MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MOHAMMAD SALIH MUBARAK BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL-AZIZ ALI,
MUSTAFA AHMED ADAM AL HAWSAWI

AE 254WW(Mohammad Sup)

Mr. Mohammad's Emergency Motion
for Appropriate Relief
to remedy unlawful influence over the Military Commission by senior government officials including the Secretary of Defense regarding the issues pending in AE 254Y

Submitted for filing on
28 October 2015 after 1600

1. Timeliness: This motion is timely filed.

2. Relief Requested: In light of extraordinary testimony before Congress on 27 October 2015 by the Secretary of Defense among others, the Military Commission should dismiss the charges, disqualify the Honorable Ashton Carter, General Joseph Dunford and General John Kelly from any role pertaining to or affecting the men who are currently defendants in this case, abate the proceedings in this matter until a hearing on this motion to dismiss can be convened, and grant whatsoever additional relief the Commission may determine appropriate.

3. Overview: The direct superior of the Military Judge in this case is the Secretary of Defense. Yesterday the Secretary of Defense testified before Congress that an order of this Military Commission is "outrageous" along with other senior national leaders who called for the order to be changed.[1] The Secretary expressly endorsed the testimony of the Chairman of the Joint Chiefs of Staff urging that the order "be fixed" and added, "outrage is a very good word for it."

[1] United States Senate Armed Services Committee Hearing on United States Military Strategy in the Middle East, 27 October 2015, video at http://www.c-span.org/video/?328955-1/secretary-carter-general-dunford-testimony-middle-east-strategy (relevant testimony beginning at approximately 2 hours 48 minutes) (hereafter "Video of SASC Testimony 27 Oct 2015").

The direct superior of a military judge has publicly harshly condemned that judge's interim order regarding matters in current litigation before that judge. There is no clearer form of unlawful influence. Further, according to statute and regulation, Military Commission authority is derived from the Secretary of Defense, and disqualification of the Secretary and the Generals involved, while necessary, is alone not adequate to remove the taint. The Commission should conduct a thorough investigation of the impact of this unlawful influence, otherwise abate proceedings until hearing on the motion to dismiss, and dismiss the charges. The requested relief is warranted under the Due Process Clause, the Fifth, Sixth and Eighth Amendments to the United States Constitution, accepted principles of death penalty jurisprudence, the Military Commissions Act of 2009, the RTMC and R.M.C., the Law of Armed Conflict including Common Article 3 of the Geneva Conventions of 1949, and other provisions of international law.

4. Burden of Proof and Persuasion: The defense has the initial burden to show potential unlawful influence by "some evidence" -- a low burden, but more than mere allegation or speculation.[2] Put another way, once unlawful influence is raised at the trial level, "a presumption of prejudice is created."[3] The burden then shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings are untainted.[4]

5. Facts:

a. The Chief Judge of the Military Commissions Trial Judiciary is Colonel James Pohl, United States Army.[5]

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[2] *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2003).
[3] *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).
[4] *United States v. Stoneman*, 58 M.J. 35, 41 (C.A.A.F. 2002).
[5] 10 U.S.C. § 948j(a); R.T.M.C. Chapter 6; R.M.C. 503(b)(1); and Transcript of 5 May 2012 at 198.

b. As Chief Judge, Colonel Pohl detailed himself to be the Military Judge in this case, and has served as Military Judge in this case since April 2012.[6]

c. On 7 January 2015, the Military Commission issued AE 254JJ, *Interim* Order, Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel (hereafter, the Order).

d. The Order was issued on an interim basis after the filing of defense emergency motion AE 254Y and related supplements, which raised the defendants' religious objection to being forcibly touched by guards of the opposite sex and specifically noted the U.S. government's documented history of systematic sexualized torture and sexualized attacks on the Islamic religious identity of these defendants and other detainees at Guantanamo Bay and other locations while in US custody. AE 254Y(WBA), AE 254Y(Mohammad Sup) and AE 254Y(RBS Sup).

e. Important issues pertaining directly to the Order are currently on the Commission's docket for the present two-week session. (Unofficial/Unauthenticated Transcript at p.8643, 22 Oct 2015, Military Judge stating in part: "I believe 350 was next on the agenda, and then 254.")

f. On 27 October 2015, the Secretary of Defense Ashton Carter appeared before the Senate Armed Services Committee and testified that the Order is "outrageous." *See* Video of SASC Testimony 27 Oct 2015 (see footnote 1 herein).

g. On 27 October 2015, the Chairman of the Joint Chiefs of Staff General Joseph Dunford appeared before the Senate Armed Services Committee and testified that the Order is "outrageous," using the word "outrageous" three times in his remarks on this issue, and stated the Order "ought to be fixed," testifying substantially as follows: "I feel the same way as the Commander of US Southern Command General Kelly who describes it as outrageous, and I read

[6] AE001 Memorandum for Convening Authority; *see also* Transcript of 5 May 2012 at 114-15.

his weekly report and have read it for about probably the last seven or eight weeks, to include the two or three weeks before transition, so, it is outrageous. He's identified it. That's being worked by lawyers, it's an injunction. I'm not using that as an excuse, but that's where it is right now, the Commander has identified it, it's outrageous, it ought to be fixed, it hasn't been to date, and that's where it's at." *Id*.

h. In his testimony, Secretary of Defense Ashton Carter said the order "is outrageous," and expressly endorsed the above-quoted testimony of Gen Dunford urging that the Commission "fix" it. The Secretary of Defense also endorsed the reported description by General Kelly, testifying further, "I think it is counter to the way we treat service members, including women service members, and outrage is a very good word for it."

i. Senator Kelly Ayotte of New Hampshire described the Order as "outrageous" during the same hearing[7] and, along with other Senators, further criticized the Order during a press conference after the hearing.[8]

j. The remarks yesterday attributed by General Dunford and Secretary Carter to General Kelly are consistent with General Kelly's previous statements. General Kelly has previously testified before Congress in a manner critical of the Order, and has made public remarks in front

[7] Senator Ayotte had recently returned from a Congressional visit to the Guantanamo Bay detention facilities at the time of this hearing. It is unclear whether it is a coincidence that she traveled to Guantanamo for the purpose of investigating the underlying factual issues related to the pending litigation. Given the timing of visit and the fact that the issue of female guards was first presented to this Commission on 17 October 2014, it is unlikely that Senator Ayotte's trip was planned before the female guard issue was raised. On the contrary, it is more probable that the trip was planned in conjunction with the Department of Defense as a result of the fact that the issue was pending before this Commission. *See* AE 254Y.

[8] *Id*; s*ee also* video footage of Sen. Ayotte, Sen. Scott and Sen. Capito press conference at https://www.youtube.com/watch?v=HWmV8u49yeo; and "Senior Defense Dept. officials decry Guantánamo judge's female guard ban," Carol Rosenberg, 27 Oct 2015, Miami Herald, at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article41615208.html#storylink=cpy.

of servicemembers at JTF Guantanamo official events expressing sharp hostility toward the Order, and establishing a command climate welcoming similar inappropriate remarks regarding the Order to be made by his subordinates.[9]

k. The positions of Secretary of Defense, Chairman of the Joint Chiefs of Staff, and Commander of U.S. Southern Command are each tremendously important positions of authority which directly impact the lives of the men who are defendants in this case.

l. Independence and impartiality of the judiciary are among the judicial guarantees deemed indispensable by civilized peoples and required by international law and Common Article 3 of the Geneva Conventions for a tribunal to be considered a regularly constituted court. *See, e.g., Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927); *Indiana v. Edwards*, 554 U.S. 164 (2008); the Universal Declaration of Human Rights, Article 10; the International Covenant on Civil and Political Rights, Article 14; and the European Convention on Human Rights, Article 5.

6. Law and Argument:

a. Independence of the Trial Judiciary.

As the Military Commission has previously noted, it has long been a tenet of American law that an independent trial judiciary is essential to any system of justice. *See* AE 343C. It is

[9] *See* "Southcom wants to expand Guantánamo's 'balsero' camp infrastructure" by Carol Rosenberg, 13 MAR 2015, Miami Herald at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article13982705.html#storylink=cpy (Gen Kelly: "Anyone that knows anything about the Moslem [sic] religion knows that it's not against their religion . . . As soon as it's over it'll be, 'We don't want to be touched by Jews. Or we don't want to be touched by black soldiers. Or we don't want to be touched by Roman Catholics,' . . . It's beyond me why we even consider these requests, . . . But I'm not a lawyer. I'm not smart enough to figure this out."); *and* "Southcom's Kelly installs new Guantánamo prison commander, rips media coverage" by Carol Rosenberg, 1 JUL 2015, Miami Herald, at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article26027224.html#storylink=cpy (Gen Kelly: "Since November, we have labored under an order that discriminates specifically against some of our personnel because of who they are. And that's un-American. And I as a personal failure have not been able to convince people [who] could change that ruling to change that.")

elementary that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U. S. 133, 136 (1955). A necessary component of a fair trial is an impartial judge. *See ibid.; Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927); *Indiana v. Edwards*, 554 U.S. 164 (2008).

In *United States v. Weiss*, 510 U.S. 163 (1994), the United States Supreme Court recognized the importance of the statutory scheme designed to protect the independence of Military Judges by shielding them from the authority of the convening officer. The Court held:

> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U. S. C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.[10]

Of course the above refers to courts-martial and not to military commissions. The only official specified in the M.C.A. and/or the R.M.C. who has authority to review or remove the Chief Judge of the Military Commissions Trial Judiciary from that post is the Secretary of Defense. *See* RTMC 6-1.b and R.M.C. 503b. The Convening Authority is statutorily prohibited from doing so. 10 U.S.C. § 948j(f); *see also* RMC 502(c)(5).

b. Unlawful Influence.

The Military Commission Act (MCA) prohibits Unlawful Influence. 10 U.S.C. § 949b. The Act prohibits such influence regardless of source and provides greater protection than the Uniform Code of Military Justice (UCMJ) prohibition of Unlawful Command Influence (UCI). UCMJ, 64 Stat. 109, 10 U.S.C. §§ 801–946.

[10] *Unites States v. Weiss,* 510 U.S. 163, 180 (1994).

Although the MCA provision is more expansive than the UCMJ, extensive UCI litigation in military courts provides a useful framework in analyzing the issue.

Unlawful Command Influence is the improper use, or perception of use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999); *and* Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012).

Unlawful Command Influence is the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Article 37, of the UCMJ was enacted by Congress to prohibit commanders and convening authorities from attempting to coerce, or by unauthorized means, influence the action of a court-martial, or any member thereof in reaching the findings or sentence in any case. Article 37(a), UCMJ.

UCI can manifest in a multitude of different situations and can affect the various phases of the court-martial process. *See United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Furthermore, "[t]he term 'unlawful command influence' has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994).

It has been noted that Unlawful Command Influence can manifest itself in one of two ways either through actual UCI or apparent UCI. The RTMC specifically warns against the appearance of unlawful influence: "all persons…should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it." RTMC Chapter 1. Therefore, even if there is no actual UCI, there may still be apparent UCI, and the military judge must take affirmative steps to ensure that both forms of potential

UCI are eradicated from the court-martial in question. *United States v. Lewis,* 63 M.J. 405, 416 (C.A.A.F. 2006).

The "appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial." *Lewis,* 63 M.J. at 407. Thus, the disposition of an issue involving UCI, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of UCI. *Id* at 416. The question of whether there is apparent UCI is determined "objectively." *Id.* This objective test for apparent UCI is similar to the tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id* Specifically, the Court must focus on the "perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Id.* Therefore, the central question to ask is whether, an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding." *Id*.

In *United States v. Biagase,* 50 M.J. 143 (C.A.A.F. 1999), the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) provided an analytical framework applicable to cases of UCI. The Court held that the initial burden is on the defense to raise the issue of UCI. The burden is "low," but it is more than mere allegation or speculation. The quantum of evidence required to meet this burden and thus raise the issue of UCI is "some evidence." *Biagase,* 50 M.J. at 150. Elaborating on this rule C.A.A.F. has held that the defense must show facts which, if true, would constitute UCI, and it must show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. Again, if the defense shows "some evidence" of such facts, then the issue is "raised." *United States v. Stoneman,* 57, M.J. 35, 41 (C.A.A.F. 2002).

Once the issue has been raised, the burden then shifts to the government. The government may show either that there was no UCI, or that any UCI would not taint the proceedings. If the government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based, or by persuading the Military Judge that the facts do not constitute UCI. The government may choose not to disprove the existence of UCI, but prove that it will not affect these specific proceedings. The government must meet their burden of beyond a reasonable doubt, despite which tactic they choose. *Stoneman,* 57 M.J. at 41 (citing *Biagase*, 50 M.J. at 151).

If actual or apparent UCI is found to exist, the Military Judge "has broad discretion in crafting a remedy to remove the taint of unlawful command influence," and such a remedy will not be reversed, "so long as the decision remains within that range." *United States v. Douglas,* 68 M.J. 349, 354 (C.A.A.F. 2010). The judge may consider dismissal of charges when the accused would still be prejudiced despite remedial actions, or if no useful purpose would be served by continuing the proceedings. *Douglas,* 68 M.J. at 354. C.A.A.F. elaborated: "However, we have noted that when an error can be rendered harmless, dismissal is not an appropriate remedy. Dismissal is a drastic remedy and courts must look to see whether alternative remedies are available." *Id*. Indeed, the Court went on to say that, "this Court has recognized that a military judge can intervene and protect a court-martial from the effects of unlawful command influence." *Id*. Finally, the Military Judge should attempt to take proactive, curative steps to remove the taint of UCI, and therefore ensure a fair trial. *Id.* C.A.A.F. has long recognized once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 M.J.

178, 186 (C.A.A.F. 2004) (citations omitted). In *Gore,* the trial judge dismissed the charges with prejudice holding that the conduct was such that dismissal was the only appropriate remedy. On appeal, the Navy-Marine Corps Court of Appeals (N-MCCA) reversed the trial judge stating that the trial judge should have applied a less drastic remedy. But the United States Court of Appeals for the Armed Forces (CAAF) overturned the service court stating, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by the proceedings." *Id.* at 184. In doing so, the court stated,

> The mandate of *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999) could not be more clear. Undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated. And this is going to be what we are about to see, the eradication of something that has shocked the conscience of this court.

Id.

Similarly, in this Commission, the only appropriate remedy is dismissal. Given the intentional, brazen nature of the influence, as well as fact that the command officials involved, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, are the most senior officials in the Department of Defense, dismissal is the only appropriate remedy.

c. The Charges should be Dismissed because the Military Judge's Direct Superior Failed to Defend the Independence of the Judiciary and Instead Publicly Condemned the Judge's Order and Urged its being "Fixed."

The Military Commissions Act of 2009 at 10 U.S.C. § 948j(a) provides in part, "The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are . . . detailed to military commissions."

In 2011, the Secretary of Defense did just that, promulgating through *then-Deputy Secretary of Defense Ashton Carter* the current Regulation for Trial by Military Commission

(RTMC). RTMC 6-2 provides that military commission trials shall be the primary duty of military judges in the Military Commissions Trial Judiciary.

In 2012, then-Secretary of Defense Leon Panetta promulgated the current Manual for Military Commissions which include the Rules for Military Commissions (R.M.C.).

RTMC 6-1.b and R.M.C. 503b each provide that the Chief Trial Judge will be selected by the Secretary of Defense or his or her designee, from a pool of military judges nominated by the military Judge Advocates General. Accordingly, the Secretary of Defense is the only official named in the statute or rules who has the authority to review or remove the Chief Judge from the position of Chief. *See Morrison v. Olsen,* 487 U.S. 654 (1998) recognizing that along with the power to appoint executive officers comes the power to remove them, absent congressional limitation.

The M.C.A. of 2009 prohibits the Convening Authority from preparing or reviewing "any report concerning the effectiveness, fitness or efficiency of a military judge detailed to the military commissions which relates to such judge's performance of duty as a military judge on the military commission." 10 U.S.C. § 948j(f); see also RMC 502(c)(5). In accordance with this restriction, the Convening Authority cannot be delegated the authority to review or remove the Chief Judge of the Military Commissions Trial Judiciary. The Secretary of Defense retains the authority to review or remove the Chief Judge and accordingly the Secretary of Defense is accurately evaluated for these purposes as the direct superior of the Military Judge.

The direct superior of the Military Judge in this case has publicly condemned an Order by the Military Judge on a contested matter of active litigation, and has publicly endorsed statements that the Order "ought to be fixed" and other statements of plainly apparent unlawful influence. This occured during an official, formal interaction between the two most powerful branches of the U.S. Government. It immediately attracted national media attention.

When asked by a Senator to take a position on this Order, the Military Judge's direct superior failed to defend the independence of the judiciary and instead publicly condemned the Judge's Order and urged that it be "fixed," plainly satisfying the legal tests for actual and apparent unlawful influence. This present incident is a far more pointed, directly relevant and brazen display of unlawful influence than that found by the Commission in AE 343C regarding change 1 to the RTMC.

d. The Charges should be Dismissed because per Statute and Regulation Military Commissions Power and Authority is Exercised by and Derived from the Secretary of Defense, who has now Demonstrated Extraordinary Bias and Willingness to Unlawfully Influence this Commission.

The first operative subchapter of the RTMC promulgated by then-Deputy Secretary of Defense Ashton Carter states as follows:

> **1-3. RESPONSIBILITIES**
>
> a. *The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the DoD*.
>
> b. The Chief Trial Judge, Military Commissions Trial Judiciary, *as a designee of the Secretary of Defense* or his designee, is responsible for the supervision and administration of the Military Commissions Trial Judiciary.
>
> c. The Deputy General Counsel for Personnel and Health Policy of the DoD, *as designee of the Secretary of Defense*, is responsible for the oversight of defense counsel services for military commissions.

Emphasis added.

The second operative subchapter of the RTMC is also relevant, stating:

> **1-4. UNLAWFUL INFLUENCE IN MILITARY COMMISSIONS PROCEEDINGS**
>
> 10 U.S.C. § 949b, prohibits unlawful influence in military commissions proceedings. All persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence. In addition, all persons, even those not officially involved in the

> commissions process, should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.

According to the MCA of 2009, no one may convene a military commission except the Secretary of Defense or his or her designee. 10 U.S.C. § 948h. The Legal Advisor to the Convening Authority is "appointed by authority of the Secretary of Defense." RTMC 2-1.b. No one may refer charges to a military commission except "[t]he Secretary of Defense or a Convening Authority designated by the Secretary of Defense." RTMC 4-1.a. The Chief Prosecutor is "appointed by the Secretary of Defense or his or her designee." RTMC 8-1. The Chief Defense Counsel is "designated by the Secretary of Defense or his designee." RTMC 9-1.a.1. The Secretary of Defense is given authority to impose punitive and other action for rules violations, per RTMC 10-1.b. These are only a few examples of the integral role of the Secretary of Defense in military commission cases, and the central role of the Secretary's authority and power over these cases. It should be noted that post-trial processing also involves the Secretary of Defense extensively, including the selection of judges for the Court of Military Commission Review. RTMC Chapter 25.

One provision of the RTMC issued by then-Deputy Secretary Carter appears to acknowledge presciently that even the Secretary of Defense may become disqualified and therefore unable to act in a particular case, stating as follows:

> *Disqualification of the Convening Authority.* If the Convening Authority is unable to refer the case to trial, the Convening Authority shall forward the case to the Secretary of Defense for further action. If the Secretary of Defense cannot take action in a particular case, the Secretary of Defense should designate an official to serve as the Convening Authority for a particular case.

RTMC 4-3.h, emphasis in original. This provision does not contemplate post-referral disqualifying testimony, public or private directives or other action by the Secretary of

Defense directed at an Order by a military judge. Due to the uniquely central role of the Secretary of Defense in military commissions (in sharp contrast to his lesser role in most courts-martial), the provision would be unable to remove the taint of a SecDef who became disqualified.

Disqualification of the Secretary of Defense from any further involvement in this case would not, by itself, adequately mitigate the taint caused by the Secretary's public condemnation of the Commission's Order in this context. The Secretary of Defense has, without hesitation, publicly, pointedly and with expressed hostility, undermined the appearance of independence of this tribunal on an issue of crucial significance to the Defense. The Secretary of Defense is the central authority for military commissions, by statute and by his own regulation. The central authority for military commissions has now directly attacked an order of this Commission, and thereby devastated the independence and appearance of independence of this tribunal.

If this case progresses any further, equally or more controversial issues and rulings likely will be required, such as suppression of statements and evidence derived from torture. Such rulings will never be free from the appearance of unlawful influence after the Secretary of Defense along with the Chairman of the Joint Chiefs and the Commander of United States Southern Command so freely condemned an Order with which they disagreed and urged to be fixed. Potential panel members witness this incident also, as do judges of the Court of Military Commissions Review. This episode demonstrates the dangers inherent in creating custom tribunals for defendants who are uniquely unpopular with the American people, which dramatically heightens the already inherent risks of unlawful command influence in a military tribunal. Proceedings must not only be fair, they must appear fair to all who observe them. *See Indiana v. Edwards*, 554 U.S. 164 at 177 (2008). A fair trial is now impossible and the charges must be dismissed.

e. The Commission should disqualify Generals Dunford and Kelly from any role in relation to the men who are defendants in this case, even after charges are dismissed, including pertaining to JTF-Guantanamo, and conduct an investigation into the extent of the unlawful influence and taint.

Disqualification of General Dunford and General Kelly is also necessary along with a thorough investigation of the full extent to which their inappropriate public and apparently non-public condemnations of this Commission's Order and authority have undermined the independence of the Military Commissions Trial Judiciary and demonstrated throughout the military chain of command a poisonous hostility to and disrespect of decisions of this tribunal with which they disagree.

Accordingly, for the foregoing reasons, Mr. Mohammad respectfully moves this Commission to dismiss the charges, to disqualify the Honorable Ashton Carter, General Joseph Dunford, and General John Kelly from any role pertaining to the men who are defendants in this case, to conduct a thorough investigation of the full extent and impact of these respected leaders' stated condemnation of the Commission's Order, to abate proceedings in this case until such time as the hearing may be held on the motion to dismiss, and for whatsoever additional relief the Commission may determine appropriate.

7. Oral Argument: Mr. Mohammad requests oral argument on this motion.

8. Witnesses Requested: Secretary of Defense, Ashton B. Carter; Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford Jr., USMC; and Commander USSOUTHCOM, General John Kelly, USMC.

9. Conference with Opposing Counsel: Defense counsel requested the prosecution's position on this emergency motion by electronic mail on 27 October 2015 at 22:28 and the prosecution did not respond within the 24 hour period per RC 3.5k so they are presumed to oppose.

10. List of Attachments:

A. Certificate of Service.

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
Maj, USMC
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 28th day of October 2015 after 1600, I electronically submitted for filing AE 254WW(Mohammad Sup) with the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel