

UNCLASSIFIED//FOR PUBLIC RELEASE  
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**

AE 091D

**ORDER**

**Defense Motion to Dismiss Because the  
Military Commissions Act  
Unconstitutionally Requires the  
Convening Authority to Act as Both  
Prosecutor and Judge of the Defendants**

19 June 2014

1. On 12 October 2012, all five Accused filed a motion to dismiss the charges alleging the 2009 Military Commissions Act (2009 M.C.A.) unconstitutionally requires the Convening Authority to act as both a prosecutor and a judge (AE 091). The Government responded on 26 October 2012 (AE 091A), and the Defense replied on 7 November 2012 (AE 091B). The motion was argued during the session on 22 August 2013.<sup>1</sup>

a. In its motion, Defense argued the 2009 M.C.A. and the 2011 Regulation for Trial by Military Commissions (RTMC) require the Convening Authority to serve in both prosecutorial and judicial roles in violation of the Fifth Amendment's Due Process Clause.<sup>2</sup> Defense asserted detailing the Commission's panel members and maintaining the ability to modify or suspend the findings or sentence following a verdict are judicial in nature.<sup>3</sup> Defense argued convening the

<sup>1</sup> Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/22/2013 from 2:18 pm to 4:28 pm, pp 5001-5014.

<sup>2</sup> See *In re Murchinson*, 349 U.S. 133, 136 (1955).

<sup>3</sup> The convening authority may take action on findings and on the sentence, but only to the benefit of an accused. The convening authority can set aside a finding of guilty or change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense. Likewise, the convening authority only has the ability to decrease a punishment imposed by a military commission. See Rule for Military Commission 1107.

commission, referring charges against an accused, approving pretrial agreements, and deciding whether to grant immunity to witnesses are prosecutorial in nature.

b. In its response, the Government contended the 2009 M.C.A. provides an accused with a fair trial in a fair tribunal and cited a host of procedural and substantive rights granted an accused under the 2009 M.C.A. The Prosecution further argued historically, military commissions were conducted in accordance with the rules governing military courts-martial.

c. Defense replied the Government failed to address the constitutional issue on which the Defense motion was based. Additionally, the Defense contended as long as the Convening Authority's role violates due process, the 2009 M.C.A. is unconstitutional regardless of the statutory rights and protections provided to an accused or the M.C.A.'s compliance with international law.

2. Discussion. The Commission need not determine whether the Accused have the right to the protections of the Fifth Amendment's Due Process Clause. Assuming, without deciding, for the purpose of resolving this motion, the Accused are entitled to the protections, the Commission will evaluate the Convening Authority's role as determined by the 2009 M.C.A. and the RTMC.

a. Congress was aware, when the 2009 M.C.A. was enacted, the Uniform Code of Military Justice (10 United States Code Chapter 47) (UCMJ) would serve as a bellwether for comparison of various aspects of Commission practice. Congress even went so far as to prescribe a rule of construction inviting litigants and the judiciary to look to the UCMJ for guidance. *See* 2009 MCA, § 984b(c). The structuring of the Military Commission Convening Authority to function so similarly to conventional military justice convening authorities speaks to the legislative intent with regard to the Convening Authority's function.

b. Defense relied on *In re Murchinson*, 349 U.S. 133, 136 (1955), to illustrate the alleged conflict and due process violation that inevitably result when a judge also plays the role of

prosecutor.<sup>4</sup> The role of the Convening Authority in this Commission, however, is neither one of prosecutor nor judge. The roles of prosecutor and fact finder in this Commission are clearly delegated to the trial counsel and panel members, respectively. Similarly, a military judge is detailed to this Commission to perform judicial functions. The functions of the Convening Authority<sup>5</sup> do not encroach upon the distinctive roles of the prosecutor, military judge, or panel members.

3. Findings. Assuming *arguendo* the Due Process Clause of the Fifth Amendment to the Constitution applies to the Accused, the M.C.A. does not violate it. Contrary to the Defense's assertions, the Convening Authority is neither a prosecutor nor a judge.

a. There are five separate, discrete functional areas of responsibility to this case: the Prosecution, responsible for presenting the government's case probative of each Accused's guilt and, if necessary, appropriate sentences; the Defense, responsible for representing the Accused during interlocutory matters, trial on the merits and, if any of the Accused are convicted, sentencing; the Military Judge, responsible for presiding over the case, making rulings of law, and managing the case through resolution; the Convening Authority, responsible for resourcing

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<sup>4</sup> In that case, a judge served as a one-man grand jury who compelled witnesses to testify before him in secret about suspected crimes as permitted by Michigan law. The same judge, however, subsequently convicted two witnesses of contempt for conduct that occurred during a secret hearing. The Court held the judge's dual functions violated the due process requirement of an impartial tribunal. *Murchinson*, 349 U.S. at 137.

<sup>5</sup> The responsibilities and functions of the convening authority are to: dispose of charges; convene the commission; detail commission members and alternates; detail or employ court reporters; detail or employ interpreters; ensure the Trial Judiciary is properly staffed with a Chief Clerk and any additional necessary staff; approve or disapprove requests from the prosecution to communicate with the media; coordinate with the Deputy Assistant Secretary of Defense for Detainee Policy on all issues dealing with policy; approve or disapprove plea agreements with an accused; order investigative resources be made available to defense counsel and the accused as deemed necessary; review requests for experts from counsel and determine if the experts sought are relevant and necessary; ensure preparation of the record of trial; review record of trial, consider defense submissions and take any action deemed appropriate; establish, maintain and preserve records that serve as evidence of the Office of the Convening Authority's functions, policies and procedures; ensure the collection, maintenance, use and release personally identifiable information contained in records associated with the execution of the convening authority's functions; communicate with members of Congress, Office of the Secretary of Defense officials and the Heads of the DoD components as appropriate; communicate with other government officials and representatives of foreign governments as applicable; obtain reports IAW DoD Instruction 8910.01; approve DoD manuals as necessary or appropriate for the conduct of proceedings by military commissions IAW DoD Instruction 5025.01; and perform other such functions as prescribed by the Secretary of Defense may prescribe. RTMC ¶ 2-3a. 1-20 (2011).

the parties and making executive decisions on the disposition of the cases; and the panel members, responsible for determining whether the Prosecution has proven the Accused's guilt beyond a reasonable doubt, and if so, an appropriate sentence.

b. The discretion exercised by the Convening Authority is executive in nature. The Convening Authority, by design, acts as an executive representative, rather than as a party advocate. His role is neither prosecutorial nor judicial in nature. Those functions are reserved to the Prosecution and the Trial Judiciary, respectively.

4. Accordingly, the Defense motion to dismiss (AE 091) is **DENIED**.

So **ORDERED** this 19<sup>th</sup> day of June, 2014.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge