

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 343F(Mohammad et al.)

Joint Defense Motion
To Disqualify the Convening Authority
Due to Unlawful Influence

10 March 2015

1. **Timeliness:** This motion is timely filed.
2. **Relief Requested:** The military commission should disqualify the Convening Authority and his legal advisors from participation in this case.
3. **Overview:** The military commission should disqualify the Convening Authority and his legal advisors from this case based on the continued risk of further unlawful influence, and because such action is necessary (but not sufficient) to purge residual unlawful influence from this trial. Further, disqualification is necessary because the defendants in this trial would suffer prejudice due to the Convening Authority's inability to function effectively in his position following his disqualification from one of the three military commission trials currently proceeding.
4. **Burden of Proof and Persuasion:** The defense bears the burden of persuasion.
5. **Facts:**

a. On 30 January 2015, the defense filed two motions¹ arising from a change to the Regulation for Trial by Military Commissions (R.T.M.C.), requested by the Convening Authority and approved by the Deputy Secretary of Defense (DEPSECDEF), requiring detailed

¹ AE343 Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary; AE344 Defense Motion to Dismiss for Convening Authority Review of Trial Judiciary Effectiveness and Efficiency in Violation of 10 U.S.C. § 948j(f). The "Facts" sections of both motions contain specific details as to the events leading to the filing of the motions, and are incorporated here by reference.

commission judges to relocate at Guantanamo and to make the military commissions their exclusive duty for the duration of the trial (“Change 1”).

b. A similar motion was filed in another military commissions trial, *United States v. Al-Nashiri*,² with hearings conducted from 23 – 27 February 2015 into the unlawful influence allegations arising from Change 1.

c. The Convening Authority, Major General Vaughn A. Ary, U.S.M.C. (Ret.) testified in a hearing in the *al-Nashiri* case on 25 February 2015.³

d. On 25 February 2015, this commission found that these actions created “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,”⁴ and ordered an abatement in the proceedings until such time as Change 1 was rescinded.⁵

e. On 26 February 2015, the DEPSECDEF rescinded Change 1.⁶

f. On 2 March 2015, the judge in the *Al-Nashiri* case similarly found that “the action of the convening authority and his legal advisors at a minimum appeared to attempt to unlawfully influence the military judge in this proceeding” and ordered the Convening Authority and his legal advisors disqualified.⁷

² Attachment B, *United States v. Al-Nashiri*, AE 332, Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary (13 January 2015).

³ See Attachment C, Unofficial hearing transcript for *United States v. Al-Nashiri*, 25 February 2015, AM Session; Attachment D, Unofficial hearing transcript for *United States v. Al-Nashiri*, 25 February 2015, PM Session.

⁴ AE343C at 9.

⁵ *Id.* at 10.

⁶ Attachment E, Memorandum, Deputy Secretary of Defense, 26 February 2015, Subj: Rescission of Change I to the Regulation for Trial by Military Commission.

⁷ See Attachment F, *United States v. Al-Nashiri*, AE332U Order (4 March 2015) (final order following bench ruling of 2 March 2015).

6. Argument:

This commission should disqualify the Convening Authority, MajGen Ary, and his legal staff, from this trial. As this commission rightly noted, the Convening Authority's actions have clearly created at least the appearance of unlawful influence, and those actions will inevitably have an enduring effect. A temporary abatement and the rescinding of Change 1 does not remove the risk of future unlawful actions and avoidable delays, and would leave a lasting negative impact on public perception of the fairness and impartiality of this trial.

As noted by the Court of Appeals for the Armed Forces in *United States v. Stoneman*:

This Court has long recognized that, once unlawful command influence is raised, 'we believe it incumbent on the military judge to act in the spirit of the Code 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.' Accordingly, disposition of an issue of unlawful command influence falls short if it 'fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.'⁸

A military judge "has broad discretion in crafting a remedy to remove the taint of unlawful command influence," whether actual or apparent,⁹ and this may include disqualification of the Convening Authority.¹⁰ This commission should exercise that discretion at present by disqualifying the Convening Authority and his legal advisors from future involvement in this

⁸ 57 M.J. 35, 42 (C.A.A.F. 2002) (citations omitted).

⁹ *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

¹⁰ See *United States v. Thomas*, 22 M.J. 388, 399 (C.M.A. 1986) (discussing judicial disqualification of the Convening Authority as an available remedy to unlawful influence).

trial. Disqualification is necessary but not sufficient to cure the unlawful influence; dismissal is the appropriate remedy.¹¹

The risk for further attempts at unlawful influence is demonstrated not only by the facts presented in the initial motion, but also by MajGen Ary's own testimony at the *Al-Nashiri* hearings on this issue. MajGen Ary demonstrated a fundamental misunderstanding of his role by differentiating himself from a "regular convening authority" which, he conceded, could not order a judge to change place of residence, or make a trial their sole duty.¹² MajGen Ary's report, and Change 1, were made without staffing through the service TJAGs, contrary to the plain language of 10 U.S.C. 948j(e).¹³ MajGen Ary conceded that the report and his recommendation to the DEPSECDEF were made in spite of "dissent" among his legal advisors.¹⁴ And when asked if he would recommend Change 1 again, MajGen Ary stated unequivocally that he stood by his recommendation.¹⁵

It is long established that "the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial."¹⁶ Overturning Change 1 but retaining MajGen Ary as the Convening Authority would negate the direct effects of this single, public act and leave in place a lingering cloud of suspicion over the

¹¹ In AE343C Order, the military commission denied the request for dismissal as a remedy.

¹² Attachment C at 37-39.

¹³ See Attachment F at 4, 8. In fact, it appears that the only individual outside of the Convening Authority to receive a staffed packet on Change 1 prior to submission to the DEPSECDEF was a Deputy General Counsel for the Department of Defense who appears to have a number of significant conflicts, including having worked as Deputy General Counsel for Litigation and Investigations at the Central Intelligence Agency from 2009-2014. See Attachment G, email from MajGen Ary to Darrin A. Hostetler, Subj: Changes to Regulation for Trial by Military Commission, dated 10 December 2014; Attachment H, Dep't of Defense Office of General Counsel Website, Official Biography for Darrin A. Hostetler.

¹⁴ Attachment D at 44.

¹⁵ *Id.* at 79-80.

¹⁶ *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

independence of the judiciary and the potential for future acts, whether overt or insidious. MajGen Ary was not only unable to rebut this perception, but his testimony bolstered it; at present it is impossible to negate that perception so long as he remains in his position.

So long as MajGen Ary remains as the Convening Authority, observers of this trial will inevitably second-guess significant future changes by the trial judge on issues such as trial procedures, hearing schedules, classification guidance, ancillary motions, or any other issue which potentially impacts the pace or outcome of this trial. The public will continue to reasonably question whether the judge is truly acting as a neutral authority, or is instead responding to behind-the-scenes pressure, or perhaps even moving proactively to avert future interference.

In the context of the appearance of unlawful influence, public perception clearly describes the public writ large, to include casual observers and those members of the public with only a passing knowledge of the proceedings.¹⁷ In the context of this trial, the public community is a worldwide audience, including individuals accustomed to compromised judiciaries and politicized trials, and those with little if any trust in the American military and public institutions. Issues of public perception are therefore of paramount concern, and must be viewed through the widest possible lens. The public perception of this trial would be irreparably compromised if the trial continues to proceed under a Convening Authority that is already widely believed to have attempted to improperly influence the judiciary.¹⁸

Further, there is a significant risk that the defendants in this trial will suffer prejudice if Maj. Gen. Ary and his legal staff are allowed to remain, as the effectiveness of the current

¹⁷ *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (“The question whether there is an appearance of unlawful command influence is similar in one respect to the question whether there is implied bias, because both are judged objectively, through the eyes of the community.”).

¹⁸ See Attachments to AE343, news articles on the announcement of Change 1.

Convening Authority may be fatally compromised by its disqualification from the *Al-Nashiri* trial. Maj. Gen. Ary and his legal staff can no longer function effectively and efficiently in this trial due to their disqualification on one of the three commissions trials currently proceeding. This, too, is part of the “taint” resulting from the Convening Authority’s actions against the judiciary, and creates further issues in both due process and public perception.¹⁹ While the Convening Authority’s role is currently in flux, it appears all but guaranteed that a division of the responsibilities and resources designed around a single Convening Authority would create further delays, conflicts, and inefficiencies due to ambiguity, conflict, and overlap. These doubts about the Convening Authority’s continued ability to function also impact his effectiveness at present.

The Convening Authority’s role in administering and overseeing a range of routine and vital functions, from travel to staffing to essential resources, has been irreparably compromised. Ironically, while Change 1, and the report leading up to its implementation, implicated the judiciary for the slow progress of this trial, the Convening Authority itself has been a significant source of delays, due to slow turnaround and overly-complex administration of the day-to-day affairs. Permitting MajGen Ary to continue in his current role creates a significant risk of worsening these issues, with a foreseeable negative impact on the public perception of the fairness and just administration of this trial.

The defense therefore respectfully requests that this commission remove the residual taint of unlawful influence, and prevent further delays in these proceedings, by acting assertively now

¹⁹ *United States v. Toohey*, 63 M.J. 353, 356, 362 (C.A.A.F. 2006) (remanding on grounds of denial of due process due to a six-year wait in post-trial review, and discussing at length the danger that long procedural delays “would adversely affect the public's perception of the fairness and integrity of the military justice system”).

and disqualifying the Convening Authority along with his legal staff from further involvement in this trial.

7. Oral Argument: The defense requests oral argument.

8. Witnesses:

- a. MajGen Vaughn Ary (Ret.);
- b. Mr. Robert Work;
- c. Mr. Darrin A. Hostetler;
- d. Mr. Mark Toole;
- e. Ms. Alyssa Adams;
- f. CDR Raghav Kotval;
- g. CPT Matthew Rich;
- h. LTG Flora D. Darpino;
- i. VADM Nanette DeRenzi;
- j. MajGen John R. Ewers;
- k. Lt Gen Christopher F. Burne.

9. Conference with Opposing Counsel: The government opposes this motion.

10. List of Attachments:

A. Certificate of Service

B. *U.S. v. Al-Nashiri*, AE 332, Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary (13 January 2015).

C. Unofficial hearing transcript for *U.S. v. Al-Nashiri*, 25 February 2015, AM Session.

D. Unofficial hearing transcript for *U.S. v. Al-Nashiri*, 25 February 2015, PM Session.

E. Memorandum, Deputy Secretary of Defense, 26 February 2015, Subj: Rescission of Change I to the Regulation for Trial by Military Commission.

F. *U.S. v. Al-Nashiri*, AE332U Order (4 March 2015).

G. Email from MajGen Ary to Darrin A. Hostetler, Subj: Changes to Regulation for Trial by Military Commission, dated 10 December 2014;

H. Dep't of Defense Office of General Counsel Website, Official Biography for Darrin A. Hostetler.

Very respectfully,

//s//

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CERTIFICATE OF SERVICE

I certify that on the 10th day of March, 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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 332

**DEFENSE MOTION TO DISMISS FOR
UNLAWFUL INFLUENCE AND DENIAL
OF DUE PROCESS FOR FAILURE TO
PROVIDE AN INDEPENDENT
JUDICIARY**

13 January 2015

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).
2. **Relief Requested:** The defense requests that the charges and specifications be dismissed with prejudice. In the alternative, the defense requests abatement of proceedings until such time as the Department of Defense establishes an independent trial judiciary for the military commissions as required by the Military Commissions Act of 2009.
3. **Overview:** Unlawful influence is the “mortal enemy of military justice.” *United States v. Douglas*, 68 M.J. 349, 355 (C.A.A.F. 2010). The Military Commissions Act (MCA) of 2009, like the Uniform Code of Military Justice (UCMJ), prohibits a convening authority from exerting unlawful influence over military judges. 10 U.S.C. § 949b(a)(1) & (2); 10 U.S.C. § 837 (2012).

“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.” *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). The defense has previously litigated the statutory and constitutional prohibitions on the Convening Authority personally selecting the military judge in this case. AE084 (10 July 2012), *et seq.* But now the Convening Authority, after having prepared a review of their performance, which leaves him

apparently displeased with the independence the military judges in these cases have exercised and how that independence has affected the prosecution's ability to rush these cases to trial, has attempted to coerce the independent judgment of the trial judiciary by marooning them on a remote penal colony. Memo from Convening Authority to Deputy Secretary of Defense dated 9 December 2014 (Attachment A). This is plainly a violation of the letter and spirit of 10 U.S.C. § 948j(f).

The "actions at issue strike at the heart of what it means to have an independent military judiciary and indeed a credible military justice system." *Salyer*, 72 M.J. at 428. The military judges of the trial judiciary should not be at-will employees of the Convening Authority. Therefore, this case should be dismissed for unlawful influence, or at a minimum, this proceedings should be abated until the Secretary of Defense promulgates regulations that to shield the military judges' independence as Congress intended.

4. Burden of Proof and Persuasion: Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence. *Salyer*, 72 M.J. at 424. This Commission is not only concerned with eliminating actual unlawful influence, but also with eliminating even the appearance of unlawful command influence. *Id.*

5. Facts: 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.” R.M.C. 503(b)(1).

On 10 April 2010, a new Convening Authority, Bruce MacDonald, personally lobbied the Army to retain Colonel Pohl on retiree-recall status. Memorandum from Bruce MacDonald to Chief, Personnel, Plans & Training dated 2 April 2010 (Attachment B). He was renewed on 30 September 2011, after Mr. MacDonald referred this case to this military commission. Colonel Pohl’s retiree-recall status has been renewed each year thereafter. The request by the Convening Authority that Colonel Pohl be put in retired recall status was never disclosed to the defense, which discovered it only after it was produced in response to a third-party’s request pursuant to the Freedom of Information Act.

On 10 July 2014, Colonel Pohl detailed Colonel Vance H. Spath to this military commission. On 11 August 2014, Colonel Spath dismissed Charges VII-IX without prejudice because the prosecution failed to meet the evidentiary burden set forth in R.M.C. 905(c)(2)(B). On 19 September 2014, the prosecution filed its notice of appeal, an appeal that was later stayed by the Court of Appeals for the District of Columbia Circuit.

On 1 October 2014, a third Convening Authority was appointed, Vaughn A. Ary. Upon taking office, the Convening Authority apparently ordered a review of the military commissions that included an assessment of the military judges’ performance. The Convening Authority apparently concluded from this review that the military commissions were not proceeding quickly enough, at least in part due to the conduct of the military judges.

On 9 December 2014, the Convening Authority successfully 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 issue assignment orders for duty at the venue where the military commissions are to be convened.” Attachment B at 2. The stated reason for altering the regulation by trial judiciary was “to accelerate the pace of litigation[.]” Attachment B at 1.

6. Argument :

I. The Charges and Specifications Should be Dismissed With Prejudice Because the Convening Authority and the Deputy Secretary of Defense Has Exerted Unlawful Influence Over this Military Commission.

Unlawful influence is the “mortal enemy” of military justice because of the recognition that members of the military, including convening authorities, military judges, witnesses, counsel, etc., 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. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The central focus of the framers of the UCMJ was the elimination of “any influence of command control from a court-martial.” *United States v. Goodwin*, 5 U.S.C.M.A. 647,659 (C.M.A. 1955) (Quinn, C.J., dissenting). At the hearings before the House Armed Services Committee involving the proposed UCMJ, the American Bar Association complained, “the instances in which commanding officers influenced courts are legion.” *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and HR. 4080 Before the Subcommittee of the Committee on Armed Services United States Senate*, 81st Cong. 717-18 (1949). Through the enactment of Article 37, UCMJ, Congress sought to put an end to this practice. *Id.* at 1019. 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. 10 U.S.C. § 837.

The MCA broadens the protections of 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.” 10 U.S.C. § 949b(a)(2)(A). 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.” 10 U.S.C. § 949b(a)(1). There could be no stronger evidence of the seriousness with which Congress viewed the threat of unlawful influence in connection with military commission proceedings and its desire to eliminate comprehensively this “mortal enemy of military justice.”

A “judge is ultimately responsible for the control of his or her court and the trial proceedings.” *United States v. Vargas*, 74 M.J. 1, 20 (C.A.A.F. 2014). “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.” *Id.* at 20-21. 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 effectively admonish the trial judiciary for the pace of litigation in the forum he selected. The clear and only purpose of forcing the military judges, and only the military judges, to relocate to a remote penal colony for the duration of the proceedings was to increase the costs to them – personally – of any delay. If a convening

authority ordered a military judge to work nights and weekends and be relocated to his military installation it would constitute unlawful influence, and the result is no different here.

The Convening Authority's action may also impermissibly have the effect of removing Judge Spath from this military commission. It is no secret he is the Chief Trial Judge of the Air Force, and has many additional duties, including the trial of another capital case at Warner Robins Air Force Base, Georgia. An evidentiary hearing in this case may reveal the Convening Authority sought to remove a military judge, who dismissed charges in this case and prompted the government to take the extraordinary step of noticing an interlocutory appeal.

“Neither the government nor the defense at a court-martial is vested with the power to designate, detail, or select the military judge. Conversely, neither party can usurp the authority of the service secretaries of Judge Advocates General by removing or unseating properly certified and detailed military judges.” *United States v. Lewis*, 63 M.J. 405, 414 (C.A.A.F. 2006). “[W]here there is evidence in the record of an effort to unseat a military judge based on the trial counsel's animosity toward the military judge, to secure a more favorable ruling, or 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.” *Salyer*, 72 M.J. at 425. Not content to designate the Chief Judge of the Trial Judiciary, the Convening Authority has now asserted control over the scope of judicial duties and physical location of the judges of the trial judiciary. This Commission must combat what amounts to a hostile takeover of the “last sentinel” in the military justice system against unlawful influence. *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006).

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 Guantanamo Bay, this influence places “an intolerable strain on public perception of the military justice system.” *Lewis*, 63 M.J. at 415. In *Salyer*, the Court of Appeals for the Armed Forces dismissed the case with prejudice where the government’s actions succeeded in unseating the military judge. “Whether the Government’s primary motive was to remove a properly detailed military judge from the case through inappropriate means or not, it had that effect.” *Salyer*, 72 M.J. at 428. “[A]ny remedy short of dismissal at this stage would effectively validate the Government’s actions.” *Id.*

II. Wholly Separate from Unlawful Influence, the Convening Authority Clearly Violated 10 U.S.C. § 948j(f) and Due Process by Evaluating the Performance of the Military Commission Trial Judiciary and Permanently Compromising Its Independence.

The Military Commissions Act could not more clearly prohibit what the Convening Authority has attempted in this case. “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.” 10 U.S.C. § 948j(f) (emphasis added). The purpose and importance of §948j(f) could not be more obvious. The Convening Authority, as the direct subordinate of the Secretary of Defense, cannot supervise how the military judges conduct their proceedings if those military judges are to have a modicum of judicial independence.

In *Weiss v. United States*, 510 U.S. 163, 180 (1994), the Supreme Court rejected a Due Process challenge to the lack of fixed terms for military judges because the “applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve impartiality so as to satisfy the Due Process Clause.” In so holding, the Court relied on the fact that “Article 26 places military judges under

the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer ... Article 26 also protects against unlawful command influence by precluding a convening authority or any command officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties.” This was important because the relationship between the Convening Authority and a military judge raises the significant specter of improper command influence over the cases the Convening Authority places before the military judge.

The regulations insulating military judges from the Convening Authority that passed constitutional muster in *Weiss* are rooted in the Military Justice Act of 1968. The Act included substantial revisions to the UCMJ, aimed at ensuring the independence of military judges, who were then called law officers. When “Congress exchanged the titled ‘law officer’ for ‘military judge’ ...it certainly intended that military judges would be subject to [the first Canon of Judicial Conduct], which is applicable to all other judges throughout the United States.” *Carlucci*, 26 M.J. at 336. That canon, “requires that judges uphold the independence and integrity of their courts.” *Id.* “The Act codified the concept of the field judiciary, which had been pioneered by the Army in 1958 and was adopted later by the other services, by providing that ‘the military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee,’ but the detail itself was still the responsibility of the convening authority.” *United States v. Newcomb*, 5 M.J. 4, 9 (C.M.A. 1978)(Cook, J. concurring); *United States v. Gordon*, 7 M.J. 869, 872 (A.C.M.R. 1972)(“‘Select’ and ‘detail’ are not coextensive terms.”). And “as a result of congressional concern about the possible use ‘of an effectiveness, fitness, or efficiency report’ to influence the action of court members, Article 37 of the Code, was amended to prohibit consideration of ‘the performance of duty of any’ person ‘as a member of a court-martial’ in

preparing such a report on that person.” *United States v. Murphy*, 26 M.J. 454, 457 (C.M.A. 1988)(Everett, C.J. concurring and dissenting in part).

In the Military Commissions Act, Congress incorporated the provisions designed to ensure judicial independence found in Article 26, UCMJ, into 10 U.S.C. § 948j. Instead of tasking the Service Secretaries as under the UCMJ, § 948j tasks the Secretary of Defense with prescribing regulations for the manner in which military judges are detailed to military commissions. Aside from this change, § 948j closely parallels Article 26, UCMJ, including its prohibition on the Convening Authority evaluating the fitness and performance of a military judge sitting as a military commission. 10 U.S.C. § 948j(f). The Secretary of Defense repeated this prohibition in R.M.C. 502(c)(5).

Importantly, nothing in either the Rules for Military Commission or the Regulation for Trial by Military Commission authorize the Convening Authority to select and designate the Chief Judge, determine the scope of judicial duties, criticize the pace of litigation, or change the military orders of military judges. Quite the opposite. Congress clearly prohibited the Convening Authority from “prepar[ing] or review[ing] any report concerning the efficiency of a military judge.” That is precisely what the Convening Authority has done here. The Convening Authority’s own memorandum to the Deputy Secretary of Defense makes clear that he “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 commission cases. ... Based on my analysis, 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. ... I believe these actions will accelerate the pace of litigation and demonstrate a renewed commitment to achieving a just conclusion to these cases.” Attachment A. An Executive Summary of the

report memorializing the Convening Authority's assessment is explicitly referenced as "TAB B." TAB B, containing this Executive Summary, however, was withheld from the documents furnished to counsel as was the text of the full report.

In *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), the Court held that it would violate Articles 26 and 37 if a Judge Advocate General decertified or transferred a military judge based on the General's opinion of the appropriateness of the judge's findings and sentences. The result can be no different in this case where the Convening Authority sought to squeeze the military trial judiciary out of an explicit dissatisfaction with their willingness to "accelerate the pace of litigation."

Even if the Secretary of Defense intended to return military justice to its status in 1967, such a system would violate the contrary congressional intent reflected in the UCMJ and MCA and Due Process under *Weiss*. "It is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (internal quotation omitted). And it goes without saying that "[a] necessary component of a fair trial is an impartial judge." *Id.* (citations omitted).

"In referring a case to trial, a convening authority is functioning in a prosecutorial role." *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) citing *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982). That is important, because "[n]either the government nor the defense at a court-martial is vested with the power to designate, detail, or select the military judge." *United States v. Lewis*, 63 M.J. 405, 414 (C.A.A.F. 2006). "We have examined the legislative history of the 1968 amendments to the Uniform Code and are convinced that Congress did not create or intend to create such a judicial sham." *Mabe*, 33 M.J. at 205. As presently constituted, this Commission is precisely that. *United States v. Beckermann*, 25 M.J. 870, 874 (C.G.C.M.R.

1988) (*en banc*) (“Congress amended the Uniform Code of Military Justice to stop such practices and the Court of Military Appeals has confirmed this Congressional intent.”).

Moreover, the Convening Authority did not just report on the military judges “efficiency.” He sought to accelerate the pace of litigation by marooning the Military Commission Trial Judiciary on Guantanamo during the pendency of any case. By doing so, the Convening Authority violated the basic principle of Due Process Clause, incorporated from the common-law and recognized by the Supreme Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), that a judge cannot preside over any case in which he has “a direct, personal, substantial, [or] pecuniary interest” in the conduct of proceedings.

The explicit intent of the regulatory change was to pressure the military judges into “accelerating” these cases, not based on the demands of justice, the government’s compliance with their discovery obligations, or counsel’s readiness to proceed. Instead, by singling out the military judges and indefinitely detaining them in Guantanamo during the pendency of any case, the Convening Authority sought to use the military judges’ discomfort as an accelerator. This violated Due Process and accordingly this case should be dismissed with prejudice or, at a minimum, abated until the Secretary of Defense implements regulations that structure the Military Commission Trial Judiciary in a way that effectively safeguards the judicial independence of its members.

7. **Oral Argument:** The defense requests oral argument on this motion.
8. **Witnesses:**
 - a. Mr. Vaughn Ary
 - b. Mr. Robert Work
9. **Conference with Opposing Counsel:** The prosecution opposes this motion.
10. **List of Attachments:**

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- A. Memo from Convening Authority to Deputy Secretary of Defense, dated 9 December 2014 (2 pages)
- B. Memorandum from Bruce MacDonald to Chief, Personnel, Plans & Training, dated 2 April 2010 (1 page)

/s/ Brian Mizer
BRIAN MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Thomas Hurley
THOMAS HURLEY, MAJ, USA
Assistant Detailed Defense Counsel

/s/ Daphne Jackson
DAPHNE JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

CERTIFICATE OF SERVICE

I certify that on 13 January 2015, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record on the date of filing.

/s/Richard Kammen
Richard Kammen / #5064-49
KAMMEN & MOUDY
135 North Pennsylvania St.
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Indianapolis, IN 46204
(317) 236-0400
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ATTACHMENT

A



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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OSD000152-15

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.

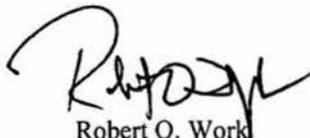
Pursuant to 10 U.S.C. § 949a(c), I hereby prescribe the following change to the Regulation for Trial by Military Commission (2011).

**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

B



CONVENING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

April 2, 2010

MEMORANDUM FOR Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
Department of the Army

SUBJECT: Retired Recall, Colonel James L. Pohl

I request that Colonel James L. Pohl be placed in a retired recall status from 30 September 2010 until 30 September 2011. Colonel Pohl serves as the Chief Trial Judge for the Military Commissions and, at this juncture, is the most experienced military judge remaining in the commissions trial judiciary.

The loss of his expertise and leadership would be extremely detrimental to the commissions at this particular time. With the anticipated renewal of commissions trials, his experience, both as a sitting judge in several commissions cases and as chief judge, will be crucial in achieving a vibrant renewal of the trial process.

The extension is requested for 12 months to enable continuity of operations for the commissions trial judiciary.

POC at this organization is

(b)(6)



Bruce MacDonald
Convening Authority
for Military Commissions

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1 [The R.M.C. 803 session was called to order at 0903,
2 25 February 2015.]

3 MJ [Col SPATH]: All right. These commissions are called
4 to order. All parties who were present before the recess are
5 again present.

6 Let's do a couple admin updates. I have marked or
7 had marked 332Q, which you all can get a copy of. I'm going
8 to give the original to the court reporter. Last night I was
9 working. I reviewed 3320, which is the exhibit, of course,
10 that the witness will be using, and the parties, and then I
11 switched and started to work on a motion ruling in an
12 unrelated case, but it's one we talked about earlier,
13 United States v. Wilson.

14 It should give you heart that I have to disclose a
15 few more facts, because I really do keep everything as
16 segregated as I possibly can when I have multiple trials, for
17 obvious reasons. So as I was going through that file last
18 night I came across the second supplement to the defense
19 motion for recusal and motion to abate proceedings dated
20 12 February 2015, and again this is the Wilson case.

21 But they filed a second supplement to let me know of
22 two additional facts. And the two facts are that on
23 10 February 2015 the Air Force Judge Advocate General informed

1 the lead defense counsel of the following information with
2 respect to Change 1 to the Regulation for Trial by Military
3 Commissions: "A, in light of the requirement that military
4 commissions judges relocate to Guantanamo and cease judging in
5 courts-martial, TJAG does not intend to permit Colonel Spath
6 to continue to serve as a detailed military commissions judge;
7 and B, TJAG is in the process of finding a replacement for
8 Colonel Spath to serve as a military commission judge. The
9 timing of the replacement has not yet been determined.
10 Negotiations on the implementation of Change 1 are ongoing."

11 So as we debate later about the relevance of General
12 Burne's testimony, or if we're going to call him, as I saw
13 that last night -- frankly, I had forgotten all about it
14 because it wasn't a conversation I had with General Burne.
15 But at least according to Lieutenant Colonel Frakt, the
16 defense counsel, that's a conversation he had with the Air
17 Force Judge Advocate General.

18 So I disclose that to you all. And, again, I've had
19 no discussion like that, as I discuss with you all about any
20 discussions that I've had about Change 1, I have had no
21 conversations like that with General Burne. So I needed to
22 let you know for its relevance on this motion and any
23 potential unlawful influence. So here you go. And, again,

1 you all can get copies. I gave that to the court reporter.
2 It's 332Q.

3 So I think the only order of business -- I'll check
4 with both sides if there's anything to take up -- is Mr. Ary
5 should be here at 9:30 by VTC, or however, whatever mechanism
6 we use to have him testify. We have the original exhibit,
7 3320, in the record. That is an unredacted version, and I
8 know they'll redact that as they need to as it goes through
9 the review process. My understanding is Mr. Ary has a copy of
10 3320 as well, and I -- to testify from. And his version also
11 is unredacted, which is good, so all of the names are in
12 there.

13 If you're going to use the ELM0, or whatever product
14 it is -- it is an ELM0 -- to display on the screens to the
15 back, there is a redacted version that has gone through the
16 procedure of ensuring there's no personal identifiable
17 information and the like. So you can use the redacted version
18 here -- or you can use the exhibit here. Just make sure you
19 use the redacted version if you are going to display in the
20 courtroom. But you're welcome to refer to names, of course,
21 because the names are going to be relevant to the testimony.
22 And if we have any issues, just let me know, but I think that
23 makes the most sense as we go through this.

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1 So are there any issues to take up before we start at
2 9:30 with Mr. Ary, Trial Counsel?

3 DCP [COL MOSCATI]: No, Your Honor.

4 MJ [Col SPATH]: Defense Counsel?

5 LDC [MR. KAMMEN]: May we have a moment to ----

6 [Pause.]

7 LDC [MR. KAMMEN]: We may ask for a little more time, but
8 I guess the question that comes to mind is, I presume if
9 General Burne says he'd rather have you as Chief Judge than
10 living in Guantanamo Bay, assuming Change 1 is -- has any
11 meaning, I assume you will follow those orders?

12 MJ [Col SPATH]: That's an interesting question. It's one
13 the -- I know you all appreciate it, didn't even -- when I was
14 going through discussions I had with Change 1, and the
15 dealings in the Wilson case really are separate in my mind,
16 and didn't even cross my mind about that conversation, because
17 it wasn't one I had with my boss.

18 LDC [MR. KAMMEN]: Please understand, we're not being
19 critical.

20 MJ [Col SPATH]: No, I know. I bring it up because I had
21 that same discussion during the Wilson case, because I had a
22 number of questions about which order are you going to follow,
23 and the difficulties that obviously this puts me in.

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5515

1 The way the detailing appears to work to me, just the
2 detailing in general, is once detailed by TJAG, which I was at
3 one point, and then assigned to a commissions case, which
4 clearly I have been, at least under the current version the
5 way for me to leave this case is recusal, which of course is
6 within my own determination, if I believe that I can't be
7 impartial, or I don't appear impartial; Colonel Pohl has the
8 ability to undetail me as the Chief Judge; or I can be
9 reassigned from the judiciary in the normal course of TJAG's
10 assignment authority. If he were to remove me from the
11 judiciary and I was no longer a trial judge in the normal
12 course of assignments, that would have the effect of
13 undetailing me. That's at least how I read the instruction.

14 I don't know if TJAG -- this is not a ruling on
15 whether or not he does or doesn't, but I don't know if TJAG
16 has the authority to say you're going to be the chief trial
17 judge in the Air Force and you're not going to a commissions
18 case to which you are currently detailed. I don't know. So
19 that's why I paused on that answer.

20 LDC [MR. KAMMEN]: I mean, as much as we want to move
21 ahead, I mean, I'll defer to you, but is this the best use of
22 everyone's time, if you are going to be leaving the case?

23 MJ [Col SPATH]: It is, because I have no idea the -- I

1 have no idea the context of that conversation. This is not
2 saying that Colonel Frakt didn't report it accurately. This
3 is not a critique. It's just everybody involved in a
4 conversation hears sometimes what they want to hope -- want to
5 hear or unintended comment. As I discussed yesterday,
6 everybody makes unintended comments.

7 And so I have no idea of the context, because I've
8 had no discussion with General Burne about that eventuality.

9 LDC [MR. KAMMEN]: That was going to be my next question,
10 is that maybe before we hear from Mr. Ary we really need to
11 hear from General Burne. And I guess formally we would renew
12 our request that he be produced briefly as a witness, because
13 if his position is you're gone from this case, I mean, I think
14 everybody -- I mean, first, in our view, quite candidly, if
15 his position is you're gone, the motion is proven.

16 MJ [Col SPATH]: That's a different issue, and so that's
17 something -- if the detailing is being affected, that's
18 certainly an issue to discuss with the unlawful influence, and
19 I know we will. But as of right now, never had a conversation
20 like that with General Burne. I reported it to you out of an
21 abundance of caution as I saw it last night as I was working
22 through that motion ruling in writing, and I think it's
23 important for me to disclose any outside contact issues like

1 that.

2 LDC [MR. KAMMEN]: I appreciate that. And Commander Mizer
3 has handed me a note indicating that he confirmed a similar
4 conversation with Major Bieber (phonetic) last week, so
5 apparently that is floating around the Air Force -- whatever.

6 MJ [Col SPATH]: I do think it's something we'll talk
7 about as we do the UI motion. I certainly think it's
8 something we're going to be talking about, absolutely. But at
9 this point the wise use of time is I am detailed; I haven't
10 recused myself; nobody has said anything to me about an
11 attempt to undetail me without changing my judiciary duties;
12 Colonel Pohl certainly hasn't undetailed me; and I plan to
13 continue to move forward until such time as something occurs,
14 and I'm sure there will be more motion practice in that
15 eventuality.

16 But Mr. Ary is the first order of business, and then
17 we'll discuss any other witnesses that need to be ----

18 LDC [MR. KAMMEN]: Could we -- and I know we're going to
19 adjourn, and could we have just -- we may ask for a few extra
20 minutes, just to digest this, and ----

21 MJ [Col SPATH]: It shouldn't impact -- for Mr. Ary, he's
22 going to be ready at 9:30, and frankly this should not impact
23 our questions for Mr. Ary, other than maybe do you know of

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1 these discussions, and you're certainly welcome to ask him
2 that if you believe that's relevant to your inquiry. But my
3 plan is to start with Mr. Ary at 9:30.

4 LDC [MR. KAMMEN]: Fine. Okay.

5 MJ [Col SPATH]: All right. Thank you. Then I'll see you
6 all at 9:30. We're in recess.

7 [The R.M.C. 803 session recessed at 0914, 25 February 2015.]

8 [The R.M.C. 803 session was called to order at 0935,
9 25 February 2015.]

10 MJ [Col SPATH]: These commissions are called to order.
11 All parties present before the recess are again present.

12 Do we have Mr. Ary here by, I assume VTC, Trial
13 Counsel?

14 DCP [COL MOSCATI]: Yes, Judge.

15 MJ [Col SPATH]: All right. If you would, let's swear him
16 in.

17 ATC [LT MORRIS]: Sir, good morning. Can you hear me?
18 This is Lieutenant Morris.

19 WIT: Yes, I can. Can you hear me?

20 ATC [LT MORRIS]: We can hear you just fine. Thank you,
21 sir. Would you please stand and raise your right hand.

22 MR. VAUGHN ARY, civilian, was called as a witness for the
23 defense, was sworn, and testified as follows:

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5519

1 A. Yes.

2 ATC [LT MORRIS]: And for the record, Your Honor, these
3 are the product 105, 107, 111 through 113 material that has
4 been previously provided to defense counsel and to Your Honor
5 and has all been Bates stamped, Your Honor?

6 MJ [Col SPATH]: It has. And it's AE 3320. Thank you.

7 ATC [LT MORRIS]: Thank you.

8 MJ [Col SPATH]: Mr. Kammen.

9 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

10 Q. Mr. Ary, I put myself in your shoes. This is
11 probably kind of a complicated day for you, fair to say?

12 A. It's different than the usual day, yes.

13 Q. Certainly different than your usual day because
14 what's at issue here are the things you and your staff did;
15 isn't that -- that's your understanding; isn't that correct?

16 A. Yes.

17 Q. The things you and your staff didn't do are at issue
18 here; isn't that your understanding?

19 A. No. My understanding is that it's about a
20 recommendation I made to my boss.

21 Q. And the recommendation that was vetted by you and
22 vetted by your staff; isn't that correct?

23 ATC [LT MORRIS]: Your Honor, I'm going to object.

1 Counsel is testifying. We ask that this is -- being direct
2 examination, that Mr. Ary be given he an opportunity to
3 testify.

4 LDC [MR. KAMMEN]: He's certainly an adverse witness, Your
5 Honor.

6 MJ [Col SPATH]: Mr. Kammen, let's do this. There is
7 little doubt that he likely is adverse to your theory of the
8 case. Let's start, though, with some open-ended questions,
9 give him an opportunity to answer some questions about what's
10 at issue. And I will give you some leeway under 104, I assure
11 you, to do some cross-examination as well.

12 Questions by the Learned Defense Counsel [MR. KAMMEN]:

13 Q. Well, is it correct that what's at issue is -- is it
14 correct that -- is it your understanding that what is at issue
15 is how the recommendation you made came to be?

16 A. I think that's probably one of many issues, yes.

17 Q. Okay. And is it -- are you familiar -- well, I mean,
18 and essentially, as you said in document 127498?

19 A. 127498.

20 Q. An information memo -- go ahead and find it.

21 MJ [Col SPATH]: Mr. Ary, those are the Bates stamp
22 numbers on the bottom right hand corner. It's the last six
23 digits you will see.

1 WIT: I'm looking for which binder that's in. I don't
2 seem to have that one. 498?

3 LDC [MR. KAMMEN]: 127498, yes, sir. It's an information
4 memo ----

5 WIT: I have -- mine goes to 485 on the last -- and this
6 is in 107 or in 105?

7 LDC [MR. KAMMEN]: Neither. I don't know.

8 MJ [Col SPATH]: I do. It's in -- it should be in ----

9 LDC [MR. KAMMEN]: It's in Tab 2.1 of whatever that was.

10 WIT: Okay. Here we go, 498.

11 MJ [Col SPATH]: If yours are marked similar to mine,
12 Mr. Ary, it should be behind product 112, and then it will be
13 in those documents.

14 WIT: Okay, yes. I see the document.

15 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

16 Q. What's at issue, in part, is what you described as
17 the results of an assessment of the Office of Military
18 Commissions trial process and administration; is that your
19 understanding as among the things we're discussing?

20 A. Yes. This is many of the -- this is part of a
21 holistic approach that I took to my job and I ----

22 LDC [MR. KAMMEN]: We ----

23 ATC [LT MORRIS]: Objection. Again I would ask that

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1 Mr. Ary be allowed to answer the question.

2 LDC [MR. KAMMEN]: I have no objection, but the question
3 was answered and then he wanted to go and give a speech.

4 MJ [Col SPATH]: I understand. This is not in front of
5 members. This is informational for me. As I said, I
6 understand -- understanding his -- his understanding of why he
7 is here to testify is relevant, in part, just so we know if
8 he's situated to why he's here. But to begin, I think it's
9 important to ask some open-ended questions, to hear what he
10 has to say about the rationale, and then I will give you, I
11 assure you, leeway to probe his answers.

12 LDC [MR. KAMMEN]: Well, I don't want to get in a fight
13 with ----

14 MJ [Col SPATH]: I understand. You have called him as
15 your witness initially. The government didn't call him.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [Col SPATH]: I just -- we need to get his rationale on
18 the record, if we want that.

19 LDC [MR. KAMMEN]: And we will. Can I do some other
20 things first?

21 MJ [Col SPATH]: You may.

22 LDC [MR. KAMMEN]: I promise you we will get ----

23 WIT: I'm ----

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5524

1 LDC [MR. KAMMEN]: Okay.

2 Questions by the Learned Defense Counsel [MR. KAMMEN]:

3 Q. Now, additionally is it your understanding, and tell
4 us if it's not, that among the things that we'll be discussing
5 as reflected in document 127193 ----

6 A. Okay. I would like to make sure I clarify that I'm
7 not sure I have seen this draft, but this is not the final
8 information memo, this document 498. It was probably
9 something that my legal advisors were working on, but is not
10 the recommendation or the information memo I submitted to the
11 Deputy Secretary for him to consider in making the decision.

12 The other document you referred to, sir?

13 Q. 127498 -- or, excuse me, 127193.

14 We'll get to whether you saw it or not later.

15 A. Okay. Okay. Yes. This is the final executive
16 summary ----

17 Q. Okay. Thank you.

18 A. ---- that I submitted to the Deputy Secretary.

19 Q. Okay. No question you've seen this one?

20 A. Yes.

21 Q. Yes, you have seen it?

22 A. Yes.

23 Q. Okay. And one of the things at issue in this case

1 was your desire to effect -- your desire as the convening
2 authority to impact the pace of litigation; isn't that true?
3 That's one of the things we're discussing here, correct?

4 A. This is a document that addressed my assessment of
5 where we were in the cases and the resourcing requirements of
6 the military commissions process.

7 Q. And one of the where we were, we'll be discussing,
8 was your desire to impact the pace of litigation; isn't that
9 true?

10 A. Yes. I believe that if the commissions were located
11 at the selected venue for the commissions, that they would be
12 available to go on the record on a more frequent basis.

13 LDC [MR. KAMMEN]: And, Your Honor, since we're going to
14 get a speech with every answer, at some point ----

15 MJ [Col SPATH]: Mr. Kammen, I don't take it that way.
16 The witness, again, is your witness, he has not yet
17 demonstrated he is a hostile witness. It is fair for him to
18 answer questions. He is answering your questions.

19 LDC [MR. KAMMEN]: Okay.

20 MJ [Col SPATH]: You may proceed.

21 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

22 Q. All right. Now, in affecting the pace of litigation,
23 your desire was to change the status quo, correct?

1 A. That's correct.

2 Q. And the status quo was that the litigation, in your
3 view, was moving too slowly; isn't that right?

4 A. I believe there are a number of factors that affect
5 the pace of litigation in these cases.

6 Q. And ----

7 A. And I believe that ----

8 Q. And among those factors that affected the pace of
9 litigation, the end result was it was going too slowly; isn't
10 that -- wasn't that your opinion as reflected on December 9,
11 2014?

12 A. Yes.

13 Q. And your desire was to affect that status quo by
14 speeding it up, correct?

15 A. No. It was about resourcing and aligning and
16 positioning the commissions to be available to go on the
17 record on a more frequent basis.

18 Q. And the purpose of doing that was to impact the pace
19 of litigation, as you said, true?

20 A. No. I believe that's for the commissions to set the
21 trial schedule. This was to allow them to make it their
22 exclusive duty, the commissions, and to position them so that
23 they would be available to address these important cases in

1 a -- what I thought was a more accessible manner.

2 Q. Okay. Now we are about how you might be feeling
3 today. And you're aware, are you not -- or are you aware of
4 Judge Spath's remarks yesterday that your actions have slowed
5 litigation? Are you aware of that?

6 A. I'm not sure that -- I'm not sure they've been
7 implemented yet.

8 Q. Are you aware of what Judge Spath said yesterday,
9 that your actions have slowed ----

10 A. I am now.

11 Q. -- the pace of litigation?

12 A. I am now.

13 Q. I'm sorry?

14 A. I am now. I assume that's what he said. I haven't
15 reviewed the transcript from yesterday.

16 Q. And you're aware, are you not, that this hearing
17 which you'll -- is preventing, according to Judge Spath, from
18 getting to litigation over evidentiary issues that had been
19 previously scheduled, right?

20 A. I understand that.

21 Q. Okay. And that you're also aware there's a lot of
22 people watching this, true?

23 A. Yes.

1 Q. Members of the media here and at other places, right?

2 A. Yes.

3 Q. Members of the public here and at other places?

4 A. Yes.

5 Q. And who else do you think might be watching this?

6 A. I don't know. I think you probably covered most
7 everybody. The people in court.

8 Q. Well, there's the NGOs from all over the world that
9 are interested in this process, right? You're aware of that,
10 aren't you?

11 A. That's correct.

12 Q. Okay.

13 A. Yes.

14 Q. That's -- and all of this because of the things you
15 and your staff did in making this recommendation, right?

16 A. Yes. I initiated it, yes.

17 Q. Okay. And that's -- thank you.

18 So we're clear, it was your decision to initiate this
19 request, correct?

20 A. Yes. And it was based upon a request from the trial
21 judiciary initially to address resourcing constraints, and I
22 believed I needed to address a number of other issues to
23 accompany that.

1 Q. Okay. And we'll come back to that.

2 But just so I'm clear, based on a request from the
3 trial judiciary, of Mr. Taylor, you then went on to make the
4 request, staff the request and make the request that became
5 Change 1, true?

6 A. Yes. There was also another issue. It was the
7 request from the prosecution to build a third courtroom.

8 Q. A request ----

9 A. And as part of my -- as part of my validation of the
10 requirement for a new courtroom, I looked into the number of
11 hours we had been on the record in the past years to determine
12 whether we needed a third courtroom.

13 Q. Excuse me for interrupting.

14 ATC [LT MORRIS]: Objection, Your Honor. I would ask that
15 the witness be allowed to testify. We'd like to hear again
16 the purposes of what his intent was.

17 MJ [Col SPATH]: Objection overruled. The question from
18 Mr. Kammen there was quite clear, and the witness can answer
19 it. You may ask it again.

20 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

21 Q. Was that request from the prosecution in writing or
22 oral?

23 A. There were e-mails, I believe, to my staff, that

1 addressed that. It was one of the first issues that was
2 presented to me when I got here.

3 Q. From General Martins?

4 A. I'm sure ----

5 Q. From General Martins?

6 A. I'm sure Ms. Kelley would have those e-mails.

7 LDC [MR. KAMMEN]: Your Honor, we would need those
8 e-mails. Your Honor, we would move to adjourn until those
9 e-mails are produced.

10 MJ [Col SPATH]: You may proceed with your questions,
11 Mr. Kammen.

12 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

13 Q. When did you receive these e-mails from General
14 Martins or his staff?

15 A. This was something that was briefed to me as I took
16 this job, that there was a request for a -- or a concern that
17 we would have two trials ongoing at the same time in
18 Guantanamo and we would need two courtrooms.

19 Q. And my question, sir, is simple: When did you
20 receive the e-mails from General Martins or his staff that you
21 referred to?

22 A. I didn't receive an e-mail from General Martins. I
23 know it was part of my discussions with General Martins when I

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1 conducted my in-brief with him.

2 Q. And when did you meet with General Martins?

3 A. Early in my time here, probably my first two weeks in
4 the job. Early October, mid October.

5 Q. And who was present during that meeting with General
6 Martins?

7 A. I know my former legal advisor, Mike Quinn, members
8 of his staff.

9 Q. And was that recorded in any way?

10 A. No.

11 Q. Did you make notes of that meeting and General -- and
12 your conversations with General Martins?

13 A. I don't believe so.

14 Q. And did you discuss with General Martins in that
15 meeting the pace of litigation?

16 A. No.

17 Q. That didn't come up at all?

18 A. But I -- no. The context, I was just getting an
19 overview of the requirements. I also met with the Chief
20 Defense Counsel, I met with the clerks at the trial judiciary.
21 It was part of my rounds in this -- as I got sort of familiar
22 with the requirements of my job and my duties.

23 Q. Well, I appreciate that, but my question is: Did you

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5532

1 discuss with General Martins the pace of litigation?
2 A. No.
3 Q. Did you discuss ----
4 A. Not that I recall.
5 Q. Not that you recall. Of course not.
6 And did you discuss with the Chief Defense Counsel
7 the pace of litigation?
8 A. No, not that I recall.
9 Q. Or the clerk? Was that an issue with the ----
10 A. No.
11 Q. ---- clerk of the courts?
12 A. No.
13 Q. Okay.
14 A. I know we discussed the complexity with the clerks.
15 Q. Well, okay, but -- and did you discuss the complexity
16 with General Martins?
17 A. I'm sure that came up.
18 Q. And as part of that ----
19 A. I think everyone realizes that these are complex
20 litigation.
21 Q. Right. And did he explain to you that as part of
22 complex litigation, things moved slowly?
23 A. Yes.

1 Q. Did he explain to you that as part of complex
2 litigation, where there's national security issues at stake,
3 that things might move extra slowly?

4 A. You know, I'm not sure if he discussed all those, but
5 I know that I realized that, and that was a part of the
6 challenge ----

7 Q. Let's focus on your discussions with the prosecutor.
8 We'll come to your individual judgments in a second.

9 Did he tell you about some of the reasons from his
10 perspective why this complex litigation might move slowly?

11 A. I'm sure that probably came up.

12 Q. Okay. Now, did General Martins make the
13 recommendation to you, hey, the way to speed things up is move
14 the judges and only the judges to Guantanamo Bay? Did he make
15 that recommendation to you?

16 A. Absolutely not.

17 Q. I'm sorry?

18 A. Absolutely not.

19 Q. Okay.

20 A. Absolutely not.

21 Q. So we're all clear, that was your brainchild,
22 correct?

23 A. Yes.

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1 Q. That was your decision, true?

2 A. That was my recommendation.

3 Q. Okay. Now, just so we're clear, the clerk didn't
4 say, hey, it would be a good idea to move the judges to
5 Guantanamo Bay, did that person?

6 A. No.

7 Q. The Chief Defense Counsel certainly didn't say, boy,
8 the way to speed this deal up is move the judge to
9 Guantanamo Bay, did she?

10 A. No.

11 Q. Okay. Now I want to talk to you a second about
12 working with staff. You were a career lawyer in the United
13 States Marine Corps. Were you a career lawyer in the United
14 States Marine Corps?

15 A. Yes, I was, but I'm currently serving in a nonlegal
16 appointment.

17 Q. I understand that. But as a lawyer and as a leader,
18 were you used to, in your career as a Marine, working with
19 advisors?

20 A. Yes.

21 Q. Okay. In fact, part of leadership, is it true, that
22 one of the aspects that -- are you taught in your military
23 training that part of being a good leader and good commander

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5535

1 is listening to advisors?

2 A. Yes, and I rely on my legal advisors.

3 Q. You rely on your legal advisors. Okay.

4 A. Yes.

5 Q. But as your career unfolded, you had times where you
6 were giving advice? Did you have times where you were giving
7 advice?

8 A. Yes.

9 Q. And did you have times when you were receiving
10 advice?

11 A. Yes, as a commander.

12 Q. I'm sorry? I didn't hear.

13 A. Yes, as a commander.

14 Q. As a commander.

15 A. As a commander.

16 Q. Right. And what you don't want to be, if you are an
17 advisor, is a yes-man, true?

18 A. That's correct.

19 Q. And as receiving advice and as a commander, you don't
20 want to have around you yes-men; would that be fair to say?

21 A. Yes. I always encourage a free and open discussion
22 between my legal advisors, because I think that gives me the
23 best legal advice when all opinions are considered.

1 Q. Let me make sure that I understand your answer.

2 You always encourage free and open discussion with
3 your legal advisors, true?

4 A. Yes. Yes.

5 Q. You did that when you were in the Marines, right?

6 A. Yes.

7 Q. And you did that in your present position, true?

8 A. Yes.

9 Q. Okay. Because that's what commanders do; isn't that
10 right?

11 A. Yes. And I might point out that I'm not a commander
12 in this job, I'm just a convening authority. It's a ----

13 Q. It's true you're not a commander in the military
14 sense, and I accept that. But can we -- is it true that you
15 preside over a rather robust organization, correct?

16 A. Yes.

17 Q. Approximately how many ----

18 A. There are ----

19 Q. ---- work for -- approximately how many people work
20 for you?

21 A. There's probably around 80 in the Office of the
22 Convening Authority. The prosecution is independent, and the
23 defense is independent, and the judiciary is independent. So

1 I have resourcing responsibilities ----

2 Q. Well, that's the issue here today, is whether the
3 judiciary is independent anymore.

4 But how many people work for the Office of Convening
5 Authority? Eighty?

6 A. Probably around 80.

7 Q. Okay. So while you're not a commander, can we
8 agree -- or is it true that you try to be a good leader?

9 A. Yes.

10 Q. And part of being ----

11 A. And I make decisions, as I see it, in the best
12 interests of justice.

13 Q. Absolutely. Part of being a good leader is, as you
14 said, listening to your advisors, right?

15 A. Yes.

16 Q. Having full, frank, robust discussions, true?

17 A. Yes.

18 Q. Airing everything out.

19 A. Yes.

20 Q. Do you try to get all of the cards on the table in
21 these full and frank and robust discussions?

22 A. Yes. In fact, where my office is, I'm surrounded by
23 my legal advisors, so ----