communications during the referral period by virtue of a written communications order<sup>4</sup> in place during that particular period of time. As a consequence, the reply maintains there was no "full" attorney-client relationship and thus no meaningful representation within the meaning of Rule for Military Commission (R.M.C.) 506 (b)<sup>5,6</sup>. An additional argument was later advanced by Mr. Hawsawi

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Bin al Shihb in Support of Motion to Dismiss for Defective Referral, filed 20 April 2012; AE 008 (KSM), Mr. Mohammad's Notice of Joinder of Defense Motion to Dismiss For Defective Referral, 25 April 2012; AE 008 (KSM Sup), Mr. Mohammad's Supplement To Defense Motion To Dismiss For Defective Referral, filed 11 May 2012; AE 008 (MAH Sup), Defense Supplement to Motion to Dismiss due to Defective Referral (AE008), filed 3 August 2012; AE 008 (MAH 2<sup>nd</sup> Sup), Defense Supplemental Authorities in relation to Defense Motion to Dismiss due to Defective Referral, filed 16 August 2012; AE 008 (MAH 3rd Sup)Mr. Hawsawi's Supplemental Exhibit to AE008 Defense Motion to Dismiss due to Defective Referral, 20 September 2012; AE 008 (MAH 4th Sup), Defense Motion To Supplement AE 008, Defense Motion to Dismiss for Defective Referral, filed 9 September 2014; AE 008 (MAH 5th Sup), Defense Motion To Supplement AE 008, Defense Motion to Dismiss for Defective Referral, filed 12 February 2015; AE008 (WBA 2nd Sup), Mr. bin 'Attash's Notice of Joinder To Join and Adopt AE008 (MAH 2nd Sup) Motion to Dismiss due to Defective Referral, filed 21 August 2012; AE 008B (AAA), Mr. al Baluchi's (Ali Abdul Aziz Ali) Reply to AE 008E (sic) Government's Response to Defense Motion to Dismiss for Defective Referral, filed 10 May 2012; AE 008B (WBA), Mr. bin 'Attash's Notice of Joinder to Join and Adopt AE 008B(AAA), Mr. al Baluchi's Reply to AE 008E (sic) Government's Response to Defense Motion to Dismiss for Defective Referral, filed 25 January 2013; AE 008KKK (MAH Sup), Mr. Hawsawi's Unclassified Notice of Classified Filing filed 5 November 2015 (classified).

<sup>2</sup> AE 008A, Government Response To Defense Motion to Dismiss for Defective Referral, filed 3 May 2012 (AE 008A); AE 008A (Gov Sup), Government Supplement to AE 008A, the Government's Response to the Defense Motion To Dismiss for Defective Referral, filed 12 February 2014; AE 008C (GOV), Government Response To Mr. Mohammad's Second Supplement To Defense Motion to Dismiss for Defective Referral, filed 25 May 2012.

<sup>3</sup> Mr. al Baluchi's (Mr. Ali Abdul Aziz Ali) Reply to AE 008E (sic), Government's Response to Defense Motion to Dismiss For Defective Referral, filed 10 May 2012 (AE 008B (AAA)) and Mr. bin 'Attash's Notice of Joinder to Join and Adopt Mr. al Baluchi's Reply to AE 008E (sic), Government's Response to Defense Motion to Dismiss For Defective Referral, filed 24 January 2013 (AE 008 (WBA)).

<sup>4</sup> Memorandum, Headquarters, Joint Task Force Guantanamo, dated 22 November 2011, SUBJECT: Revision of Privileged Communications Screening Procedures. See Attachment C, Mr. al Baluchi's (Ali Abdul Aziz Ali) Supplement to AE 008 Defense Motion to Dismiss for Defective Referral, filed 20 April 2012 (AE 008 (AAA)).

<sup>5</sup> R.M.C 506(b) *Capital Offenses*. In any case in which the trial counsel makes a recommendation to the convening authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, or in which the convening authority refers a charge to a capital military commission, the accused has the right to be represented in accordance with section (a) above, and by at least one additional counsel who is learned in applicable law relating to capital cases.

<sup>6</sup> AE 008B (AAA) at p. 3.

that the CA was not advised of, nor did he consider, mistreatment suffered by the Accused prior to 2006.<sup>7</sup>

b. In formulating this order the Commission considered the pleadings of all parties; the exhibits submitted to the Commission for consideration;<sup>8</sup> testimony from the (then) Convening Authority<sup>9</sup> and other witnesses;<sup>10</sup> and argument before the Commission.<sup>11</sup> The *gravamen* of the

<sup>7</sup> Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 10/29/2015 from 9:06 AM to 9:35 AM at 9078-9097.

<sup>8</sup> AE 008 (MAH 3rd Sup), Mr. Hawsawi's Supplemental Exhibit to AE-008 Defense Motion to Dismiss due to Defective Referral, 20 September 2012; AE 008D (MAH), Defense Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 20 August 2012; AE 008D (MAH Sup), Supplement to Defense Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 21 August 2012; AE 008D (MAH 2<sup>nd</sup> Sup), Second Supplement to Defense Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 3 April 2013 (AE 008D (MAH 2<sup>nd</sup> Sup)); AE 008E, Government Exhibit in Support of Opposition to Supplement to Defense Exhibits in Support of Motion to Dismiss Due To Defective Referral and Notice of Supplemental Authority, filed 22 August 2012; AE 008F, Government Exhibit in Support of Opposition to Supplement to Defense Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 12 October 2012; AE 008L (AAA), Defense Notice of Filing of Exhibits, filed 31 January 2013 (AE 008G (AAA)); Defense Notice of Exhibits In Support of Motion to Dismiss Due to Defective Referral, filed 14 February 2013; AE 008N (WBA), Mr. bin Attash's Supplement of Exhibit in Support of in Support of Motion to Dismiss Due To Defective Referral, filed 5 April 2013; AE 008S (AAA), Defense Notice of Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 7 June 2013; AE 008S (KSM) Mr. Mohammad's Notice of Joinder To Join and Adopt AE 008S (AAA) Defense Notice of Exhibits in Support of Motion to Dismiss Due To Defective Referral, filed 11 June 2013; AE 008T (MAH), Supplement To Defense Exhibits in Support of AE 008, Motion to Dismiss Due To Defective Referral, filed 17 June 2013; AE 008FF Government Motion filed 11 May 2013 (classified); AE 008XX, Memorandum, SUBJECT: Request for Extension of Mitigation Submission Deadline - *United States v. Mohammed, et al.*, dated December 13, 2011; AE 008ZZ, *Amicus* Brief filed by James G. Connell, III and Major Sterling B. Thomas on behalf of Ammar al Baluchi in Support of al Nashiri's Defense Motion To Bar JTF-GTMO Personnel from Reading Attorney-Client Mail, dated 2 November 2011; AE 008AAA, Declaration of Staff Sergeant Benny G. Perry, III, dated 10 February 2012; AE 008BBB(WBA), Brief of Amici Curiae Society of Professional Journalists, Project on Government Oversight, and Government Accountability Project In Support of Plaintiffs-Appellees Donald Vance and Nathan Ertel and Affirmation of the District Courts Decision Below, Donald Vance, et al v. Donald Rumsfeld , 7<sup>th</sup> Cir. (Case Nos 10-1687. 10-2442); AE 008CCC (WBA), Brief of Amici Curiae Former Secretaries of Defense and Members of the Joint Chiefs of Staff In Support of Defendants-Appellants Donald H. Rumsfeld and the United States and Reversal of the District Courts Decision Below, Donald Vance, et al v. Donald Rumsfeld , 7<sup>th</sup> Cir. (Case Nos 10-1687. 10-2442); AE 008DDD (WBA), Response Brief of Appellees, Donald Vance, et al v. Donald Rumsfeld, 7<sup>th</sup> Cir. (Case Nos 10-1687. 10-2442).

<sup>9</sup> Mr. Bruce MacDonald:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/14/2013 from 9:01 AM to 10:19 AM at 2445- 2545;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/17/2013 from 9:04 AM to 10:42 AM at 2739- 2788;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/17/2013 from 11:05 AM to 12:33 PM at 2792-2846;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/17/2013 from 1:38 PM to 3:15 PM at 2849-2918;

Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/17/2013 from 3:57 PM to 5:07 PM at 2920-2970;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/18/2013 from 9:08 AM to 10:20 AM at 2982-2029;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/18/2013 from 10:43 AM to 12:17 PM at 3031-3035;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/18/2013 from 1:02 PM to 3:25 PM at 3094-3196;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/18/2013 from 3:43 PM to 6:40 PM; 3198-3326.

<sup>10</sup> Lieutenant Alexander Homme, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/13/2013 from 9:00 AM to 10:10 AM at 2126 -2168.

Lieutenant Colonel Ramon Torres, U.S. Army:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM at 2064-2112.

Colonel John V. Bogdan, U.S. Army:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/13/2013 from 10:28 AM to 12:02 PM at 2169- 2247;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/13/2013 from 1:02 PM to 2:36 PM at 2248- 2295.

Captain Thomas J. Welsh, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM at 1954-2029;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM at 2030- 2061;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/20/2013 from 3:20 PM to 4:35 PM at 3689-3749;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/21/2013 from 9:01 AM to 12:30 PM at 3765- 3856;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/21/2013 from 1:49 PM to 2:42 PM at 3858-3899;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/21/2013 from 3:00 PM to 4:50 PM at 3900 -3984;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/21/2013 from 5:23 PM to 8:23 PM at 3992-4083.

Ms. Robin Maher, Director, ABA Death Penalty Representation Project:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing Dated 2/13/2013 from 2:54 PM to 5:09 PM at 2333-2416.

Lieutenant Commander George Massucco, U.S. Navy:

Unofficial/Unauthenticated Transcript of the KSM et al. (2) Hearing Dated 2/14/2013 from 1:11 PM to 3:06 PM at 2602- 2642;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10/24/2013 from 9:05 AM to 10:25 AM at 6821- 6891;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10/24/2013 from 10:47 AM to 12:33 PM at 6892- 6985;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10/24/2013 from 1:50 PM to 4:06 PM at 6988 - 027.

Admiral David B. Woods, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/19/2013 from 9:05 AM to 12:19 PM at 3351- 3386;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/19/2013 from 1:36 PM to 4:23 PM at 3451-3550;

Defense argument is the failure of the Government to provide the resources, access and time necessary for counsel to formulate and submit mitigation matters to the CA before referral to potentially influence his decision to refer their respective cases capital, if at all.

c. The CA first extended the offer to submit matters for his “consideration” to Mr. Hawsawi in July 2011, an offer that was ultimately extended to all the Accused with a suspense of 6 February 2012. The charges were not referred for trial until 4 April 2012. The Commission notes that at least two of the defense counsel, Mr. Ruiz and Mr. Nevin, had relationships with their clients well before charges were re-preferred in May 2011.<sup>12</sup>

## 2. Legal Analysis.

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Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/20/2013 from 9:03 AM to 9:56 AM at 3553-3575, 3631-3681;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/20/2013 from 11:29 AM to 12:35 PM at 3592-3630;

Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/20/2013 from 1:36 PM to 2:59 PM at 3631-3681.

Bryan Broyles, Principal Chief Deputy Defense Counsel, Office of Military Commissions:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10/25/2013 from 10:15 AM to 12:18 PM at 7109 -7132.

Commander Jennifer A. Strazza, U.S. Navy:

AE 008QQ, Stipulation of Expected Testimony, filed 18 September 2013.

<sup>11</sup> Argument:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12/17/2013 from 1:20 PM to 3:02 PM at 7383 – 7430;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12/17/2013 from 3:36 PM to 5:07 PM at 7433- 7488;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12/18/2013 from 3:37 PM to 4:39 PM at 7706- 7739;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 10/29/2015 from 9:06 AM to 9:35 AM at 9069-9097.

The Prosecution waived argument; *see* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/17/2014 from 9:07 AM to 9:50 AM at 7856.

<sup>12</sup> In 10 April 2008, capital charges were referred in the cases of *United States v. Khalid Sheikh Mohammad, Walid Muhammad Salih Mubarak Bin'Attash, Ramzi BinalShibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. They were arraigned on 5 May 2008 and counsel of record for Mr. Mohammad included Mr. Nevin (Transcript US v. Mohammad et al; dated 5 May 2008 p. 7). On 6 November 2009 (then) LCDR Ruiz was detailed counsel for Mr. Hawsawi (Declaration of Walter B. Ruiz, Jr. dated 3 January 2012 (Attachment K, AE 008 (MAH)). On 21 January 2010 the charges withdrawn and dismissed without prejudice (Direction of the Convening Authority, dated 21 January 2010).

a. In resolving the issue before it, the Commission will assume, *arguendo*, the encumbrances alleged by the Accused inhibited the ability of their counsel to develop mitigation for consideration by the CA.<sup>13</sup> The Commission concurs with the position of the Accused that mitigation efforts are crucial in refuting culpability, and, if necessary during sentencing. The crux of this issue, however, lies in what right, if any, did the Accused have to provide mitigation for consideration by the CA during the referral process.

b. The R.M.C 601 requirement for the CA to “refer” the charges, and their specifications, stems from the similar practice found in our courts-martial system. To refer a charge to a general courts-martial the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§801 *et seq*, requires the legal advisor to a CA to prepare, in writing, legal advice that the charges allege an offense cognizable under the UCMJ; the charge is warranted by the evidence indicated in a report of investigation (if there is such a report);<sup>14</sup> and a court-martial would have jurisdiction over both the accused and the offense.<sup>15</sup> The purpose of this advice is two-fold: to apprise the CA in the determination as to whether charges allege an offense under the UCMJ and to aid in the determination of whether trial is warranted based upon available evidence. In fulfilling this function both the legal advisor and CA have been construed to be acting in a quasi-prosecutorial role. *United States v. Green*, 37 M.J. 380, (C.M.A. 1993); *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979); *United States v Frederick*, 7 M.J. 791 (N.C.M.R. 1979). This legal advice is not offered to determine an accused's guilt or innocence but to advise the CA whether, within the bounds of his discretion, he may legally proceed to refer the case to a general court martial. The

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<sup>13</sup> The Prosecution conceded as to Mr. Hawsawi’s language abilities as pled in AE 008 *et seq*. See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Motions Hearing Dated 12/17/2013 from 1:20 PM to 3:02 PM at 7381.

<sup>14</sup> Article 32 of the UCMJ ((10 U.S.C. § 832) requires an investigation and recommendation as to the charges; there is no similar requirement under the M.C.A. 2009.

<sup>15</sup> 10 U.S.C. § 834.

recommendations of the legal advisor as to the disposition of the charges are not binding on the CA, and any benefit inuring to the accused is “salutary” in that the pretrial advice provides assurance that the evidence warranting trial, both as to the alleged offense(s) and personal jurisdiction, were examined by an attorney versed in military law. *United States v. Hardin*, 7 M.J. 399 (C.M.A.1979). A defect in the legal advice leading to a faulty referral, must be such that “there is fair risk the omission of fact would mislead the convening authority in his prosecutorial decision to determine appropriate level of court-martial or what charges should be referred.” *United States v. Clements*, 12 M.J. 842 (A.C.M.R.1982), *pet. denied* 13 M.J. 232 (C.M.A.1982) citing *United States v. Foti*, 30 C.M.R. 303 (C.M.A., 1961); *United States v. Skaggs*, 40 C.M.R. 344 (A.B.R.1968). In determining whether the legal advice provided the CA is defective, rendering the referral deficient, military courts have used the test of whether the defect “materially prejudices the substantial rights of the accused.”<sup>16</sup> *United States v. Loving*, 41 M.J.213 (C.A.A.F 1994); *United States v. Murray*, 22 M.J. 700 (A.C.M.R. 1986). The M.C.A. 2009, in §950a(a), expresses the same test, thus the Commission will use it in evaluating the alleged deficiencies in referral.

c. When in receipt of charges the CA for a military commission has full and sole discretion to do the acts enumerated in R.M.C. 407<sup>17</sup> including to “refer any or all charges to a military commission” subject to the provisions of R.M.C. 601(d). In turn, R.M.C. 601(d) sets out responsibilities incumbent upon the CA when considering the disposition of the charges.

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<sup>16</sup> Article 59, UCMJ (10 U.S.C.A. § 859).

<sup>17</sup> R.M.C. 407 is generally the same language found in Rule for Courts Martial (R.C.M.) 407 applicable to military personnel.

R.M.C. 601(d)(1),<sup>18</sup> in pertinent part, states “... a case may not be referred to a military commission except in compliance with R.M.C. 406.” R.M.C 601(d)(2) directs a CA may not refer a case capital unless the requirements of Rule 506(b) have been met for the provision of learned counsel.<sup>19</sup>

d. R.M.C. 406 requires the CA receive the advice of his or her legal advisor as to the disposition of the charges; said advice containing at least four conclusions:

1. whether each specification alleges a criminal offense under chapter 47A of title 10, United States Code;
2. whether each offense alleged is supported by evidence in any report of investigation;
3. whether a military commission has jurisdiction over both the accused and the offense; and
4. whether the trial would be harmful to national security.

The Legal Advisor must then make a written recommendation to the CA as to the action to be taken. The “Discussion” that follows the Rule provides the option “when appropriate” for the inclusion of a brief summary of the evidence; and discussion of significant aggravating, extenuating or *mitigating factors*”<sup>20</sup> (*emphasis added*).

e. The Accused advance the point that representation inherently means full participatory advocacy at all stages of the trial process to include referral. Thus, if they were precluded from advocating mitigation for the Accused, the referral process was fatally flawed. The Commission finds this interpretation is legally incorrect based upon statutory provisions, regulatory construction, and case law. Section 949a(b)(2)(C) of M.C.A. 2009<sup>21</sup> establishes the representational “right” of an accused as:

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<sup>18</sup> R.C.M 601(d)(1) contains generally the same language as R.M.C. 601(d).

<sup>19</sup> There is no comparable language in the Rules for Courts Martial.

<sup>20</sup> The general requirements of R.M.C. 406 and the options expressed in the Discussion are found in the Rule for Courts-Martial 406 and Discussion.

<sup>21</sup> 10 U.S.C. §§ 948a, *et seq.*

(i) When none of the charges preferred against the accused are capital, to be represented *before a military commission* by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or the military counsel of the accused's own selection, if reasonably available.

(ii) When any of the charges preferred against the accused are capital, to be represented *before a military commission* in accordance with clause (i) and, to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense (*emphasis added*.)<sup>22</sup>

R.M.C 506(b) addresses capital cases and, as pertaining to this motion, provides:

“...the accused has the right to be *represented in accordance with section (a)* above, and by at least one additional counsel who is learned in applicable law relating to capital cases....” (*emphasis added*).<sup>23</sup>

R.M.C 506(b) references application in “accordance with section (a)” of the same Rule. Section (a) addresses an accused's rights to counsel and specifies an accused has the right to be “represented before a military commission,” mirroring the statutory right, but does not otherwise extend the right to advocacy during referral. Reading the subsections of R.M.C 506 together, the Commission concludes that “representation” as a right of advocacy is inherent only “before the Commission,” as a critical stage of the trial process, and not otherwise unless provided for by statute or regulation. There is no such statutory or regulatory mandate during the referral process. This conclusion is further buttressed by comparing the rights of an accused before arraignment and at the conclusion of a trial. Before arraignment an accused has no specified right to participate in the decision making process; *i.e.* to refer the charges for trial or dispose of them otherwise. In contrast, post-trial procedures specifically provide for an accused to submit “any

<sup>22</sup> The Military Commissions Act of 2006 (M.C.A. 2006) did not contain this provision, since learned counsel were not required, but instead referred to §948k, which goes to the detailing of counsel.

<sup>23</sup> There is no comparable provision in the Manual for Courts Martial.

matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence."<sup>24</sup> The genesis of this Rule is found in 10 U.S.C §950b(b) and Congress, had it so desired, could have specified a comparable right during referral but did not do so.

f. It is instructive to compare this interpretation of the "right" to present mitigation to the CA, pre-referral, to the Protocol used by the Department of Justice (DOJ) in making the determination to seek the death penalty in any given case. DOJ policy<sup>25</sup> requires a U.S. Attorney to get the approval of the Attorney General prior to serving notice that a death sentence will be sought. The Protocol provides that, before the U.S. Attorney decides whether to request approval to seek the death penalty, defense counsel be given reasonable opportunity to submit any factors, including any mitigation, for the government's consideration. After receiving any information provided by the defense, the U.S. Attorney completes an assessment of the case, which indicates the theory of prosecution, the aggravating and mitigating factors associated with the crime or accused, and makes a recommendation as to whether the government should seek the death penalty. This assessment along with a copy of the indictment and any information submitted by defense counsel are forwarded to DOJ. At DOJ, the materials are first reviewed by attorneys in the Capital Case Unit and an analysis of the case and a recommendation as to disposition are provided to a Capital Case Review Committee (Review Committee). Before the Review Committee makes a recommendation to the Attorney General it reviews the materials from the U.S. Attorney, the Capital Case Unit, and defense counsel, and holds a meeting with both the U.S. Attorney and defense counsel to hear their views and arguments regarding whether the

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<sup>24</sup> R.M.C 1105 Matters submitted by the Accused.

<sup>25</sup> Death Penalty Protocol, United States Attorneys' Manual, §§ 9-10.010 et seq., (Protocol).

death penalty should be sought. After the presentations, the Review Committee makes a recommendation to the Attorney General through the Deputy Attorney General. The Attorney General then signs a memorandum approving or disapproving the request to seek the death penalty. In numerous instances, however, this Protocol has been abridged, either in part or in whole. The decision to seek a death penalty has been held to be a matter of prosecutorial discretion and the Protocol does not create any individual right.<sup>26</sup> Moreover, demands for pre-decisional discovery will not be judicially enforced<sup>27</sup> nor will requests for delay in the decision-making process.<sup>28</sup> There is no requirement that a prosecutor consider any mitigating factors concerning the offense or the character and circumstances of a particular defendant; these decisions belong to the jury and are made only after a full hearing and consideration of aggravating and mitigating factors submitted pursuant to an adversarial process. The constitutional protections accruing to an accused are provided by any sentencing hearing assuming a finding of guilt as to the charged offenses.

### 3. Findings.

a. Neither the M.C.A 2009 nor the Manual for Military Commissions provide a right for defense advocacy during the referral process;

b. An invitation by the CA to the Accused to provide matters for his consideration in disposing of the charges does not confer advocacy rights during this process;

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<sup>26</sup> *United States v Dzhokhar A. Tsarnaev*, Case 1:13-cr-10200-GAO Document 126 Filed 10/18/13 (D. Mass); *United States v. Pray*, 764 F.Supp.2d 184 ( D.D.C. 2011); *United States v Shakir*, 113 F.Supp.2d 1182 (M.D. TN 2000); *United States v. Torres Gomez*, 62 F. Supp. 2d 402 (D.P.R. 1999); *United States v. McVeigh*, 944 F.Supp.1478 (D.Colo.1996). Cf. *United States v Lee*, 89 F.Supp.2d 1017 (E.D. AR. 2000).

<sup>27</sup> *United States v. Le*, 306 F.Supp.2d 589 (E.D. VA 2004); *United States v. Delatorre*, 438 F.Supp.2d 892, (N.D. Ill 2006); *United States v. Perez*, 222 F.Supp.2d 164 (D. CT 2002).

<sup>28</sup> *United States v. Savage*, 2011 WL 6747479 (E.D. PA.); *United States v. Hardrick*, 2011 WL 2516340 (E.D.LA.); *United States v. McGill*, 2010 WL 1571200 (S.D.CA.).

c. An invitation by the CA to the Accused to provide matters for his consideration in disposing of the charges does not confer a right to undue delay during this process;

d. The legal advisor has the option in his advice to the CA, to include a brief summary of the evidence and discussion of significant aggravating, extenuating or mitigating factors;

e. The Panel<sup>29</sup> has the ultimate power to give balance to all facts within its purview and give appropriate weight to both aggravating and mitigating factors;

f. There has not been a material prejudice to any right of the Accused; and

g. The period that has lapsed, and will lapse between referral and trial, provides the Accused sufficient ability, and time, to formulate effective trial and sentencing strategies.

4. The Defense Motion to Dismiss for Defective Referral (AE 008) is **DENIED**.<sup>30</sup>

So Ordered this 29<sup>th</sup> day of December 2015.

//s//  
JAMES L. POHL  
COL, JA US Army  
Military Judge

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<sup>29</sup> The “jury” in both the courts-martial and Commissions systems is called a “panel.”

<sup>30</sup> The CA has the discretion to take action on the charges and referral throughout the course of a trial; *see* R.M.C. 407, Action by convening authority; R.M.C 601, Referral; R.M.C 604, Withdrawal of charges; R.M.C 1101, Report of result of trial; post-trial restraint; deferment of confinement and fine; R.M.C 1107, Action by convening authority. At any point the Defense is free to submit mitigation and other matters to the CA to try to convince him to reconsider the capital referral about their individual clients.