

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

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

AE 343(Mohammad, bin 'Atash, bin al
Shaibh, al Baluchi)

Defense Motion to Dismiss
For Unlawful Influence on Trial Judiciary

30 January 2015

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Requested:** The military commission should dismiss the charges against the defendants.
- 3. Overview:** The Convening Authority, after reviewing the military judges' conduct of the military commissions and preparing a report, has successfully lobbied the Deputy Secretary of Defense to implement a rule requiring the permanent assignment of military judges to Guantanamo Bay.¹ The express purpose of this rule change is to affect the conduct of this case by "accelerat[ing] the pace of litigation,"² regardless of the government's actions in disrupting the case and its strategy of denying, delaying, and degrading discovery. The actions of both the Deputy Secretary of Defense and Convening Authority constitute actual and apparent unlawful influence over the trial judiciary, the "mortal enemy of military justice."³
- 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.⁴ Put another way, once unlawful influence is raised at the trial level, "a presumption

¹ Attachment B.

² Attachment B (Action Memo).

³ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *see* 10 U.S.C. § 949b(a)(1) & (2).

⁴ *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2003).

of prejudice is created.”⁵ 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.⁶

5. Facts:

a. On 21 November 2008, the Convening Authority, Susan Crawford, appointed Colonel James Pohl as Chief Judge of the Military Commissions. This appointment gave Colonel Pohl the authority to preside over military commissions, and to detail to each commission “certified military judges, nominated for that purpose by the Judge Advocates General of each of the military departments.”⁷

b. On 30 September 2010, Colonel Pohl was discharged from the United States Army and changed to retiree-recall status.⁸

c. On 8 April 2012, Colonel Pohl advised the Convening Authority that he detailed himself as military judge in this case.⁹

d. On 1 October 2014, Major General Vaughn A. Ary (Ret.) was appointed Convening Authority.

e. Shortly after becoming Convening Authority, Maj. Gen. Ary reviewed the effectiveness and efficiency of the military judges and other elements of the Office of the Convening Authority with a view to implementing what he viewed as improvements. The Convening Authority prepared a report of the effectiveness and efficiency of the military judges and other elements, as well as an executive summary of the report.

⁵ *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

⁶ *United States v. Stoneman*, 58 M.J. 35, 41 (C.A.A.F. 2002).

⁷ R.M.C. 503(b)(1).

⁸ Transcript of 5 May 2012 at 198.

⁹ AE001 Memorandum for Convening Authority; *see also* Transcript of 5 May 2012 at 114-15.

f. On 9 December 2014, the Convening Authority lobbied the Deputy Secretary of Defense to amend the Regulation for Trial by Military Commission (R.T.M.C.) in order to make military commissions the exclusive duty of the military judges assigned to the trial judiciary and, moreover, directing that they “shall be issued assignment orders for duty at the venue where the military commissions are to be convened.”¹⁰ The stated reason for altering the regulation by trial judiciary was “to accelerate the pace of litigation[.]”¹¹ As part of this effort, the Convening Authority provided the Deputy Secretary of Defense with the executive summary of his report on the effectiveness and efficiency of the military judges.

g. On 7 January 2015, the Deputy Secretary of Defense signed the rule change proposed by the Convening Authority. Regulation for Trial by Military Commission § 6-2(a) now provides in relevant part, “A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened.”¹²

6. Argument :

A. The military commission should dismiss the charges because the Deputy Secretary of Defense and Convening Authority have exercised unlawful influence over the military commission trial judiciary.

The Deputy Secretary of Defense, at the insistence of the Convening Authority, has changed the Regulations for Trial by Military Commission (RTMC) to require all military judges to be stationed at Guantanamo Bay for the duration of the military commission over which they preside. This action, for the explicit purpose of influencing the pace of military commissions litigation, constitutes unlawful influence over the judicial independence of the military judges.

¹⁰ Attachment C.

¹¹ Attachment B (Action Memo).

¹² Attachment C.

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Unlawful influence is the “mortal enemy” of military justice because of the recognition that members of the military, including most convening authorities, military judges, witnesses, and most counsel, through strict discipline and adherence to a military chain of command, are more susceptible to the influence of military superiors and policies than their civilian counterparts in a civilian judicial proceeding.¹³ Article 37, UCMJ, prohibits, *inter alia*, any person subject to the UCMJ from attempting to “coerce or, by any unauthorized means, influence the action” of courts-martial or military tribunals.¹⁴ “While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the opportunity to put on a defense.”¹⁵

Unlawful influence, like its counterpart unlawful command influence, causes “exceptional harm . . . to the fairness and public perceptions of military justice.”¹⁶ The Military Commissions Act broadens the protections of UCMJ Article 37, extending the scope of the prohibition to “any person”—not only those subject to the UCMJ—and prohibits attempts to coerce or influence the “action of a military commission . . . or any member thereof, in reaching the findings or sentence in any case.”¹⁷ The MCA specifically provides that a convening authority shall not “censure, reprimand, or admonish the military commission, or any member, military judge . . . with respect to any other exercises of its or their functions in the conduct of the proceedings.”¹⁸

The Convening Authority’s central complaint with the trial judiciary appears to be the amount of time required to address the issues before the military commissions. His Executive

¹³ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹⁴ 10 U.S.C. § 837.

¹⁵ *Salyer*, 72 M.J. at 423.

¹⁶ *Douglas*, 68 M.J. at 355 n.6.

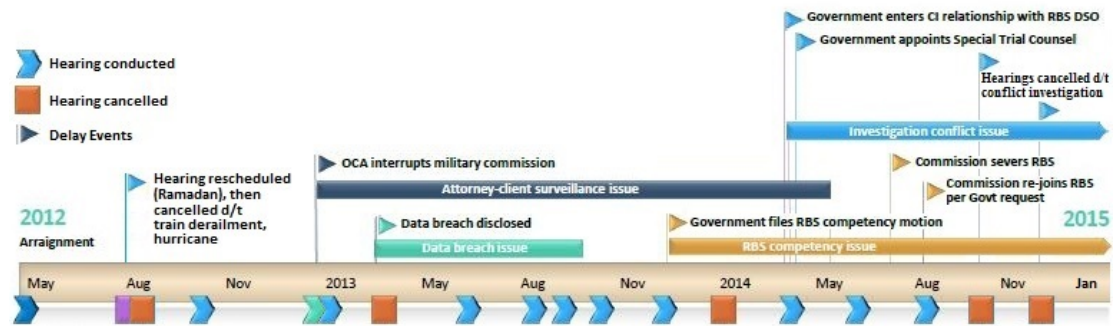
¹⁷ 10 U.S.C. § 949b(a)(2)(A).

¹⁸ 10 U.S.C. § 949b(a)(1).

Summary decries the cost of \$78 million for 107 hours, 50 minutes of hearings in FY2014.¹⁹

Four main issues have caused the cancellation of hearings and occupied much of the hearing time of the military commission: (1) the government’s maintenance of surveillance capabilities in the courtroom and attorney-client meeting spaces;²⁰ (2) the government’s improper access to defense information technology systems;²¹ (3) the government’s decision to seek a competency evaluation of Mr. bin al Shihb;²² and (4) the government’s investigation and infiltration of one or more defense teams.²³

The following timeline documents the effect of these issues on the military commissions’ schedule:



¹⁹ Attachment B (Executive Summary).

²⁰ See AE133 Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in Any Location, Including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings.

²¹ See AE155 Emergency Defense Motion to Abate for Information Technology Compromise, or to Continue Hearing.

²² See AE152G Government Motion for Inquiry into Ramzi Binalshihb’s Mental Capacity to Stand Trial Pursuant to R.M.C. 706.

²³ See AE292 Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused.

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All four of these issues are the direct result of government actions. There is no credible way to blame the military judge for the government's decision to surveil and investigate defense teams and challenge the competency of Mr. bin al Shibh. As the military commission has explained, the FY2014 delays are "attributable to issues initiated by the Government."²⁴

Apparently blaming the military judges rather than the government for these issues, the Convening Authority decided that the military commissions are proceeding too slowly. The Convening Authority took it upon himself to review the military commissions' work, and prepared a report regarding the effectiveness and efficiency of the trial judiciary. The Convening Authority sent a summary of these findings to the Deputy Secretary of Defense, demanding a change to the Regulation for Trial by Military Commission to require military judges to move to Guantanamo Bay. The explicit goal of this change is to "accelerate the pace of litigation."²⁵

The litigation schedule is the exclusive province of the military judge, outside the concern of the Convening Authority. A "judge is ultimately responsible for the control of his or her court and the trial proceedings."²⁶ "Proper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility."²⁷ Once a case has been referred to a military commission, the Convening Authority has no responsibility for or role in dictating the pace of litigation, much less authority to pressure the trial judiciary to accelerate it.

In direct contravention of statute, the Convening Authority and the Deputy Secretary of Defense have conspired to admonish the trial judiciary for the pace of litigation in the forum the Convening Authority selected. There are only two possible goals, and effects, of the change in

²⁴ AE334A Amended Docketing Order at 1.

²⁵ Attachment B (Action Memo).

²⁶ *United States v. Vargas*, 74 M.J. 1, 20 (C.A.A.F. 2014).

²⁷ *Id.* at 20-21.

the Regulation for Trial by Military Commission. The first is to increase the personal cost to military judges of time between hearings, as the military judges must spend that time at Guantanamo Bay rather than their current place of residence. Indeed, the Convening Authority told the Deputy Secretary of Defense that he “believe[s] the pace of litigation will accelerate” after the rule change requiring a move to Guantanamo.²⁸ There is some evidence that this strategy is already working to accelerate the pace of litigation: although the posture of the AE292 series is little changed from December, the February 2015 docket²⁹ includes many more motions for possible consideration than the December 2014 docket.³⁰ If a convening authority ordered a military judge to work nights and weekends confined to his or her military installation, it would constitute unlawful influence, and the result is no different here.

If a military judge is unwilling to bear the personal cost of moving to Guantanamo Bay, the second goal comes into play: the military judge will recuse himself, retire, or decline retirement recall status in favor of a military judge willing to move to Guantanamo Bay. “[W]here there is evidence in the record of an effort to unseat a military judge . . . to cause the assignment of an alternative military judge, where the presiding military judge is otherwise qualified to serve, and appearance of unlawful command influence is raised.”³¹ It remains to be seen if this eventuality will come to pass, but the Deputy Secretary of Defense and Convening Authority must certainly have contemplated it.

The RTMC change requiring a change of duty station for military judges is clearly an improper attempt to influence the military commissions. The military commission must combat what amounts to a hostile takeover of the “last sentinel” in the military justice system against

²⁸ Attachment B (Executive Summary).

²⁹ AE334 Docketing Order; AE334A Amended Docketing Order.

³⁰ AE324 Docketing Order.

³¹ *Salyer*, 72 M.J. at 424.

unlawful influence.³² Dismissal, while normally a last resort, is the only effective remedy available to the military commission.

B. The military commission should dismiss the charges because the Deputy Secretary of Defense and Convening Authority have created the appearance of unlawful influence.

The Deputy Secretary of Defense and Convening Authority also have created the reasonable public perception of unlawful influence. Every independent news source to report on the rule change described it as intended to influence the trial judiciary to speed up the pace of litigation. This appearance of unlawful influence is just as damaging—and just as illegal—as actual unlawful influence.

The military commission must review the actions of the Deputy Secretary of Defense and Convening Authority for the appearance of unlawful influence as well as actual unlawful influence.³³ “The ‘appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.’”³⁴ The objective test for appearance of unlawful influence “focus[es] upon the perception of fairness in military justice system as viewed through the eyes of a reasonable member of the public.”³⁵ “An appearance of unlawful command influence arises ‘where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.’”³⁶

There can be little doubt that disinterested observers would conclude that the RTMC changes are likely to affect the proceedings, because they already have. As soon as the

³² *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006).

³³ *Salyer*, 72 M.J. at 423-24.

³⁴ *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (quoting *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)).

³⁵ *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

³⁶ *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415).

Department of Defense announced the rule change—before any filings by defense counsel in *al Nashiri*—media observers universally concluded that the rule change was intended to and probably would affect the litigation of the case.³⁷ David Lerman of *Bloomberg* wrote an article entitled *Guantanamo Judges Told to Stay Put and Get Trials Moving*.³⁸ The *Miami Herald*—the most consistent observer of the military commissions—ran the same article with the headline, *Pentagon Orders Guantanamo Judges to Stay There to Pick Up Pace*.³⁹ A few days later, the *Miami Herald* credited a Yale Law School expert on military justice as saying “the reassignment order would inevitably accelerate the pretrial process.”⁴⁰ Of course, it can be no surprise that independent observers concluded that the rule change is intended to and will affect the litigation, as that is the express goal of the Convening Authority.

The unlawful influence in this case is not merely apparent; it is obvious. The military commission must dismiss the charges to dispel the clear indication that the military justice system is subject to manipulation by superiors in the chain of command.

C. The unlawful influence also violates Common Article 3 of the Geneva Conventions by compromising the independence of the judiciary.

The prohibition against unlawful influence is not merely an aspect of U.S. military law; it is an essential guarantee of due process through the independence of the military judiciary. Common Article 3 of the Geneva Conventions prohibits “the passing of sentences and the

³⁷ See Jonah Bennett, *In Aftermath of Paris Attack, DOD Forces Judges to Move to Guantanamo*, *The Daily Caller* (Jan. 9, 2015) (Attachment D); Maggie Ybarra, *Pentagon Orders Gitmo Tribunal Judges to Ditch Side Jobs*, *The Washington Times* (Jan. 9, 2015) (Attachment E).

³⁸ David Lerman, *Guantanamo Judges Told to Stay Put and Get Trials Moving*, *Bloomberg* (Jan. 8, 2015) (Attachment F).

³⁹ David Lerman, *Pentagon Orders Guantanamo Judges to Stay There to Pick Up Pace*, *Miami Herald* (Jan. 9, 2015) (Attachment G).

⁴⁰ Carol Rosenberg, *Defense Lawyers Cry Foul Over Rule Change Requiring War Court Judges to Move to Guantanamo*, *Miami Herald* (Jan. 13, 2015) (Attachment H).

carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”⁴¹ which include an independent and impartial judiciary.⁴²

Although U.S. courts have had little opportunity to construe the judicial independence requirement, the European Court of Human Rights (ECHR) has applied the requirement for an independent and impartial tribunal⁴³ to a military proceeding under a “convening officer” structure very similar to the military commissions’ Convening Authority.⁴⁴ The ECHR explained that, “in order to establish whether a tribunal can be considered as ‘independent,’ regard must be had, *inter alia*, to . . .the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”⁴⁵ Both the actual and the

⁴¹ Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3(1)(d).

⁴² See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) § 75(4) (June 8, 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) § 6(2) (June 8, 1977). The United States has not adopted Additional Protocols I or II, but recognizes Additional Protocol I Art. 75 and Additional Protocol II Art. 4-6 as customary international law. *Hamdan*, 548 U.S. 557, 633-34 (2006) (plurality op.) (regarding Additional Protocol I Art. 75); DoD Directive No. 2310.01E § 3(a)(2)-(3) (regarding Additional Protocol II Art. 4-6 during non-international armed conflict and Additional Protocol I Art. 75 during international armed conflict); *Report on U.S. Practice* Ch. 5.3 (1997) (“It is the *opinion juris* of the U.S. that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5, and 6 [of Additional Protocol II].”); see also *Civilians Claims (Eritrea v. Ethiopia)*, Eritrea’s Claims 15, 16, 23 & 27-32, Partial Award (Eritrea Ethiopia Claims Comm’n 2004) (“The Commission views Article 75 of Additional Protocol I as reflecting particularly important customary principles.”).

⁴³ See, e.g., Article 14 (1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention of Human Rights.

⁴⁴ *Findlay v. United Kingdom*, Judgment, No. 22107/93 (E.C.H.R. 1997). The United Kingdom abolished the role of “convening officer” in 1996.

⁴⁵ *Findlay*, No. 22107/93, at ¶ 73; see also *Çiraklar v. Turkey*, No. 19601/92 (E.C.H.R. 1998); *Şahiner v. Turkey*, No. 29279/95 (E.C.H.R. 1995).

apparent unlawful influence of the Convening Authority and Deputy Secretary of Defense violate Common Article 3 by compromising the independence of the trial judiciary.

7. **Oral Argument:** The defense requests oral argument.

8. **Witnesses:**

a. Maj. Gen. Vaughn Ary (Ret.)

b. Mr. Robert Work

9. **Conference with Opposing Counsel:** The prosecution opposes this motion.

10. **List of Attachments:**

A. Certificate of Service

B. Convening Authority's package to the Deputy Secretary of Defense

C. Deputy Secretary of Defense Action

D. In Aftermath of Paris Attack, DOD Forces Judges To Move To Guantanamo

E. Pentagon Orders Gitmo Tribunal Judges to Ditch Side Jobs

F. Guantanamo Judges Told to Stay Put and Get Trials Moving

G. Pentagon Orders Guantánamo Judges to Stay There to Pick Up Pace

H. Defense Lawyers Cry Foul Over Rule Change Requiring War Court Judges to Move to Guantánamo

Very respectfully,

//s//

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Learned Counsel

Counsel for Mr. al Baluchi

//s//

DAVID Z. NEVIN
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Counsel for Mr. bin 'Attash

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Learned Counsel

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Defense Counsel

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TRI N. NHAN
CDR, USNR
Defense Counsel

//s//

MARK V. BALFANTZ,
Maj, USMC
Defense Counsel

Counsel for Mr. bin al Shibh

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

~~FOR OFFICIAL USE ONLY~~

OFFICE OF MILITARY COMMISSIONS				<input type="checkbox"/> URGENT <input checked="" type="checkbox"/> ROUTINE	
1. SUBJECT: Action Memo for Deputy Secretary of Defense Concerning Changes to Regulation for Trial by Military Commission				2. TODAY'S DATE 9-Dec-14	
3. ACTION REQUESTED:		<input type="checkbox"/> Signature	<input type="checkbox"/> Concurrence	<input checked="" type="checkbox"/> Decision/Approval	<input type="checkbox"/> Other:
				4. POC: Ms. Alyssa Adams [REDACTED]	
5. ROUTING		INITIALS	DATE	REMARKS	
Deputy Secretary of Defense					
6. SUMMARY:					
<ul style="list-style-type: none"> • Request approval of recommendations in attached Action Memo. • Attachments: <ul style="list-style-type: none"> TAB A: Proposed Changes to Regulation for Trial by Military Commission TAB B: Executive Summary TAB C: Coordination Sheet 					
7. CONVENING AUTHORITY:					

This communication is intended only for the use of the designated recipient(s) and may contain attorney-client communication. As such, it is privileged and confidential. Any distribution or copying of the message is strictly prohibited.



Convening Authority and Director

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS



ACTION MEMO

DEC 09 2014

FOR: DEPUTY SECRETARY OF DEFENSE

FROM: Mr. Vaughn A. Ary, Director, Office of Military Commissions and Convening Authority *MAA*
for Military Commissions

SUBJECT: Recommendation to Revise the Regulation for Trial by Military Commission

- I recommend you revise the Regulation for Trial by Military Commission, as indicated in the attached draft proposed changes at TAB A.
- In my first two months at the Office of Military Commissions, I conducted an assessment of this organization with a view to implementing measures that will contribute to the efficient, fair and just administration of ongoing and future military commissions cases. My findings and conclusions are addressed in the Executive Summary attached at TAB B.
- Based on my analysis, I believe the status quo does not support the pace of litigation necessary to bring these cases to a just conclusion. I believe we must realign resources and reposition the trial judiciary to make it a full-time, on-site duty for the judges assigned to military commissions. To achieve this end state, my recommendations are two-fold: (1) I recommend implementing the attached proposed changes to the Regulation for Trial by Military Commission, which would, in effect, move the judges to Guantanamo Bay and make the military commissions their exclusive judicial duty, and (2) I have requested the General Counsel validate the hiring of five law clerks, four paralegals, three court security officers, and an office manager to support the judges. See Executive Summary attached at TAB B and proposed changes to the Regulation attached at TAB A. I believe these actions will accelerate the pace of litigation and demonstrate a renewed commitment to achieving a just conclusion to these cases.

RECOMMENDATION: Initial your approval of the proposed changes to the Regulation for Trial by Military Commission.

Approve _____ Disapprove _____ Other _____

COORDINATION: TAB C

Attachments:
As stated



TAB A

Chapter 6
MILITARY JUDGES

6-1. GENERAL

a. Military judges will preside over the military commissions. *See* 10 U.S.C. § 948j; and R.M.C. 503(b).

b. *Organization.* The Military Commissions Trial Judiciary will consist of military judges nominated by the Judge Advocates General from the military departments. The Chief Trial Judge will be selected from that pool of military judges by the Secretary of Defense or his or her designee. *See* R.M.C. 503(b)(2).

6-2. DETAIL OF MILITARY JUDGES

a. The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary when charges are referred for each military commission trial. Once detailed, military commissions shall be the military judge's exclusive judicial duty until adjournment, final disposition of charges, recusal, replacement by the Chief Trial Judge pursuant to R.M.C. 505(e), or reassignment by the appropriate Judge Advocate General. A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened.

b. Military judges in the Military Commissions Trial Judiciary may be detailed to a detailed military judge may perform such other duties as are assigned by the Chief Trial Judges of their respective services or with the approval of the appropriate Judge Advocate General or his/her designee, provided that such other duties do not conflict with their primary duty judicial duties as a detailed military judges for military commissions trials. *See* 10 U.S.C. § 948j(e).

6-3. QUALIFICATIONS

a. A military judge must be a commissioned officer of the armed forces and a member in good standing of the bar of Federal court, or a member of the bar of the highest court of a State or the District of Columbia.

b. A military judge must be certified to be qualified for duty under section 10 U.S.C. § 826 (Article 26 of the U.C.M.J) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member. *See* 10 U.S.C. § 948j(b).

c. Military judges must be on active duty at the time of their detail to a military commission.

d. Military judges must have a current TOP SECRET clearance. A TOP SECRET/SCI(Sensitive Compartmented Information) clearance or a TOP SECRET

clearance with eligibility for SCI is preferred and may be required for certain cases. Military judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial. *See* R.M.C. 503(b).

Chapter 6
MILITARY JUDGES

6-1. GENERAL

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b. A detailed military judge may perform such other duties as are assigned by or with the approval of the appropriate Judge Advocate General or his/her designee, provided that such other duties do not conflict with judicial duties as a detailed military judge for military commissions. *See* 10 U.S.C. § 948j(e).

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a. A military judge must be a commissioned officer of the armed forces and a member in good standing of the bar of Federal court, or a member of the bar of the highest court of a State or the District of Columbia.

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Regulation for Trial by Military Commission (2011)

Chapter 6

Chapter 6
MILITARY JUDGES

6-1. GENERAL

- a. Military judges will preside over the military commissions. *See* 10 U.S.C. § 948j; and R.M.C. 503(b).
- b. *Organization.* The Military Commissions Trial Judiciary will consist of military judges nominated by the Judge Advocates General from the military departments. The Chief Trial Judge will be selected from that pool of military judges by the Secretary of Defense or his or her designee. *See* R.M.C. 503(b)(2).

6-2. DETAIL OF MILITARY JUDGES

The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary for each military commission trial. Military judges in the Military Commissions Trial Judiciary may be detailed to other duties by the Chief Trial Judges of their respective services, provided that such other duties do not conflict with their primary duty as military judges for military commissions trials.

6-3. QUALIFICATIONS

- a. A military judge must be a commissioned officer of the armed forces and a member in good standing of the bar of Federal court, or a member of the bar of the highest court of a State or the District of Columbia.
- b. A military judge must be certified to be qualified for duty under section 10 U.S.C. § 826 (Article 26 of the U.C.M.J) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member. *See* 10 U.S.C. § 948j(b).
- c. Military judges must be on active duty at the time of their detail to a military commission.
- d. Military judges must have a current TOP SECRET clearance. A TOP SECRET/SCI(Sensitive Compartmented Information) clearance or a TOP SECRET clearance with eligibility for SCI is preferred and may be required for certain cases. Military judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial. *See* R.M.C. 503(b).

**Military
Commissions Act of
2009**

10 U.S.C. § 948j

H. R. 2647—388

best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

“(c) EXCUSE OF MEMBERS.—Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

“§ 948j. Military judge of a military commission

“(a) DETAIL OF MILITARY JUDGE.—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.

“(b) ELIGIBILITY.—A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

“(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person is eligible to act as military judge in a case of a military commission under this chapter if such person is the accuser or a witness or has acted as investigator or a counsel in the same case.

“(d) CONSULTATION WITH MEMBERS; INELIGIBILITY TO VOTE.—A military judge detailed to a military commission under this chapter may not consult with the members except in the presence of the accused (except as otherwise provided in section 949d of this title), trial counsel, and defense counsel, nor may such military judge vote with the members.

“(e) OTHER DUTIES.—A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to such officer by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

“(f) PROHIBITION ON EVALUATION OF FITNESS BY CONVENING AUTHORITY.—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.

“§ 948k. Detail of trial counsel and defense counsel

“(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel shall be detailed for each military commission under this chapter.

“(2) Assistant trial counsel and assistant and associate defense counsel may be detailed for a military commission under this chapter.

“(3) Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable.

TAB B



Convening Authority and Director

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS

EXECUTIVE SUMMARY

DEC 09 2014

FOR: DEPUTY SECRETARY OF DEFENSE

FROM: Mr. Vaughn A. Ary, Convening Authority and Director, Office of Military Commissions *VAA*

SUBJECT: Assessment of Office of Military Commissions

- In the first sixty days following my appointment as Convening Authority, I conducted an assessment of the current situation and future challenges facing the Office of Military Commissions (OMC). Based on this assessment, I am convinced we must take action to realign resources and better position the commissions to achieve the efficient, fair, and just administration of ongoing and future military commissions.
- During FY14, the trial judiciary conducted hearings on 33 calendar days for a total of 107 hours and 50 minutes on the record in all four cases combined. In other words, during FY14, the commissions as a whole averaged less than three days of hearings each month and an average of less than three and a half hours on the record for the days on which hearings were held. One case was resolved at a guilty plea in February 2014, but three contested cases (seven detainees) remain on the docket: 9/11 (*U.S. v. Khalid Shaikh Mohammad, et al.*, charges referred 31 May 2011); USS Cole (*U.S. v. Abd al-Rahim al-Nashiri*, charges referred 28 Sept 2011); and *U.S. v. Abd al Hadi al-Iraqi* (charges referred 2 June 2014). An analysis of the FY13 hearing data yields a similar pattern. In FY13, commissions held hearings in only two cases: 9/11 and USS Cole. These hearings were held in nine sessions over the course of the year with a total of 34 separate days of hearings and an average of less than five hours on the record each day.
- The parties continue to create additional demand for more hearings by appropriately filing a large number of motions to address the multitude of complex issues in these cases (*e.g.*, there are 325 appellate exhibits to date in the 9/11 case alone). To properly litigate these issues, the parties request oral argument routinely. Certain issues have generated multiple hearings with several matters from the initial phases of litigation still pending resolution. Of the three contested cases on the docket, two were referred for trial over three years ago, two still have jurisdictional issues pending resolution, all three have pending motions regarding the form of the charges, and the discovery phase of litigation in all three cases has yet to be resolved. Given the complexity of the cases, the current pace of litigation, the issues to be decided, and the work necessary to get these contested cases to trial, I believe we still find ourselves in the beginning stages of the trial process.
- In FY14, OMC spent approximately \$78 million in support of the commissions (not including military personnel costs for approximately 153 uniformed personnel).

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- I believe action is required to change the status quo. The commissions are currently positioned to accomplish exactly what they have done over the last several years: support guilty pleas and conduct infrequent litigation on the record. Moving forward, the addition of each potential variable could further impact the pace of litigation: the possibility of one or more of the accused being severed from the joint 9/11 prosecution; the referral of charges in another contested case; or the initiation of an extended trial period. Fundamental changes are necessary if we are to better position the commissions to meet the demands of complex contested litigation. Unless and until we dedicate full-time judges on site, we cannot demonstrate a serious commitment to the commissions process. I believe the time to act is now.
- Recommendation: I recommend that you implement two important revisions to the Regulation for Trial by Military Commission: (1) establish military commissions as the exclusive judicial duty for the military judges and (2) designate the judge's place of duty as the venue where the military commission is to take place. See TAB A, recommended revisions to Regulation. If you approve my recommendations, I believe the pace of litigation will accelerate, leading to a corresponding increase in requirements in order to build OMC's capability and capacity to support the commissions.
- Supporting Action: On October 31, 2014, I requested the prosecution, defense and trial judiciary revisit their personnel requirements. We are continuing a dialogue with the prosecution and defense to assess their needs. As we work through the challenges and as their missions evolve, we will continue to make sure they are adequately and equitably resourced. The trial judiciary has demonstrated an immediate need for additional support. I have therefore requested the General Counsel validate the hiring of five additional civilian attorney-advisors for the judiciary to assign as law clerks to each military commission case, as well as four paralegals, three court security officers and an office manager, in accordance with the Regulation for Trial by Military Commission, chapter 2-3(d).
- Future Requirements: I am prepared to dedicate additional resources to expand on-site offices for the prosecution, defense, trial judiciary, and the office of the convening authority. In a parallel effort, OMC is taking measures to improve the efficiency of our budgetary and resource management processes. Finally, as the pace of litigation accelerates, I anticipate an emerging requirement for further resources from outside agencies in order to synchronize the declassification process to meet the time constraints of trial.

COORDINATION: TAB C

Attachments:
As stated

TAB C

LIST OF COORDINATING OFFICIALS FOR
Recommendation to Revise the Regulation for Trial by Military Commission

General Counsel Stephen Preston

Attachment C



Convening Authority and Director

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

ACTION MEMO

DEC 09 2014

FOR: DEPUTY SECRETARY OF DEFENSE

FROM: Mr. Vaughn A. Ary, Director, Office of Military Commissions and Convening Authority
for Military Commissions

SUBJECT: Recommendation to Revise the Regulation for Trial by Military Commission

- I recommend you revise the Regulation for Trial by Military Commission, as indicated in the attached draft proposed changes at TAB A.
- In my first two months at the Office of Military Commissions, I conducted an assessment of this organization with a view to implementing measures that will contribute to the efficient, fair and just administration of ongoing and future military commissions cases. My findings and conclusions are addressed in the Executive Summary attached at TAB B.
- Based on my analysis, I believe the status quo does not support the pace of litigation necessary to bring these cases to a just conclusion. I believe we must realign resources and reposition the trial judiciary to make it a full-time, on-site duty for the judges assigned to military commissions. To achieve this end state, my recommendations are two-fold: (1) I recommend implementing the attached proposed changes to the Regulation for Trial by Military Commission, which would, in effect, move the judges to Guantanamo Bay and make the military commissions their exclusive judicial duty, and (2) I have requested the General Counsel validate the hiring of five law clerks, four paralegals, three court security officers, and an office manager to support the judges. See Executive Summary attached at TAB B and proposed changes to the Regulation attached at TAB A. I believe these actions will accelerate the pace of litigation and demonstrate a renewed commitment to achieving a just conclusion to these cases.

RECOMMENDATION: Initial your approval of the proposed changes to the Regulation for Trial by Military Commission.

Approve Disapprove _____ Other _____

COORDINATION: TAB C

Attachments:
As stated

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JAN 07 2015

**CHANGE 1
TO REGULATION FOR TRIAL BY MILITARY COMMISSION (2011)**

PURPOSE: The Regulation for Trial by Military Commission (Regulation) provides guidance for practitioners in military commissions and implements the provisions of the Military Commissions Act of 2009 and the 2012 edition of the Manual for Military Commissions. This is Change 1 to the Regulation.

APPLICABILITY: The Regulation applies to trials by military commission under Chapter 47A of Title 10, United States Code.

RELEASABILITY: **Cleared for public release.** The Regulation and Change 1 are available on the Internet from the Office of Military Commissions website at <http://www.mc.mil/>.

EFFECTIVE DATE: Change 1 is effective as of the date of my signature.

Pursuant to 10 U.S.C. § 949a(c), I hereby prescribe the following change to the Regulation for Trial by Military Commission (2011).

**Chapter 6
MILITARY JUDGES**

6-2. DETAIL OF MILITARY JUDGES

a. The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary when charges are referred. Once detailed, military commissions shall be the military judge's exclusive judicial duty until adjournment, final disposition of charges, recusal, replacement by the Chief Trial Judge pursuant to R.M.C. 505(e), or reassignment by the appropriate Judge Advocate General. A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened.

b. A detailed military judge may perform such other duties as are assigned by or with the approval of the appropriate Judge Advocate General or his/her designee, provided that such other duties do not conflict with judicial duties as a detailed military judge for military commissions. *See* 10 U.S.C. § 948j(e).



Robert O. Work
Deputy Secretary of Defense

Attachment D

- The Daily Caller - <http://dailycaller.com> -

In Aftermath Of Paris Attack, DOD Forces Judges To Move To Guantanamo

Posted By [Jonah Bennett](#) On 2:03 PM 01/09/2015 In | [2 Comments](#)

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In the aftermath of the Islamic terror attack in Paris that left 12 dead, the Department of Defense is now requiring judges to move to Guantanamo Bay in an effort to shut down the prison by speeding up trials and clearing the backlog.

Deputy Defense Secretary Robert Work signed a regulation Thursday which forces military judges to assign the highest priority to their cases, ending the previous arrangement of part-time work conducting judicial proceedings, [the Miami Herald reports](#).

"This change makes the military commissions the exclusive judicial duty for the military judges," [said Lt. Col. Myles Caggins](#), the Pentagon's spokesman for military commissions.

Despite congressional opposition, [President Obama hasn't show any signs of stopping](#). The next Department of Defense Secretary, Ashton B. Carter, is expected to move much more quickly than Chuck Hagel, as Hagel expressed concerns about the pace of the releases. Hagel's resignation has given new momentum to the push to shut down the prison.

However, even a move as bold as the new regulation may not substantially speed up the pace. The new regulations allows for exceptions in the event of other, more pressing duties, and it will likely take months for judges to move, as they are domiciled in all areas of the world, from Washington, D.C., to Naples, Italy.

Work's new regulation doesn't state that hearings have to be held more often, but presumably, the full-time presence of a judge like Army Col. James Pohl will help mitigate the endless delays which have plagued court proceedings.

Pohl has been presiding over the hearings of accused 9/11 mastermind Khalid Sheikh Mohammed. But since his arraignment at Guantanamo in 2012, there hasn't been much progress in the case. Now that Pohl is mandated to live at the naval base until the case comes to a close, the administration hopes this will provide an incentive to wrap up trials quickly.

Not all of the delays can be blamed on legal squabbles in preliminary hearings. Sometimes Pohl couldn't make it the hearings, which occur every other month, because of severe hurricanes.

There are still 127 prisoners left out of the original 679. Even if Obama succeeds in lowering the numbers by around a dozen this year, a projection of that rate reveals the prison will be around for quite a while longer. At any rate, Obama's hope is that if he can lower the number to around 80, he'll be able to make the economic case that costs exceed benefits.

[Follow Jonah Bennett on Twitter](#)

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URL to article: <http://dailycaller.com/2015/01/09/in-aftermath-of-paris-attack-dod-forces-judges-to-move-to-guantanamo/>

Attachment E

Pentagon orders Gitmo tribunal judges to ditch side jobs

By [Maggie Ybarra](#) - *The Washington Times* - Friday, January 9, 2015

The Pentagon is directing judges who oversee military tribunals at a high-security detention facility in Cuba to stop juggling cases in other countries and focus solely on closing the cases of detainees charged with terrorism.

Deputy Defense Secretary Robert Work instructed the judges to move from their homes to military housing near the courtroom at Guantanamo Bay, Cuba, Lt. Col. Myles Caggins said. Mr. Work issued the order in a Jan. 7 memo.

There are three judges who oversee the military tribunals. Those judges live in Georgia, Italy and the Washington D.C. area, Lt. Col. Caggins said.

"The change in policy does two things," he said. "One, it makes their military commission case their primary duty. The second thing it does is it requires them to relocate to the venue where the military commissions occur."

There are no set dates for when the judges will move because the relocations are subject to military personnel policies and other factors, he said.

The majority of Guantanamo's law-of-war detainees have been transferred to the jurisdiction of other countries, reducing the population from 679 in 2003 to 127, according to the Miami Herald.

Of the 127 prisoners remaining at Guantanamo, there are 59 who are eligible for transfer and 10 who are currently being prosecuted or are in confinement, Lt. Col. Caggins said.

The remaining 58 prisoners have been deemed "too dangerous to transfer or they might be prosecuted," he said.

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Attachment F

BloombergBusiness

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Guantanamo Judges Told to Stay Put and Get Trials Moving

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by David Lerman
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January 8, 2015

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Mr. President, World's Worst Air Is Taking 6 Hours Off Your Life

(Bloomberg) -- The Pentagon is requiring military judges to stay on the U.S. base at Guantanamo Bay, Cuba, in an effort to speed trials, including a long-delayed one for the alleged mastermind of the Sept. 11 terrorist attacks.

A regulation signed yesterday by Deputy Defense Secretary Robert Work requires judges assigned to military tribunals to give such cases their highest priority and remain at Guantanamo for the duration of the assignment.

Until now, judges assigned to the trials, called commissions, have juggled those cases with other work and commuted to Guantanamo part time. The move reflects quickening efforts by the administration to deliver on President Barack Obama's long-frustrated pledge to close the prison camp at the U.S. naval station despite congressional opposition.

"This change makes the military commissions the exclusive judicial duty for the military judges," said Lieutenant Colonel Myles Caggins, the Pentagon's spokesman for military commissions.

A prolonged stay at Guantanamo means that judges who now live in locations including the Washington area, Georgia and Naples, Italy, will have to move to military housing on a base cut off from the rest of Cuba and with few flights to the U.S. mainland. While the naval base offers a beach, it has little more than a handful of modest restaurants and fast-food outlets.

Prisoner Transfers

<http://www.bloomberg.com/news/articles/2015-01-08/guantanamo-judges-told-to-stay-put-and-get...> 1/28/2015

The regulation takes effect immediately while allowing for exceptions for other duties to be performed, and any moves to Guantanamo may still be months away.

Most prisoners who were at Guantanamo have been transferred to the jurisdiction of other countries. A transfer of five inmates to Kazakhstan last month brought the number of prisoners to 127 from a high of 679 in 2003.

Even if dozens more can be transferred in coming months, court action for those awaiting trial at Guantanamo has proceeded at a glacial pace.

Khalid Sheikh Mohammed, the accused mastermind of the Sept. 11 attacks, was arraigned at Guantanamo for a second time in May 2012 and is still awaiting a trial. Preliminary hearings for Mohammed and four other defendants have been tied up for more than two years over procedural squabbles.

The judge in that case, Army Colonel James Pohl, has mostly kept to a schedule calling for a week of hearings every other month. Even that timetable has been delayed at times by everything from legal maneuverings to hurricanes.

While nothing in the new regulation explicitly requires hearings to be held more often, Pohl will soon be living at Guantanamo until the case is resolved.

Locating “the judges at Guantanamo and making the commissions their exclusive judicial duty will increase their availability to schedule trial sessions as needed and as appropriate,” Caggins said.

To contact the reporter on this story: David Lerman in Washington at dlerman1@bloomberg.net

To contact the editors responsible for this story: John Walcott at jwalcott9@bloomberg.net Larry Liebert, Bernard Kohn

Tags Military, Regulation, Work, Washington, Georgia, Italy, Food, Kazakhstan, Hurricanes

<http://www.bloomberg.com/news/articles/2015-01-08/guantanamo-judges-told-to-stay-put-and-get...> 1/28/2015

Attachment G



Pentagon orders Guantánamo judges to stay there to pick up pace

DAVID LERMAN - BLOOMBERG

01/09/2015 8:42 AM | Updated: 01/09/2015 9:08 AM

The Pentagon is requiring military judges to stay on the U.S. base at Guantánamo Bay, Cuba, in an effort to speed trials, including a long-delayed one for the alleged mastermind of the Sept. 11 terrorist attacks.

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"This change makes the military commissions the exclusive judicial duty for the military judges," said Lieutenant Colonel Myles Caggins, the Pentagon's spokesman for military commissions.

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<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article5679231.html> 1/28/2015

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<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article5679231.html> 1/28/2015

Attachment H

The logo for the Miami Herald newspaper, featuring the name in a white, stylized gothic font on a blue rectangular background.

Defense lawyers cry foul over rule change requiring war court judges to move to Guantánamo

BY CAROL ROSENBERG - CROSENBERG@MIAMIHERALD.COM

01/13/2015 7:15 PM | Updated: 01/15/2015 11:26 AM



This Aug. 23, 2013 pool file photo reviewed by the U.S. Department of Defense shows Guantánamo Bay's now disused medium security courthouse building as seen through a broken window at Camp Justice war court compound at the U.S. Navy base at Guantánamo Bay, Cuba. U.S. military censors forbid photography of the actual courthouse where the war court judges work. It's a corrugated metal topped prefabricated building that looks like a warehouse. MICHELLE SHEPHARD / TORONTO STAR

Lawyers for the alleged planner of the USS Cole bombing filed a motion Tuesday accusing senior Pentagon officials of unlawfully meddling in the Saudi prisoner's coming death-penalty tribunal by ordering the judge to move to Guantánamo until the trial is over. They asked the judge to throw out the case.

The 12-page filing, under seal at the war court, invokes the U.S. military principle of unlawful command influence, which says that military justice works only if the officers who serve as judges aren't beholden to more senior leaders in their chain of command.

<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article6342552.html> 1/28/2015

But lawyers for Abd al Rahim al Nashiri argue that a retired two-star Marine general guiding the process from the Pentagon does just that by suddenly requiring war court judges to move to Guantánamo from the moment they are assigned a case through trial.

Retired Maj. Gen. Vaughn A. Ary (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2353082.html>), called the convening authority for military commissions, proposed the rule change Dec. 9, saying “the status quo does not support the pace of litigation necessary to bring these cases to their just conclusion.” Deputy Secretary of Defense Robert Work adopted it Jan. 7 (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article5679231.html>).

“The Convening Authority is clearly seeking to hold the judges prisoner at the Guantánamo penal colony,” said Nashiri attorney Rick Kammen by email Tuesday. He confirmed that his team had filed the 12-page unlawful influence motion at the war court but declined to release it.

The new rule appears to require that the Cole case judge, Air Force Col. Vance Spath, set aside his primary duty as chief of the Air Force judiciary and move to the remote base in Cuba until the end of the capital trial of Nashiri, 50. No date has been set because of protracted pretrial wrangling, an appeal and CIA-related security issues.

Nashiri is accused of orchestrating (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1938976.html>) al-Qaida’s October 2000 suicide bombing of the warship off Aden, Yemen, that killed 17 U.S. sailors. But Spath has refused to set a trial date until certain issues are decided — including a prosecution appeal of his decision to dismiss charges (<http://www.miamiherald.com/news/nation-world/world/americas/article1979349.html>) involving al-Qaida’s 2002 attack on a French oil tanker.

But, rather than speed the way to trial, the unlawful-influence issue could become the next legal question to preoccupy the war court at Guantánamo. Attorneys in the five-man Sept. 11 conspiracy trial are preparing a similar motion, said David Nevin, attorney for the alleged 9/11 mastermind, Khalid Sheik Mohammed.

In fact, defense attorneys in the Sept. 11 case (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html>) want that case’s judge, Army Col. James L. Pohl (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1939992.html>), to order the disclosure of behind-the-

<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article6342552.html> 1/28/2015

scenes information about the timing and influence of the relocation question — including any possible role by the prison and U.S. Southern Command commanders as well as Congress and the Obama administration.

Both were in go-slow mode awaiting the release of the Senate Intelligence Committee report on the CIA prison network that interrogated the six men awaiting death trials before their 2006 transfer to Guantánamo. Now the judges in each case have ordered prosecutors to review the sealed, secret filings and transcripts of the pretrial proceedings to see what might be made public.

Meanwhile, the motion filed Tuesday with Spath, and obtained by the Miami Herald, asks him to dismiss the case for “denial of due process” and “failure to provide an independent judiciary.” It seeks to question both Ary and Work under oath about how the rule change came about.

“The decision was made with the goal of having judges more available for the military commissions,” a Pentagon spokesman, Army Lt. Col. Myles B. Caggins III, told the Herald Tuesday. “As always, the judges remain fully in control of their scheduling and docket.”

Caggins said it not yet known how or when the order would be implemented.

One scenario would reassign the judges to Guantánamo on temporary duty status, meaning they might continue bivouacking at \$50-a-night guest quarters not far from the base Officers Club and shuttle to the expeditionary, tent city court compound with just one courtroom that’s secure enough for the national security cases.

Another would constitute a Permanent Change of Station, meaning the Army-colonel-equivalent judges would be able to bring their households and vehicles by barge, enroll their children in the K-12 base school (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article5133627.html>) and be based at the 45-square-mile outpost in southeast Cuba.

Eugene R. Fidell (<http://www.law.yale.edu/faculty/EFidell.htm>), a Yale Law School expert in military justice who has observed a war court hearing and has co-taught courses on Guantánamo, said Tuesday the reassignment order would inevitably accelerate the pretrial process.

“It’s a pretty grim place and that will incentivize the judges to set a faster pace for everyone,” he said.

<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article6342552.html> 1/28/2015

If the judges are there full time, he added, he'd expect they'll order other court participants to Guantánamo more frequently as well. "If that means calling people in senior FBI and CIA positions and saying you're going to be in court at Guantánamo answering questions, that will be a sea change, too."

Fidell said the commute and surroundings have slowed the trials, calling it "another dividend we can trace back to the Bush administration and the whole concept of using Guantánamo as an expensive, makeshift courthouse."

"The problem is that we don't have a real judiciary in the military commissions," he added. "A real judiciary would have had judging as its primary responsibility from the beginning, instead of this one-week-on/two-weeks-off arrangement."

Spath, through an aide, declined to comment Tuesday on how soon he could move to the remote base, or whether he would be allowed to choose to drop either the war court case or run the Air Force Judiciary from Guantánamo.

Ary wrote an action memo seeking the change on Dec. 9, three weeks after the Navy judge in Guantánamo's third war court case, the non-capital prosecution of alleged al-Qaida commander Abd al Hadi al Iraqi, refused to move up (<https://www.documentcloud.org/documents/1502723-al-iraqi-trans18nov2014-1.html>) a Jan. 26-30 hearing.

At issue was the sensitive topic of whether the prison's practice of having female guards handle war-court defendants between legal meetings violated the status quo, disrupted attorney-client meetings and was disrespectful of the accused terrorists' practice of Islam. Prosecutors hadn't provided defense lawyers what they needed to argue it that day, Nov. 18 (<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article4001973.html>), but thought they could get it to them before the Jan. 26 hearing.

But Navy Capt. J.K. Waits, who's based in Italy, refused to hold an earlier hearing. "That's not going to happen," he said. "I have a day job."

He then rattled off a court schedule that took him from Sigonella, Sicily, to Bahrain and two other U.S. military cases on his circuit of Navy and Marine Corps cases from Europe to the Middle East.

Under the new rule it was unclear whether Waits could continue handling those U.S. military trials but put them on a back burner behind the war court prosecutions, or would have to give up his "day job" as a military judge under the Uniform Code of Military Justice.

<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article6342552.html> 1/28/2015

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FROM THE DEFENSE FILING

“Even if the Convening Authority is merely unlawfully attempting to influence the pace of litigation, and not also trying to unseat a sitting military judge by restricting his duties and ordering him to be permanently reassigned to Guantánamo Bay, this influence places an intolerable strain on public perception of the military justice system.”

<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article6342552.html> 1/28/2015