

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 343C</b>  <b>RULING</b>  Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary  25 February 2015
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1. Defense moves to dismiss the charges and specifications based on alleged unlawful influence exerted on the trial judiciary by requiring Military Judges to move to U.S. Naval Station, Guantanamo Bay, Cuba (GTMO) for the duration of the trial.<sup>1</sup> The government opposes the motion<sup>2</sup> and the Defense Reply reiterates their position.<sup>3</sup> The Commission has considered the pleadings submitted by both sides.<sup>4</sup>

2. Facts.

a. On or about 1 October 2014, Mr. Vaughn A. Ary was appointed as the Convening Authority for the Military Commissions.

b. Subsequent to assuming his role as the Convening Authority, Mr. Ary conducted an assessment of Commission cases and concluded, *inter alia*, "...the status quo does not support the pace of litigation necessary to bring these cases to a just conclusion. I believe we must

<sup>1</sup> Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, filed 30 January 2015 (AE 343).

<sup>2</sup> Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 13 February 2015 (AE 343A).

<sup>3</sup> Joint Defense Reply To Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 20 February 2015 (AE 343B).

<sup>4</sup> In its response, AE 343A, the government discusses other aspects of the DEPSECDEF decision, e.g., additional staffing of the trial judiciary. These other aspects of the DEPSECDEF's decision have no relevance to the issue presented and will not be discussed further.

realign resources and reposition the trial judiciary to make it a full-time, on-site duty for the judges assigned to military commissions.”<sup>5</sup>

c. Mr. Ary recommended the Deputy Secretary of Defense (DEPSECDEF) change the Regulation for Trial by Military Commissions (R.T.M.C.) requiring detailed Commission judges to live at the venue of the trial, GTMO, for the length of the trial.<sup>6</sup>

d. Mr. Ary did not staff the proposed change with The Judge Advocate General (TJAG) of any service.<sup>7</sup>

e. The proposed change was not staffed with the Chief Trial Judge, serving as the designee of the Secretary of Defense, for the “supervision and administration of the Military Commissions Trial Judiciary.”<sup>8</sup>

f. On 7 January 2015, the DEPSECDEF approved the recommendation of Mr. Ary as to Change 1 of the R.T.M.C.<sup>9</sup>

3. Witnesses. The pleadings speak for themselves. The Commission does not believe further fact finding is necessary to resolve the issue. Accordingly, the Defense request for witnesses<sup>10</sup> is

**DENIED.**

4. Oral Argument. The issue has been fully briefed by both sides. The issue presented goes to the very heart of the trial process. This issue needs to be resolved deliberately but as expeditiously as possible. Accordingly, pursuant to Rule for Military Commission (R.M.C.) 905h and Military

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<sup>5</sup> AE 343, Attachment B.

<sup>6</sup> “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.” AE 343, Attachment B, Tab A.

<sup>7</sup> AE 343A, Attachment B, page 1.

<sup>8</sup> “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 Commission Trial Judiciary,” Para. 1-3b., R.T.M.C.

<sup>9</sup> AE 343, Attachment B.

<sup>10</sup> Para. 3, AE 343.

Commissions Trial Judiciary Rule of Court (R.C.) 3.9, the request for oral argument is

**DENIED.**<sup>11</sup>

5. Assignment and Detailing of Military Judges.

a. Military judges are certified to be qualified for duty as a military judge by The Judge Advocate General (TJAG) of the armed force of which such military judge is a member.<sup>12</sup>

Military judges may perform judicial duties only when he/she is assigned and directly responsible to service TJAGs.<sup>13</sup>

b. Commission military judges are nominated by the service TJAGs for Commission duty.<sup>14</sup> The Military Commission Trial Judiciary consists of a pool consisting of the Chief Trial Judge and other nominated Military Judges.<sup>15</sup> The only role of the Department of Defense in regard to Commission judges is to designate the Chief Trial Judge from the pool of Military Judges nominated by TJAGs<sup>16</sup> and provide the requisite logistical support for trials. Once a case is referred for trial, the Chief Trial Judge details the presiding Military Judge.<sup>17</sup>

6. Independence of the Trial Judiciary.

a. It has long been a tenet of American law that an independent trial judiciary is essential to any system of justice. It is 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).

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<sup>11</sup> The government waived Oral Argument: "The Commission can decide this matter without oral argument, as the Defense has failed to meet their initial burden. See Military Commissions Trial Judiciary Rule of Court 3.9(a). If the Commission grants the Defense an opportunity to present oral argument, however, the Prosecution requests an opportunity to do the same." See Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 13 February 2015 (AE 343A), Para. 8.

<sup>12</sup> Article 26(b), UCMJ, 10 U.S.C. § 826b.

<sup>13</sup> Article 26c, UCMJ, 10 U.S.C. § 826c.

<sup>14</sup> R.M.C. 503(b)1.

<sup>15</sup> R.M.C. 503(b)3.

<sup>16</sup> R.M.C. 503(b)2.

<sup>17</sup> R.M.C. 503(b)1.

b. 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.<sup>18</sup>

#### 7. Unlawful Influence.

a. The Military Commission Act (MCA) prohibits Unlawful Influence.<sup>19</sup> The Act prohibits such influence regardless of source and provides greater protection than the Uniform Code of Military Justice (UCMJ)<sup>20</sup> prohibition of Unlawful Command Influence (UCI).

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

c. 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).<sup>21</sup>

<sup>18</sup> *United States v. Weiss*, 510 U.S. 163, 180 (1994).

<sup>19</sup> 10 U.S.C. §949b.

<sup>20</sup> Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. §§ 801-946.

<sup>21</sup> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case. Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012).

d. 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.

e. 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).

f. Unlawful Command Influence can manifest itself in one of two ways either through actual UCI or apparent UCI. The R.T.M.C. 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.”<sup>22</sup> 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).

g. 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

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<sup>22</sup> R.T.M.C. Chapter 1, p. 1-4.

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.*

h. 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).

i. 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).

j. 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).

#### 8. Discussion.

a. The Commission considered providing a detailed chronology as to what caused the delays over the last year that appear to concern the Convening Authority. However, to do so would be a tacit admission the Commission needs to explain its rulings to the Convening Authority. Such an admission would compromise the independence of the Commission.



b. Continuances and pace of litigation are in the sole discretion of the trial judge.<sup>23</sup> “[A] judge is ultimately responsible for the control of his or her court and the trial proceedings...[p]roper case management during a trial...is encompassed within that responsibility.” *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014) (internal quotations and citations omitted). This is a complicated international terrorism case with a joint trial of five accused under a new statutory scheme with an unprecedented amount of classified evidence. It will take time to try.<sup>24</sup>

c. The Commission is at a loss as to how assigning the military judge at GTMO will make the litigation proceed at a faster pace. Hearings require the presence of counsel and support personnel, apparently none of whom are being assigned to the Naval Station. Unless the intent is to make the military judge ignore his duty to exercise discretion under the law and instead move the case faster to shorten his stay at GTMO, the purported change will not, and cannot, have its intended effect. Moreover, any legitimate denial of delay requested by the Defense immediately gives rise to an issue as to whether the military judge acted in the interests of justice or personal convenience. Though the DEPSECDEF may not have intended for the Military Judge to adjust his trial schedule to limit his personal inconvenience caused by living at GTMO, his actions did create the appearance of that intent.<sup>25</sup> An “objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.”<sup>26</sup>

d. Applying the *Biagase* analysis, defense has met its initial burden to show that the actions of the DEPSECDEF raise the issue of Unlawful Influence by creating the appearance of

<sup>23</sup> R.M.C. 707(b)4E; R.M.C. 801(a)(3)

<sup>24</sup> As a point of reference the trial of Zacarias Moussaoui began 2 January 2002 and concluded 4 May 2006. <http://www.npr.org/templates/story/story.php?storyId=5243788>

<sup>25</sup> AE 343, Attachments D, F and G.

<sup>26</sup> *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006)



improper pressure on the military judge to adjust the pace of the litigation. There is no dispute that the actions of the DEPSECDEF did take place. As discussed earlier, the actions do affect the proceedings as they are directed at the military judge in the exercise of his sole discretion. The government has failed to prove beyond a reasonable doubt that the Unlawful Influence will not affect the proceedings.

9. Holding. The actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge. As such, Change 1 to R.T.M.C. violates 10 U.S.C. §949b.

#### 10. Remedy

a. Remedies for unlawful command influence are designed in order to cure the prejudice. *United States v. Salyer*, 72 M.J. 415, 427 (C.A.A.F. 2012). The Commission has broad discretion as to remedies for unlawful influence. Dismissal is one and has been requested by the defense. The Commission believes taint from the DEPSECDEF and Convening Authority's actions can be remedied and as such does not believe such a drastic remedy is needed at this time under the current facts.

b. Another option would be to rule that Change 1 is an unenforceable illegal order. However, leaving Change 1 in place, but unenforced, could create the perception that subsequent rulings on continuances and the trial schedule are influenced by the specter of Change 1. Public confidence in the independence of the trial judge would be compromised. Accordingly, the Commission believes that leaving the order in place but unenforced will not completely eradicate the unlawful influence.

c. The Commission believes the only real remedy is to return to the *status quo ante* before the issuance of Change 1. Accordingly, the Commission orders **ABATEMENT** of the proceedings in this case until Change 1 to R.T.M.C. is rescinded by proper authority. If such rescission is not done in a timely manner, the Commission will consider other remedies.

So **ORDERED** this 25th of February, 2015.

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JAMES L. POHL  
COL, JA, USA  
Military Judge