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 AL HAWSAWI	AE 091A **Government Response** To Defense Motion To Dismiss Because the Military Commissions Act Unconstitutionally Requires the Convening Authority To Act as Both Prosecutor and Judge of the Defendants 26 October 2012

1. Timeliness

The government timely files this response under Military Commissions Trial Judiciary Rule of Court 3.7.c.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to dismiss.

3. Overview

Reformed military commissions provide all essential procedural protections, and "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples." 1949 Geneva Conventions, Common Article 3, ¶ (1)(d).

Reformed military commissions not only meet, but exceed all applicable requirements for providing the accused with a fair trial in a fair tribunal. The Military Commissions Act of 2009 ("M.C.A.") provides robust institutional safeguards that ensure the Convening Authority is neutral as a matter of law, and the Convening Authority's actions thus far in this case reveal that the Convening Authority is neutral in fact. The Convening Authority's role in courts-martial and military commissions is well-established, and it is quite distinct from those of prosecutor and judge. Accordingly, the defense motion to dismiss this case should be denied.

4. Burden of Proof

Because the defense motion raises a purely legal question, neither party bears the burden of producing evidence "on any factual issue the resolution of which is necessary to decide [the] motion" under R.M.C. 905(c) or M.C.T.J. Rule 3.8.a. Further, the defense has not identified "[t]he point, if any, at which the . . . burden of persuasion is shifted to the non-moving party," and has failed to provide any legal argument or authority to support shifting the burden of persuasion to the government. Consequently, the burden of persuasion remains with the defense. M.C.T.J. Rule 3.8.a; *see United States v. Canty*, 469 F.2d 114, 120-21 (D.C. Cir. 1972) (holding that "a party asserting the unconstitutionality of governmental action has the burden of demonstrating it" and "[t]hat burden extends to production of the facts essential to a determination respecting the constitutional claim").

5. Facts

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009, charges in connection with the 11 September 2001 attacks were sworn against the accused. These charges were referred to this Military Commission on 4 April 2012. The accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism. On 5 May 2012, the accused were arraigned before this Commission.

The M.C.A. authorizes "the Secretary of Defense or . . . any officer or official of the United States designated by the Secretary" to convene military commissions. 10 U.S.C. § 948h. Pursuant to this authority, on 25 March 2010, the Secretary of Defense appointed retired Navy Vice Admiral Bruce MacDonald "as the Convening Authority for Military Commissions." Letter from Robert M. Gates, Sec'y of Defense, to the Deputy Secretary of Defense *et al.*, *Designation of Vice Admiral (Ret) Bruce MacDonald as the Convening Authority for Military Commissions* (Mar. 25, 2010).

To date, defense counsel collectively submitted a total of 14 requests for expert assistance to the Convening Authority. *See* Attachment B. The Convening Authority has either granted or proposed an adequate substitute for 10 of these requests.[1] Each request for expert assistance that was denied included a detailed memorandum citing the legal and/or factual basis for such decision, and was not done in an arbitrary or capricious manner. The Convening Authority has also approved three separate requests from the Chief Defense Counsel for additional resources in this case.

6. Law and Argument

I. Reformed Military Commissions Provide the Accused a Fair Trial in a Fair Tribunal

Reformed military commissions provide numerous substantive and procedural rights giving the accused a "fair trial in a fair tribunal." *See In re Murchison*, 349 U.S. 133, 136 (1955). For instance, under the M.C.A., every accused is entitled to the following panoply of procedural protections: the presumption of innocence (10 U.S.C. § 949l(c)(1)); the requirement that charges be proven beyond a reasonable doubt (10 U.S.C. § 949l(c)(4)); the right to notice of the charges (10 U.S.C. § 948q(b)); the right to counsel and choice of counsel (10 U.S.C. § 949c(b)); the right to be present during the proceedings (10 U.S.C. § 949a(b)(2)(B)); the right against self-incrimination (10 U.S.C. § 948r(b)); protection against the use of statements obtained through torture or cruel, inhuman, or degrading treatment (10 U.S.C. § 948r(a)); the requirement that admitted statements be voluntary (10 U.S.C. § 948r(c)); the right to present evidence, cross-examine witnesses, and compel attendance of witnesses in his defense (10 U.S.C. §§ 949a(b)(2)(A), 949a(b)(2)(A), 949j(a)(2)); the right to exculpatory evidence that the prosecution may have as to guilt, sentencing, and the credibility of adverse witnesses (10 U.S.C.

[1] In this case, counsel for Mr. Mohammad submitted one request for expert assistance. The Convening Authority approved the request. Counsel for Mr. Bin 'Attash submitted three requests, of which one was approved. Counsel for Mr. Binalshibh submitted two requests, of which two were approved. Counsel for Mr. Ali submitted five requests, of which three were approved. Counsel for Mr. Hawsawi submitted three requests, of which two were approved and one additional request was authorized an adequate substitute .

§ 949j(b)); the right to an impartial decision-maker (10 U.S.C. § 949f); the right to exclusion of evidence that is not reliable or probative, or that will result in unfair prejudice (10 U.S.C. §§ 949a(b)(2)(E), 949a(b)(2)(F)); the right to qualified self-representation (10 U.S.C. § 949a(b)(2)(D)); protection against double jeopardy (10 U.S.C. § 949h); and the right to appeal to a federal civilian court (the United States Court of Appeals for the District of Columbia Circuit), and ultimately to the United States Supreme Court (10 U.S.C. §§ 950g(a), 950g(e)). In fact, judicial decisions in reformed military commissions are subject to three levels of appellate scrutiny, one more than federal district court decisions. *See United States v. Hamdan*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008).

Reformed military commissions also comply with international law by "affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 1949 Geneva Conventions, Common Article 3, ¶ (1)(d); Military Commissions Act of 2006, § 948b(f); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1322-23 (C.M.C.R. 2011). Reformed military commissions more than satisfy these indispensable judicial guarantees: R.M.C. 502 (qualifications and duties of personnel of military commissions, including defense counsel); R.M.C. 506 (accused's right to counsel); R.M.C. 602 (service of charges on the accused and defense counsel); R.M.C. 701 (discovery); R.M.C. 703 (production of witnesses and evidence); R.M.C. 804 (presence of the accused at trial); R.M.C. 806 (public trial); R.M.C. 910 (advice to the accused of his rights, including the right to be represented by counsel during every stage of the military commission, and the right to cross-examine witnesses); R.M.C. 920 (requiring the military judge to give certain instructions on findings, including that the accused is presumed innocent and that the prosecution bears the burden of proving the accused's guilt beyond a reasonable doubt); M.C.R.E. 301 (privilege against compulsory self-incrimination); M.C.R.E. 502 (lawyer-client privilege); M.C.R.E. 505 (discovery of classified information); and M.C.R.E. 706 (expert witnesses, including those of the accused's own selection). *See also* 1977 Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), Art. 6 (expanding on Common Article 3 by further

defining indispensable judicial guarantees). Thus, reformed military commissions not only meet, but surpass all applicable requirements of providing the accused with a "fair trial in a fair tribunal."

II. The Convening Authority's Role Does Not Render the Trial or the Tribunal Unfair

A. The Convening Authority Is Neither Prosecutor Nor Judge

The M.C.A. establishes robust institutional safeguards that ensure the neutrality of the Convening Authority. Despite these institutional safeguards, the defense argues that the Convening Authority is not neutral because he "exercises the power of both prosecutor and judge over the defendants." AE 091 at 1. The defense motion misapprehends the role of the Convening Authority in particular, and the structure of military commissions in general.

By law, Congress has vested the role of "prosecutor" before military commissions in a Chief Prosecutor and one or more "trial counsel," who prosecute in the name of the United States. 10 U.S.C. §§ 948k(b) & (d); 949c(a) ("The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.").

By law, Congress has vested the role of "judge" of a military commission in a "military judge." The Military Commissions Act of 2009 provides:

> A military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions. The military judge shall preside over each military commission to which such military judge has been detailed.

10 U.S.C. § 948j(a). Because Congress has not vested either of these roles in the Convening Authority, the Convening Authority, by statute, is neither "prosecutor" nor "judge."

To the contrary, Congress carefully delineated the role of the Convening Authority. The M.C.A. authorizes "the Secretary of Defense or . . . any officer or official of the United States designated by the Secretary" to convene military commissions. 10 U.S.C. § 948h. Pursuant to this authority, the Secretary of Defense appointed retired Navy Vice Admiral Bruce MacDonald "as the Convening Authority for Military Commissions." Letter from Robert M. Gates, Sec'y of

Defense, to the Deputy Secretary of Defense *et al.*, *Designation of Vice Admiral (Ret) Bruce MacDonald as the Convening Authority for Military Commissions* (Mar. 25, 2010). Among other functions, the Convening Authority reviews and disposes of charges, convenes military commissions to try alien unprivileged enemy belligerents, details military commission members, and reviews the findings and sentences of military commissions. R.T.M.C. ¶ 2-3.a.

The M.C.A. also prevents the Convening Authority from unlawfully influencing the actions of a military commission by prohibiting him from "censur[ing], reprimand[ing], or admonish[ing] the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings." 10 U.S.C. § 949b(a)(1); *accord* R.M.C. 104(a)(1). Further, the Convening Authority may not prepare or review any fitness report of a military judge detailed to a military commission. 10 U.S.C. § 948j(f) ("The convening authority of a military commission under this chapter may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to such judge's performance of duty as a military judge on the military commission.") The role of the Convening Authority is therefore completely independent of, and separate from, the roles of prosecutor and judge.

B. The Responsibilities and Functions of the Convening Authority Are Specified by Law and Regulation

Pursuant to the M.C.A., the M.M.C., and the R.T.M.C., the Convening Authority has numerous responsibilities and functions. He disposes of charges—by dismissing them, forwarding them to another authority for disposition, or referring them to a military commission (if there are reasonable grounds to believe that an offense triable by military commission has been committed and that the accused committed it, and that the specification alleges an offense). R.M.C. 401; R.M.C. 601. He receives the consideration and advice of the legal advisor of the Convening Authority prior to referral for trial by military commission. R.M.C. 406. He may withdraw charges. R.M.C. 604. He issues orders convening one or more military commissions

to try alien unprivileged enemy belligerents for violations of the law of war or other crimes triable by military commissions. R.T.M.C. ¶ 2-3.a.2. He details as military commission members and alternate members those commissioned officers (including reserve component officers on active duty and retired officers recalled to active duty) who are, in the opinion of the Convening Authority, best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament. R.M.C. 503; R.T.M.C. ¶ 2-3.a.3. An accuser may not convene a military commission for the trial of the person accused. R.M.C. 504. Prior to referral he may order depositions. R.M.C. 702. He may grant immunity. R.M.C. 704. Following referral and prior to the first session of the military commission, he may inquire into the mental capacity of the accused if the military judge is not reasonably available. R.M.C. 706. He details or employs court reporters qualified to make a quality verbatim record of all commission sessions. R.T.M.C. ¶ 2-3.a.4. He details or employs qualified interpreters. R.T.M.C. ¶ 2-3.a.5. He ensures that the Trial Judiciary is properly staffed. R.T.M.C. ¶ 2-3.a.6. He orders that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the Convening Authority for a fair trial. R.T.M.C. ¶ 2-3.a.10. He reviews requests from the prosecution and the defense for experts and determine whether the experts sought are relevant and necessary. R.M.C. 703(d); R.T.M.C. ¶ 2-3.a.11. He is responsible for effecting preparation of the record of trial. R.T.M.C. ¶ 2-3.a.12. He reviews military commission records of trial, considers matters, including matters in clemency, submitted by an accused with respect to the findings and sentence of a military commission, and takes such action deemed appropriate by the Convening Authority. *See* R.T.M.C. ¶ 2-3.a.13. He may approve, disapprove, commute, or suspend the sentence of a military commission, in whole or in part. 10 U.S.C. § 950b. There is nothing inherent in the performance of any of these roles that renders the Convening Authority unneutral or puts him in an adversarial relationship with the accused. Furthermore, just as an adverse ruling on a motion by the military judge does not create an adversarial relationship between the judge and the accused, neither does a denial of an

expert assistance request, or the performance of any of these other roles by the Convening Authority, render his relationship vis a vis the accused adversarial.

C. The M.C.A. Establishes Robust Institutional Safeguards that Ensure the Neutrality of the Convening Authority

The M.C.A. ensures the objective neutrality of the Convening Authority. The M.C.A. prevents the Convening Authority from being unlawfully influenced by prohibiting any person from "attempt[ing] to coerce or, by any unauthorized means, influence" the "action of any convening, approving, or reviewing authority with respect to their judicial acts." 10 U.S.C. § 949b(a)(2); *accord* R.M.C. 104(a)(2)(B) ("No person may attempt to coerce or, by any unauthorized means, influence . . . (B) the action of any convening, approving, or reviewing authority with respect to their judicial acts . . . .").

The Convening Authority's actions with respect to the sentences of military commissions are similarly limited by law. Although the Convening Authority may "approve, disapprove, commute, or suspend the sentence in whole or in part," he "may not increase a sentence beyond that which is found by the military commission." 10 U.S.C. § 950(b)(C). Appeal of the Convening Authority's action is taken directly to the United States Court of Military Commission Review, which reviews it *de novo*. 10 U.S.C. § 950(f)(d) ("The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses."); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1158 (C.M.C.R. 2011); *id.* at 1164 ("Whether a military commission may exercise jurisdiction over the charged offenses is a question of law we review *de novo*. . . . We also review sentence appropriateness and factual sufficiency *de novo*.").

Certain significant decisions by the Convening Authority—such as the Convening Authority's decisions regarding the employment of experts and the production of witnesses—are

subject to judicial review by an independent military judge. Pursuant to R.M.C. 703(d), the prosecution and the defense must submit requests for the employment of expert witnesses to the Convening Authority. R.M.C. 703(d) ("A request denied by the convening authority may be renewed before the military judge, who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute.").

D. The Neutral Role of the Convening Authority Rests on Two Centuries of Military Precedent

The defense contends that the Convening Authority established by the M.C.A. is unconstitutional and that "[n]one of the special characteristics of military justice that the D.C. Circuit relied upon in *Curry* [*v. Secretary of the Army*] to exempt military justice from ordinary due process requirements . . . apply to prosecutions brought under the MCA." AE 091 at 8. This contention is inconsistent with both longstanding American practice and current law.

The existence of a Convening Authority is as old as American military law itself. *See*, *e.g.*, Res. of Continental Congress of June 30, 1775, *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 111 (Worthington Chauncey Ford ed., 1905) (enacting 1775 Articles of War); Res. of Continental Congress of Sept. 20, 1776, *in* 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 788 (Worthington Chauncey Ford ed., 1906) (enacting 1776 Articles of War); Act of Apr. 10, 1806, ch. 20, 2 Stat. 359 (enacting 1806 Articles of War, the first Articles of War under the U.S. Constitution). The role of the Convening Authority in both courts-martial and military commissions is sanctioned by more than two centuries of military practice and precedent. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 42-60 (rev. 2d ed. 1920). Historically, military commissions convened under the common law of war were generally "conducted according to the rules and forms governing courts-martial." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841 (rev. 2d ed. 1920); *id.* at 835 n.81 (noting that "military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"). As such, military commissions employed "convening

authorities" as in courts-martial. Recognizing this historic American practice, Congress, when it enacted the M.C.A., based the procedures for military commissions upon the procedures for trial by general courts-martial. 10 U.S.C. § 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice)."). *Compare* R.M.C. *with* Rules for Courts-Martial (R.C.M.).

The defense argues that different policy concerns undergird court-martial and military-commission convening authorities. The dispositive difference is that "[t]he overriding purpose of this power is not punitive but to ensure that the armed forces are 'ready to fight wars.' The military justice system serves this purpose by maintaining service members' '[o]bedience, discipline, and centralized leadership and control.'" AE 091 at 8. The defense further contends that the "sole purpose" of military commissions is "punishment" and "the notion of imposing 'discipline and good order'" on unprivileged enemy belligerents is "meaningless." AE 091 at 9.

To the contrary, the Supreme Court of the United States has held that military commissions are "disciplinary measures" employed during times of war to punish and deter law-of-war violations. In *Ex parte Quirin*, the Supreme Court reasoned that:

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.

Ex parte Quirin, 317 U.S. 1, 28-29 (1942); *see also In re Yamashita*, 327 U.S. 1, 11 (1946) (quoting the same passage); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920) ("The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war."). Thus, the defense is incorrect—both courts-martial and military commissions rest on the same disciplinary purpose. Indeed, a literal application of the defense contention would invalidate every military commission trial in American history, as they generally followed the

procedures of courts-martial. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841 (rev. 2d ed. 1920).

The defense further argues that because the Convening Authority "is a civilian position in a civilian bureaucracy" and not "a military commander whose primary responsibilities are military, not judicial or prosecutorial," the law-of-war military commission trying the accused is therefore irregularly convened. AE 091 at 11. The defense contention is, once again, historically incorrect. Civilian convening authorities from within the executive branch of the United States Government, including several commanders-in-chief, have convened some of the most important law-of-war military commissions in our nation's history.[2] Thus, when Congress authorized the Secretary of Defense or his designee (military or civilian) to convene military commissions under the M.C.A., Congress acted consistently with historic American practice. 10 U.S.C. § 948h ("Military commissions under this chapter may be convened by the Secretary of

[2] President Andrew Johnson personally convened the military commission that tried the Lincoln assassination conspirators. *See* President Andrew Johnson, Special Orders, No. 211, War Department, Adjutant-General's Office, Washington, May 6, 1865, *reprinted in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 335 (James D. Richardson ed., Washington, Gov't Printing Office 1897) (convening military commission to try Lincoln assassination conspirators). President Johnson also personally convened the military commission that tried Capt. Henry Wirz, C.S. Army. *See* President Andrew Johnson, Special Orders No. 453, War Department, Adjutant General's Office, Washington, Aug. 23, 1865, *reprinted in* H.R. EXEC. DOC. NO. 40-23, at 2 (2d Sess. 1867) (convening military commission to try Capt. Henry Wirz, C.S. Army). During the Civil War, the Secretary of War (the present-day Secretary of the Army) routinely convened military commissions and acted as the reviewing authority thereon. *See, e.g.*, Sec'y of War Edwin M. Stanton, General Court Martial Orders, No. 202, War Department, Adjutant General's Office, Washington, July 22, 1864 (approving conviction, but mitigating sentence, of Phillip Trammell (Virginia citizen charged with violating law of war in carrying on guerrilla warfare in northeast Virginia during 1863 before special military commission convened Feb. 10, 1864 at Washington, D.C.)). After the Civil War, President Ulysses S. Grant authorized the convening of a military commission to try six Modoc prisoners charged with violating the law of war during April 1873. *See* Letter from William W. Belknap, Sec'y of War, to Gen. W. T. Sherman (June 11, 1873), *reprinted in* H.R. EXEC. DOC. NO. 43-122, at 91 (1st Sess. 1874) (authorizing—by June 1873 order of President Ulysses S. Grant—trial of six Modoc prisoners by military commission). During World War II, President Franklin D. Roosevelt personally convened a military commission to try eight Nazi saboteurs. *See* President Franklin D. Roosevelt, Mil. Order (July 2, 1942), 7 FED. REG. 5103 (July 2, 1942) (convening military commission to try eight Nazi saboteurs); *see generally Ex parte Quirin*, 317 U.S. 1 (1942). Thus, civilian convening authorities of military commissions are completely consistent with historic American practice.

Defense or by any officer or official of the United States designated by the Secretary for that purpose.").

III. The Defense Fails To Provide Any Basis that the Convening Authority's Decisions in These Proceedings Have Been Unfair

The Convening Authority has continued to act neutrally in-law and in-fact in this case following his decision to refer. One of the principal roles the Convening Authority has once trial proceedings of a military commission have commenced is in determining whether to fund defense requests for expert assistance and resources. *See* R.M.C. 703(d). To date, the five defense teams collectively submitted a total of 14 requests for expert assistance to the Convening Authority. *See* Attachment B. The Convening Authority has either granted or proposed an adequate substitute to 10 of those requests; an approval rate of more than 70 percent of all defense requests for experts. Furthermore, each request for expert assistance that was denied included a detailed memorandum citing the legal and/or factual basis for such decision. Approval of such expert assistance is indicative of the Convening Authority's continued neutrality in these proceedings while discharging his duties.

The defense cites to numerous cases that are inapt, either because they do not support their arguments or because the Convening Authority fully satisfies the legal standard the cited cases articulate. For example, the defense cites (at 4) *In re Murchison*, 449 U.S. 133, 136 (1955), to support the principle that "no one is permitted to decide a case where he or she had an interest in the outcome." *Murchison* held that it is a violation of due process for a one man to serve as a judge presiding over a contempt charge arising out of a hearing where he had served as the one man grand jury out of which the contempt charges arose. *Id.* Here, the Convening Authority is not the judge. Further, in *Murchison*, the presiding judge was also the accuser and the victim. Here, the Convening Authority is not an accuser (and is not permitted to be by law) or a victim of the crime charged.

The defense also cites (at 2) *Schweiker v. McClure,* 456 U.S. 188, 195 (1982), for the proposition that "[d]ue process demands impartiality on the part of those who function in judicial

or quasi-judicial capacities." In *Schweiker*, the Court found that the appellants did not show that the procedures prescribed by Congress for Medicare hearings were not fair, and noted that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 198 (citing *Morrisey v. Brewer*, 408 U.S. 481 (1972)). Again, the Convening Authority here is impartial in law and in fact. The defense cites (at 2-3) *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) for the proposition that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." *Tumey*, however, involved the mayor of a small town who had a direct personal pecuniary interest in convicting the defendant who came before him for trial. *Id.* at 523. The Convening Authority in this case has no personal pecuniary interest in the outcome.

The defense also relies upon *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979), to support its argument by reasoning that the M.C.A.'s Convening Authority system would be "inconsistent with due process if instituted in the context of a civilian criminal trial." AE 091 at 7. In *Curry*, the D.C. Circuit upheld the general court-martial conviction of a U.S. soldier under the Uniform Code of Military Justice ("UCMJ") on the basis that the Supreme Court has recognized the military's "unique circumstances and needs justify a departure from civilian legal standards." *Curry*, 595 F.2d at 877. The defense argument, however, fails to acknowledge that the Court has held that determining appropriate due process depends upon "'an analysis of the interest of the individual and those of the regime to which he is subject.'" *Curry*, 595 F.2d at 876 (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). That analysis, applied here, shows that the reformed military-commission system, including the role of the Convening Authority, fully comports with due process. The *Curry* court held that, "given [the] substantial deference to Congress in military matters," the UCMJ's procedures struck a constitutionally permissible balance and were appropriate to accommodate the interests of justice with the demands for an efficient, well-disciplined military. *Curry*, 595 F.2d at 880-81. An analogous conclusion applies here as well because military commissions are "disciplinary measures"

employed during times of war to punish and deter law-of-war violations—in effect to ensure the proper conduct of war. *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942).

In reaching its determination of constitutionality, the *Curry* court enumerated the precautions that Congress enacted in the UCMJ to guard against the improper exercise of command influence. Military commissions under the M.C.A. contain analogous provisions for all of the UCMJ provisions cited in *Curry*. First, under the UCMJ, "before ordering a trial, the convening authority must consult his staff judge advocate concerning the sufficiency of the charges and the availability of the evidence." *Curry*, 595 F.2d at 879 (citing UCMJ Art. 34, 10 U.S.C. § 834 (1976)). Similarly, R.M.C. 406 states, "[b]efore any charge may be referred for trial by a military commission, it must be reviewed by the legal advisor of the convening authority for consideration and advice. The legal advisor must state whether (1) each specification alleges an offense under the Military Commissions Act, (2) the allegation of each offense is warranted by the evidence, and (3) a military commission would have jurisdiction over the accused and the offense." Second, under the UCMJ, "[u]pon review of a conviction, the staff judge advocate must submit to the convening authority an opinion which becomes part of the record." *Curry*, 595 F.2d at 879 (citing UCMJ Arts. 61, 65(b), 10 U.S.C. §§ 861, 865(b) (1976)). Similarly, R.M.C. 1104(g) states, "[a]fter every military commission, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action. The convening authority shall refer the record to the legal advisor for recommendation under R.M.C. 1106 before the convening authority takes action." Third, under the UCMJ, "[i]f the convening authority approves a sentence that extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable discharge, or confinement for one year or more, a Court of Military Review must review the record." *Curry*, 595 F.2d at 879 (citing UCMJ Art. 66(b), 10 U.S.C. § 866(b) (1976)). Similarly, R.M.C. 1111 states, "[i]n all cases where there is a finding of guilt approved by the convening authority, except where appellate review has been waived pursuant to R.M.C. 1110, the convening authority shall send each record of trial and the convening authority's action directly to the United States Court of

Military Commission Review." Fourth, under the UCMJ, legal challenges raised by court-martial defendants are subject to appellate review by the "United States Court of Military Appeals," a court composed of civilian judges 'completely removed from all military influence or persuasion.'" *Curry*, 595 F.2d at 879 (citing UCMJ Art. 67, 10 U.S.C. § 867 (1976)). Section 950(g) of the M.C.A. provides that military-commission cases are subject to civilian appellate review in the United States Court of Appeals for the District of Columbia Circuit.

In addition to the aforementioned precautions, the *Curry* court reasoned that "Congress further provided the accused with a wide range of procedural rights to guard against command influence" and listed additional examples of such procedural rights. *Curry*, 595 F.2d at 879. With the exception of an option to select enlisted panel members or trial by the judge alone, the M.C.A. also affords an accused all the analogous procedural safeguards noted by the *Curry* court. For example, under the UCMJ, "[a] defendant is guaranteed legal representation at both trial and appellate levels" and "may select his own military counsel, so long as the counsel is 'reasonably available,' or he may provide his own civilian counsel" in the court-martial process and are similarly guaranteed by R.M.C. 506 and 1202. *Curry*, 595 F.2d at 879 (citing UCMJ Art. 27(a), (b), 10 U.S.C. § 827(a), (b) (1976), UCMJ Art. 38(b), 10 U.S.C. § 838(b) (1976), and UCMJ Art. 38(b), 10 U.S.C. § 838(b) (1976)). An accused may "challenge any member for cause, and he has one peremptory challenge" as is similarly guaranteed by R.M.C. 912. *Curry*, 595 F.2d at 879 (citing UCMJ Art. 41, 10 U.S.C. § 841 (1976)). Last, the court noted that "the UCMJ broadly prohibits the improper use of command influence" and makes such violation a "military offense." *Curry*, 595 F.2d at 879-80 (citing UCMJ Art. 37, 10 U.S.C. § 837 (1976) and UCMJ Art. 98, 10 U.S.C. § 898 (1976)). R.M.C 104 similarly institutes a rule against a convening authority or other person from attempting to unlawfully influence military commission proceedings.

7. Conclusion

Reformed military commissions provide the full panoply of procedural protections, and "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples." 1949 Geneva Conventions, Common Article 3, ¶ (1)(d). Reformed military commissions not only meet, but surpass all applicable requirements of due process—of providing the accused with a fair trial in a fair tribunal.

The M.C.A. establishes robust institutional safeguards that ensure the neutrality of the Convening Authority as a matter of law. Further, the Convening Authority's funding decisions under R.M.C. 703 show that the Convening Authority is neutral in fact as well. The Convening Authority's role is historically well-established in both courts-martial *and* military commissions, and that role is quite distinct from those of prosecutor and judge. Accordingly, the defense motion to dismiss should be denied.

8. Oral Argument

Should the defense be granted oral argument on this motion, the government requests the opportunity to respond.

9. Witnesses and Evidence

The government does not anticipate relying on witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 26 October 2012.

B. Affidavit from Deputy Chief of Staff for the Convening Authority, Office of Military Commissions, dated 25 October 2012.

Respectfully submitted,

_____//s//_____
Clay Trivett
Deputy Trial Counsel

Michael J. Lebowitz
Captain, JA, USA
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 26th day of October 2012, I filed AE 091A, the **Government Response** to Defense Motion To Dismiss Because the Military Commissions Act Unconstitutionally Requires the Convening Authority To Act as Both Prosecutor and Judge of the Defendants with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Michael J. Lebowitz
Captain, JA, USA
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

Affidavit

I, Colonel [2] [redacted], U.S. Army, having been first sworn, state that the following information is true and correct to the best of my knowledge and belief:

- I am the Deputy Chief of Staff for the Convening Authority, Office of Military Commissions. My official duties include responsibility for oversight of all information; personnel; installation security; information technology; personnel management; logistics; transportation; litigation support; and court administration for the Office of Military Commissions. As part of my responsibilities in litigation support, I am responsible for oversight of the tracking of defense expert witness requests, including how many defense requests for expert funding have been sent, how many defense requests for expert funding have been approved by the Convening Authority, how many defense requests for expert funding have been denied, and whether any alternative "adequate substitute" experts have been approved by the Convening Authority.

- As of 24 October 2012, defense counsel submitted to the Convening Authority a total of 14 requests for expert assistance in the case of *United States v. Mohammad, et al*. The Convening Authority has either authorized or proposed a reasonable alternative to 10 of the 14 requests for expert assistance. Each request for expert assistance that was denied included a detailed memorandum citing the legal and/or factual basis for such a decision. This number does not reflect joint requests or requests for learned counsel. The numbers also do not reflect multiple requests for the same expert. Multiple requests for the same expert are treated as one request.

- The following details the disposition for each defense team's requests for expert assistance:

  a. Khalid Shaikh Mohammad: 1 request; 1 approved, 0 denied.
  b. Walid Bin 'Attash: 3 requests; 1 approved, 2 denied.
  c. Ramzi Binalshibh: 2 requests; 2 approved, 0 denied.
  d. Ali Abdul Aziz Ali: 5 requests; 3 approved, 2 denied.
  e. Mustafa al Hawsawi: 3 requests; 2 approved, 0 denied, 1 adequate substitute.

- Defense counsel also submitted 5 requests for additional resources. The Convening Authority denied all of these requests. Furthermore, the Chief Defense Counsel submitted 6 requests for additional resources for the defense teams in *United States v. Mohammad, et al*. The Convening Authority approved 3 requests and denied 3 requests. Each request for additional resources that was denied included a detailed memorandum citing the legal and/or factual basis for such a decision.

- The following details the disposition for each defense team's requests for additional resources:

  a. Khalid Shaikh Mohammad: 1 request; 0 approved, 1 denied
  b. Walid Bin 'Attash: 2 requests; 0 approved, 2 denied
  c. Ramzi Binalshibh: 0 requests; 0 approved, 0 denied
  d. Ali Abdul Aziz Ali: 1 request; 0 approved, 1 denied
  e. Mustafa al Hawsawi: 1 request; 0 approved, 1 denied

2 [redacted]

2 [redacted]

Sworn before me this 25th day of October, 2012 at Alexandria, Virginia.

2 [redacted]