

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

UNITED STATES OF AMERICA  v.  ABD AL RAHIM HUSSAYN MUHAMMED AL NASHIRI	<b>AE 332A</b>  <b>Government Response</b> To Defense Motion To Dismiss For Unlawful Influence And Denial Of Due Process For Failure To Provide An Independent Judiciary  26 January 2015
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**1. Timeliness**

The government timely filed this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(1).

**2. Relief Sought**

The government respectfully requests the Commission deny the defense motion to dismiss all charges and specifications with prejudice or, alternatively, abate the proceedings.

**3. Overview**

Unlawful influence can have a deleterious effect on the fair administration of justice. Commanders are prohibited from “control[ing] the actions of subordinate[s] in the exercise of their duties under the U.C.M.J.” *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Change 1 to the Regulation for Trial by Military Commission is not an example of such impropriety. In attempting to argue otherwise, the defense selectively plucks the Convening Authority’s statements out of context and misrepresents the Convening Authority’s lawful and official interest in improving the fairness and efficiency of all military commissions.

In order to successfully raise a claim of unlawful command influence, the defense must first satisfy its burden of providing “some evidence” of improper influence. *United States v.*

*Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). “Some evidence” must be more than “mere allegation or speculation.” *Id.* Only then does the burden shift to the government to rebut the presumption of unlawful command influence. Here, the defense has not and cannot present any facts to show that the actions of the Convening Authority and the Deputy Secretary of Defense constitute unlawful influence. Both officials acted with proper and due authority to address the complexity and challenges facing all military commissions and to create a full-time and dedicated trial judiciary that serves to enhance the efficient, fair, and just administration of future and ongoing military commissions. Such conduct negates the defense theory that the Convening Authority “sought to squeeze the military trial judiciary out.” AE 332 at 10. Further, the non-specific, universal change to the Regulation for Trial by Military Commission and its application and effect on all military commissions belies and rebuts the defense claim of unlawful influence. The defense motion is based entirely on speculation without any facts in support and, accordingly, the claim of unlawful influence should be dismissed.

The defense argument that the Convening Authority violated 10 U.S.C. § 948j(f) and due process is similarly hollow. To be in breach of 10 U.S.C. § 948j(f) or the principle of due process, the Convening Authority or the Deputy Secretary of Defense must express dissatisfaction with the military judge’s performance such that the judge’s independence and impartiality is compromised.<sup>1</sup> As stated above, the Convening Authority and the Deputy Secretary of Defense sought to create a full-time and dedicated trial judiciary because the state of

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<sup>1</sup> Specifically, 10 U.S.C. § 948j(f) prohibits the Convening Authority from using the officer fitness-reporting system as a means to express dissatisfaction with a military judge’s performance, ruling, findings, or sentence. As discussed in section IV, detailed military judges remain under the supervisory authority of the service appropriate Judge Advocate General, and the Convening Authority for Military Commissions does not have any authority to provide annual fitness or performance evaluations for the military judges detailed to military commissions.

military commissions warrants such a commitment, which is consistent with the official duties and obligations of the Convening Authority and the Deputy Secretary of Defense. *See* 10 U.S.C. § 948j(a) (“The Secretary of Defense shall prescribe the regulations providing for the manner in which military judges are so detailed to military commissions.”); Regulation for Trial by Military Commissions ch. 2-3(a)(6) (2011) (“In performing duties directly related to military commissions, the Convening Authority for Military Commissions . . . shall . . . [e]nsure that the Trial Judiciary is properly staffed with a Chief Clerk of the Trial Judiciary . . . and any additional staff necessary to perform various support roles and duties necessary to maintain the proper and efficient administration of the Trial Judiciary . . . , assign other personnel necessary (*e.g.*, security personnel, bailiffs, and clerks) to facilitate military commission.”). Nothing in the accompanying memoranda reflects, implies, or in any way, in fact, evinces an intention that either official was “evaluating” the “effectiveness, fitness, or efficiency” of the Military Judge’s performance, findings, or decisions in this or, indeed, any military commission. 10 U.S.C. § 948j(f). Accordingly, the Commission should deny the defense motion because there is no evidence that the trial judiciary’s independence has been compromised.

#### **4. Burden of Proof**

The defense carries the initial burden of raising the issue of unlawful command influence. *Biagase*, 50 M.J. at 150 (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). “At trial, the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* Only if the defense can show “some evidence” of unlawful command influence, which must be “more than mere allegation or speculation,” does the burden shift to the government. *Id.* If the defense meets this threshold,

only then must the government rebut the allegation of unlawful command influence. The government must persuade 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 will not affect the proceedings. *Id.* at 151.

## 5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) is charged with multiple offenses under the Military Commissions Act of 2009 (“M.C.A.”) relating to terrorist attacks against the United States and its allies. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.<sup>2</sup>

Vice Admiral Bruce MacDonald (Ret.) first served as the Convening Authority for this Commission, having been appointed on 25 March 2010. On 21 March 2013, Mr. MacDonald stepped down from the position because his three-year term ended. Defense Secretary Chuck Hagel appointed the Honorable Paul L. Oostburg Sanz to serve as the interim Convening Authority until the position could become permanently filled. On 30 September 2014, Major General Vaughn A. Ary (Ret.) was appointed to serve as the Convening Authority for Military Commissions.

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<sup>2</sup> The Commission dismissed the separate charges relating to the accused’s alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2 & Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission’s order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government’s requested relief while modifying the initial order by stating that dismissal was without prejudice. AE 168K; AE 241G. The order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the *Limburg* attack. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review (U.S.C.M.C.R.), causing AE 168K/241G to be automatically stayed pending disposition by the U.S.C.M.C.R.

During the first two months as the Convening Authority, Mr. Ary “conducted an assessment of this organization [Military Commissions] with a view to implementing measures that will contribute to the efficient, fair and just administration of ongoing and future military commission cases.” Attachment B. Based on this assessment, the Convening Authority drafted findings and conclusions that he subsequently forwarded to the Deputy Secretary of Defense. Among his recommendations, the Convening Authority believed that the trial judiciary needed additional resources and that the judges should serve in a full-time capacity. *Id.* To that end, the Convening Authority requested Change 1 to the Regulation for Trial by Military Commissions, which would make military commissions the exclusive duty of the detailed military judge and would require the detailed military judge to have assignment orders to the venue where military commissions are convened. *Id.* Additionally, the Convening Authority requested the Department of Defense Office of General Counsel to “validate the hiring of five law clerks, four paralegals, three court security officers, and an office manager to support the [military] judges.” *Id.* Similar personnel requirements were requested of the prosecution and defense “in order to build OMC’s capability and capacity to support the commissions.” *Id.* On 7 January 2015, the Deputy Secretary of Defense approved the Convening Authority’s request to amend the Regulation for Trial by Military Commissions. Attachment C. On 14 January 2015, the Department of Defense Office of General Counsel approved the Convening Authority’s request for additional legal, paralegal, and office administrative support for the trial judiciary. Attachment D.

On 28 September 2011, Chief Judge James L. Pohl detailed himself to this Commission. On 10 July 2014, Chief Judge Pohl stepped down as the presiding judge over this Commission

and detailed Military Judge Vance H. Spath to serve as the presiding judge. To date, Military Judge Spath remains detailed to this Commission.

## **6. Law and Argument**

### **I. The Defense Motion Is Premature As No Changes Have Occurred Since Change 1 to Regulation for Trial by Military Commission Took Effect on 7 January 2015**

Change 1 to the Regulation for Trial by Military Commission (“Change 1”) prioritizes military commission duties over other duties for detailed military judges. The amended rule provides that

when charges are referred . . . military commissions shall be the [detailed] military judge’s exclusive judicial duty until adjournment, final disposition of charges, recusal, replacement by the Chief Trial Judge . . . or reassignment by the appropriate Judge Advocate General. . . . A detailed military judge may perform such other duties as are assigned . . . provided that such other duties do not conflict with judicial duties as a detailed military judge for military commissions.

Attachment C. In an e-mail to all of the service Judge Advocates General, the Convening Authority requested that each of the detailed military judges remain assigned to military commissions despite Change 1. Attachment E. Additionally, the Convening Authority specifically understood the need to retain flexibility in the judges’ assignments, which would allow the judges to oversee other cases previously assigned to them. *Id.*

The new rule has had no effect on these proceedings as Military Judge Spath remains detailed to this Commission, though Change 1 took effect on 7 January 2015. The defense incorrectly presumes that Change 1 will cause the Military Judge to leave his position as the presiding judge. AE 332 at 6. There is no basis, however, for this defense conclusion. No changes have occurred in this Commission, and it remains to be seen if Change 1 will have any effect, other than eventually changing the exclusive judicial duty of all of the military

commission judges, on these proceedings. The defense motion, therefore, is premature and should be denied.

## **II. The Defense Fails To Meet Its Threshold Burden Under the *Biagase* Standard for Unlawful Influence Because Its Claim Rests on Mere Speculation**

The defense carries the initial burden of raising the issue of unlawful influence. *Biagase*, 50 M.J. at 150 (citing *Stombaugh*, 40 M.J. at 213). “At trial, the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* Only if the defense can show “some evidence” of unlawful command influence, which must be “more than mere allegation or speculation,” does the burden shift to the government. *Id.* “Mere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient.” *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009). Similarly, “proof of [command influence] in the air, so to speak, will not do.” *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991); *see also United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006).

In *Ashby*, the accused was charged and convicted of conduct unbecoming an officer and obstruction of justice based on the destruction of a videotape depicting the accused’s aircraft mishap that killed twenty civilians in Italy. 68 M.J. at 112-14. During the court-martial, the accused raised the issue of unlawful command influence because senior military officials were involved in the aftermath and investigation of the international incident. *Id.* at 128. The U.S. Court of Appeals for the Armed Forces (“C.A.A.F.”) stated the accused was required to show that the actions of senior military officials was anything other than “proper, official and lawful[.]” *Id.* at 129. Because the accused could not point to any direct evidence that the actions

of senior officials were improper or improperly influenced the court-martial proceedings, C.A.A.F. dismissed the unlawful command influence argument. *Id.* at 129.

Similarly, the defense allegations are nothing but pure speculation and are full of innuendo with no evidence to support them. For instance, the defense boldly states the Convening Authority and the Deputy Secretary of Defense “have conspired to effectively admonish the trial judiciary” and that they are “forcing the military judges . . . to relocate to a remote penal colony” in order “to increase the costs to them—personally.” AE 332 at 5. The defense further postulates that “an evidentiary hearing . . . 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.”<sup>3</sup> *Id.* at 6. The defense, however, cites to no evidence or facts to support such brazen theories. The only evidence the defense submits is an official memorandum from the Convening Authority to the Deputy Secretary of Defense requesting a change to the rules to improve the “efficient, fair, and just administration of ongoing and future military commission cases.” AE 332, Attachment A. A plain reading of the memorandum demonstrates that the Convening Authority did not improperly suggest to, let alone place pressure on, the Deputy Secretary of Defense to promulgate inappropriate changes to military commission rules. The Convening Authority’s actions were no different from the military officials in *Ashby*. Simply, the memorandum is an official communication with lawful and proper objectives.

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<sup>3</sup> The Commission dismissed the charges relating to the accused’s alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, & Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission’s order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government’s requested relief while modifying his initial order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. On 29 September 2014, the government lawfully filed an interlocutory appeal with the United States Court of Military Commission Review (“U.S.C.M.C.R.”) pursuant to 10 U.S.C. § 950d.

In order to successfully shift the burden to the government on an unlawful command influence motion, the defense must first satisfy the threshold of raising “some evidence” of improper influence. Without “some evidence” of impropriety, the defense motion necessarily fails. *See United States v. Johnson*, 54 M.J. 32, 36 (C.A.A.F. 2000) (rejecting the accused’s claim of unlawful command influence because no evidence of such was adduced, other than the accused’s bald assertions at a *DuBay* hearing). The defense has not presented any evidence, let alone “some evidence,” of unlawful influence, thus its motion should be dismissed.

### **III. Change 1 to Regulation for Trial by Military Commission Does Not Constitute Unlawful Influence**

In the event the Military Judge finds the defense has met its burden of producing “some evidence” of unlawful command influence, the burden then shifts to the government. The government must then prove 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 will not affect the proceedings. *Biagase*, 50 M.J. at 151. The government must disprove both types of unlawful influence—actual and apparent. *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). Under any analysis, unlawful influence does not exist, particularly not based on the Convening Authority’s request to the Deputy Secretary of Defense to provide additional resources to the trial judiciary.

#### **A. The Predicate Facts, as Asserted by the Defense, Do Not Establish Unlawful Influence**

The defense claims of unlawful influence are premised on faulty and incorrect facts. First, the defense alleges the Convening Authority and the Deputy Secretary of Defense “have conspired to effectively admonish the trial judiciary” because the pace of litigation, as established by the judiciary, has been wanting. AE 332 at 5. Not only has the defense failed to

present any evidence that the Convening Authority has in any way “conspired” with the Deputy Secretary Defense, but the only “proof” the defense cites in support of its argument is inapposite—an official memorandum from the Convening Authority to the Deputy Secretary of Defense *requesting* approval of a change to the rules to “contribute to the efficient, fair and just administration of ongoing and future military commission cases.” Attachment B. Additionally, the defense mischaracterizes the Convening Authority’s request. The Convening Authority’s memorandum simply notes that the complexity of the litigation and the high demands placed on the trial judiciary requires full-time, dedicated staff to address those concerns in a fair, just, and efficient manner. To state this official and proper request is meant to “admonish the trial judiciary” misses the mark.

Second, the defense speciously claims the Convening Authority has forced “the military judges . . . to relocate to a remote penal colony” in order “to increase the costs to them—personally.” AE 332 at 5. Notably, the defense does not, and cannot, cite to any evidence of such animosity—because none exists.

Third, the defense alleges the Convening Authority “has now asserted control over the scope of judicial duties and physical location of the judges of the trial judiciary” in what amounts “to a hostile takeover” of the trial judiciary. *Id.* at 6. This defense claim is also meritless. The defense insinuates bad faith on the part of the Convening Authority, but the defense presents no facts or evidence of such hostility. It is clear the Convening Authority’s interest in military commissions is official, as it should be. In order to successfully raise a colorable claim of unlawful influence, the defense must cite “some evidence” to the contrary—that the Convening Authority has taken a personal interest, not official interest, in military commissions. The facts here establish quite the opposite. As stated above, the memorandum is an administrative request

to properly staff the trial judiciary with sufficient resources commensurate with the increased complexity and high volume anticipated in future military commissions. Further, the Convening Authority has only displayed praise for the military judges and has requested to maintain the trial judiciary generally.

Finally, the defense asserts the Convening Authority seeks to unseat the Military Judge, and the defense compared this case with the unprofessional and egregious efforts of trial counsel and judge advocates to unseat military judges in *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013) and *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). AE 322 at 6-7. This case is markedly different from the facts in *Salyer* and *Lewis*. In both courts-martial, trial counsel and judge advocates deliberately and inappropriately sought to remove the detailed military judge. The manner in which the government sought to obtain this result was highly objectionable. *Salyer*, 72 M.J. at 425-28 (holding that pulling the personnel file of the military judge, calling the circuit military judge to express dissatisfaction with the trial judge's ruling, and challenging the trial judge's impartiality, based on nothing more than personal rumors, was inappropriate and raised the appearance of unlawful command influence); *Lewis*, 63 M.J. at 412-15 (noting that while an accused is not entitled to a specific military judge or that a change in the military judge is not a recognizable form of prejudice, the distasteful manner in which trial counsel and the staff judge advocate accused the trial judge of having an inappropriate relationship with civilian defense counsel created the appearance of unlawful command influence). Here, neither the government, nor the Convening Authority has acted in any way inappropriately or even remotely comparable to the conduct in *Lewis* and *Salyer*. To be clear, the facts and circumstances of *Lewis* and *Salyer* share nothing with the present case. As noted above, the Convening Authority has stated his official interest in maintaining the trial judiciary. In an

e-mail to all of the service Judge Advocates General, the Convening Authority stated he “sincerely hope[d] that the three judges currently detailed can remain on their cases.”

Attachment E. Importantly, the Military Judge remains detailed to this Commission, and neither the Convening Authority nor the government has sought to unseat the Military Judge from this Commission.

Underlying all of the defense arguments is the presumption that the Convening Authority has colluded with or forced the hand of the Deputy Secretary of Defense into promulgating Change 1 based on vague ulterior motives. Nothing of the sort is true. The Convening Authority made a request for a change in the rules to ensure that military commissions are adequately and equitably resourced. That the Deputy Secretary of Defense subsequently approved the request is not evidence of unlawful influence. The Deputy Secretary of Defense, as the superior officer, possesses the discretion to accept, reject, or modify recommendations from subordinate officials, such as the Convening Authority. Change 1 to the Regulation for Trial by Military Commission is not an attempt to remove the Military Judge, or any military judge, from these proceedings, and the defense assertion of such is unfounded.

**B. Assuming *Arguendo* the Predicate Facts Raise an Allegation of Unlawful Influence, No Such Influence In Fact Occurred**

The predicate facts do not establish a valid claim of unlawful influence, as discussed above, but assuming *arguendo* that they do, the government must rebut the presumption that actual unlawful influence occurred. The facts of this case demonstrate that actual unlawful influence did not occur for several reasons.

First, the request is not a critique of a particular outcome or decision or a disguised effort to spur a particular decision in this Commission, or indeed any military commission, nor is it a reflection of the Convening Authority’s desire for a particular result. It is a lawful exercise of

the Convening Authority's duties as Convening Authority. Though the Convening Authority commented on the pace of all military commission litigation, the statement must be viewed in context. Military commissions are a complex process, involving a rigorous and robust criminal justice system that carefully balances the fair trial rights of the accused with the interests of justice while safeguarding national security. All parties are seeking to move, in good faith, expediently toward trial because it is in the interest of all parties. For the Convening Authority to suggest that the trial judiciary should be given the necessary resources to meet this goal is not only proper, it is a requirement of his office. Regulation for Trial by Military Commissions ch. 2-3(a)(6) (2011). As noted in *United States v. Redmon*, N.M.C.C.A. No. 20130007, 2014 WL 2900191, at \*7 (N-M. Ct. Crim. App. June 26, 2014), *petition for review denied*, —M.J. — (C.A.A.F. 2014), the convening authority's interest in conducting the proceedings "in an expeditious manner was [not] anything other than proper, official, and command prerogative." The Convening Authority's action here is the same as in *Redmon* because there is no evidence of contrary intent and any attempt by the defense to impute contrary intent is baseless. The request was "proper, official and lawful[.]" and is not indicative of actual unlawful influence. *Ashby*, 68 M.J. at 129.

Second, as the subordinate, the Convening Authority requested approval of a change to the rules regarding the location and duty parameters of military judges detailed to commissions. The Deputy Secretary of Defense, as the superior official, was and is free to approve, reject, or modify any recommendations from the Convening Authority. The Convening Authority's memorandum, itself, corroborates this point. In it, the Convening Authority described the complexity and demands placed on military commissions as a whole. In order to "better position the commissions to meet the demands of complex contested litigation," the Convening Authority

suggested that additional resources be dedicated to commissions. Attachment B. Nowhere in the document does the Convening Authority place undue pressure on the Deputy Secretary of Defense to accept his recommendations.

With respect to its propriety, the memorandum reflecting Change 1 from the Deputy Secretary of Defense is no different. In fact, the Deputy Secretary of Defense provided no additional commentary when promulgating Change I. Attachment C. To then suggest that the Deputy Secretary of Defense acted with malice and sought to penalize the military judges is not only misleading, but a complete distortion of the facts. Quite simply, there is no evidence of actual unlawful influence.

### **C. The Appearance of Unlawful Influence Does Not Exist**

If the Military Judge finds the defense has met its burden, and only after the defense has met this burden, the government must disprove both actual and the appearance of unlawful influence. *Rosser*, 6 M.J. at 271. The test for the appearance of unlawful command influence is whether a reasonable member of the public, as a “disinterested observer, [who is] fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

As stated above, there is no evidence of unlawful influence beyond defense speculation. The Convening Authority lawfully acted pursuant to his official obligation to promote the fair, efficient, and just administration of military commissions. Any reasonable member of the public, having been fully informed of the duties of the Convening Authority and then having read the Convening Authority’s request to the Deputy Secretary of Defense, would conclude that the Convening Authority was only acting pursuant to his official authority and did not improperly pressure the Military Judge to reach a particular conclusion in this, or any, military

commission. *See Ashby*, 68 M.J. at 129 (holding general comments made by senior officials in the aftermath of a serious international incident, which placed a strain on the diplomatic relations between the United States and Italy, “could not reasonably be perceived by a disinterested member of the public as improper command influence or otherwise indicative of an unfair proceeding”); *Redmon*, 2014 WL 2900191, at \*7 (holding the accused’s “claims regarding the special court-martial CA’s quest to have the Article 32 completed in an expeditious manner does not give rise to unlawful command influence . . . .” or that it “was anything other than proper, official, and command prerogative”). Under these circumstances, it is evident that the Convening Authority’s actions were free of apparent unlawful influence.

#### **IV. The Convening Authority’s Request and the Deputy Secretary of Defense’s Subsequent Action Do Not Constitute a Violation of 10 U.S.C. § 948j(f) or Due Process**

Related to the proscription on unlawful command influence, Article 26 of the Uniform Code of Military Justice (“U.C.M.J.”), and 10 U.S.C. § 948j(f), prohibit a convening authority from “prepar[ing] or review[ing] 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).<sup>4</sup> This provision is rooted in the notion of due process because “a fair trial in a fair tribunal is a basic requirement of due process” (*In re Murchinson*, 349 U.S. 133, 136 (1955)) and “[a] necessary component of a fair trial is an impartial judge.” *Weiss v. United States*, 510 U.S. 163, 178 (1994). The U.S.C.M.C.R. held in *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1315-16 (U.S.C.M.C.R. 2011), that due process applies to military commissions because such process is due for “persons

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<sup>4</sup> The U.C.M.J. provision is nearly identical. “Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge so detailed, which relates to his performance of duty as a military judge.” 10 U.S.C. § 826(c).

tried before an American court or tribunal established under our Constitution.” Understanding this principle, Congress enacted a number of safeguards to ensure military commissions are fair tribunals and protect a military judge’s independence and impartiality similar to the court-martial system established by Congress and upheld by the Supreme Court.

In rejecting the accused’s Due Process Clause argument, the Supreme Court in *Weiss v. United States*, 510 U.S. 163, 180-81 (1994), highlighted a number of provisions within the U.C.M.J. that insulate a military judge from improper influence. Those same provisions in the U.C.M.J. exist in the M.C.A. *Compare* 10 U.S.C. § 826(c) (prohibiting the convening authority from preparing or reviewing a report concerning the effectiveness, fitness or efficiency of a military judge, which relates to the judge’s performance of duty as a military judge), *with* 10 U.S.C. § 948j(f) (same); *compare* 10 U.S.C. 826(d) (disallowing a military judge to act as judge in a case if he was the accuser, witness, investigating officer, or counsel in the same case), *with* 10 U.S.C. § 948j(c) (same); *compare* 10 U.S.C. § 837 (proscribing unlawful command influence), *with* 10 U.S.C. § 949b (same); *compare* 10 U.S.C. § 841(a)(1) (permitting trial and defense counsel to challenge the military judge for cause), *with* 10 U.S.C. § 949f(a) (same). The Supreme Court also found it compelling that the court-martial process was overseen by an appellate court composed entirely of civilian judges. *Weiss*, 510 U.S. at 181. Military commissions also are overseen by a civilian appellate court—the United States Court of Appeals for the District of Columbia Circuit. 10 U.S.C. § 950g. In sum, military commissions are similarly situated as courts-martial and adequately provide for an independent judiciary.

The court-martial prohibition on evaluating a military judge’s performance is based on the prior military justice model whereby military judges did in fact report to the convening authority and were specifically detailed to courts-martial by the convening authority. *United*

*States v. Newcomb*, 5 M.J. 4, 6-7 (C.M.A. 1978) (“We observe that the language of both Articles 26 and 27, UCMJ, is prescriptive. Article 26 provides that the convening authority ‘shall . . . detail a military judge.’ Article 27 provides that the convening authority ‘shall detail trial counsel and defense counsel.’”). In order to protect military judges’ independence and impartiality, Congress enacted Article 26(c), U.C.M.J., thereby preventing convening authorities from influencing or directing judges to reach a particular finding or sentence through the use of the officer-fitness reporting system. *See United States v. Mabe*, 33 M.J. 200, 206 (C.M.A. 1991) (stating that Article 26(c) and the officer-fitness reporting system “cannot be used as a conduit for command complaints against judge-alone sentencing”). Since *Newcomb*, Congress amended Article 26, U.C.M.J., and placed military judges under the authority of the service appropriate Judge Advocate General and removed the provision requiring the convening authority to personally detail the military judge. H.R. Rep. No. 98-549, at 14 (1983). However, the general proscription to evaluate the military judge as an officer under the convening authority’s control remained.

This system is no different under the M.C.A. Detailed military judges remain under the supervisory authority of the service appropriate Judge Advocate General, and the Convening Authority for Military Commissions does not have any authority to provide annual fitness or performance evaluations for the military judges detailed to military commissions. Neither does the Convening Authority have the right to pass comment on the appropriateness of findings, sentences, or outcomes reached by the Military Judge in these proceedings. Rather, the Convening Authority is an independent and neutral party in the criminal justice process, as repeatedly recognized by this Commission. AE 087D, 117C, 172C; *see also Burns v. Wilson*, 346 U.S. 137, 140-41 (1953); *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975); *United*

*States v. Redmon*, N.M.C.C.A. 201300077, 2014 WL 2900191, at \*2 (N-M. Ct. Crim. App. June 26, 2014); *United States v. Allen*, 31 M.J. 572, 584 (N-M.C.M.R. 1990). The Convening Authority's request to the Deputy Secretary of Defense is in no way a critique of the Military Judge's performance or decisions in this or, indeed, any military commission.

In the memorandum, the Convening Authority describes the increasing logistical challenges facing commissions, generally, as the process progresses and, accordingly, recommends full-time staff and additional resources be dedicated to the trial judiciary in order to properly and fully litigate the issues before commissions. Attachment B. To strive for the efficient, fair, and just administration of military commissions is a proper goal, and the Convening Authority request is consistent with that lawful and proper objective. The request is also a reflection of the Convening Authority's desire to remain neutral. Nothing in the memorandum indicates otherwise. Because the Convening Authority has acted appropriately and with due regard to maintaining an independent and impartial judiciary, there is no violation of 10 U.S.C. § 948j(f) or the principle of due process.

**V. The Remedy Requested by Defense—Dismissal of All Charges and Specifications With Prejudice—Is a Drastic and Inappropriate Remedy**

Dismissing all charges and specifications with prejudice “is a drastic remedy and courts must look to see whether alternative remedies are available.” *United States v. Harvey*, 64 M.J. 13, 21 (C.A.A.F. 2006) (quoting *Gore*, 60 M.J. at 187). Yet, despite this well-known principle, the relief the defense requests is the dismissal of all charges and specifications. AE 332 at 1. In fact, the defense appears to argue that dismissal with prejudice is warranted in all cases in which the military judge is removed. *Id.* at 7. The defense reliance on *Salyer* indicates a misunderstanding of the court's ruling and the law.

“[D]ismissal of charges is permissible when necessary to avoid prejudice against the accused and the findings of fact of the military judge document[] the prejudice to [the accused] from the egregious error . . . .” *Harvey*, 64 M.J. at 21. In *Salyer*, the originally detailed military judge recused himself after trial counsel’s extensive and unprofessional efforts to unseat him. 72 M.J. at 422-23. A new judge was then assigned to the case. *Id.* “Were [C.A.A.F.] to authorize a rehearing, the Government would obtain the result it sought to obtain through inappropriate means—a trial with a different military judge. Thus, any remedy short of dismissal at this stage would effectively validate the Government’s actions.” *Id.* at 428. Accordingly, dismissal with prejudice was necessary.

Several reasons dictate that dismissal with prejudice is an inappropriate remedy for this case. First, unlike the facts in *Salyer*, the Military Judge detailed to this Commission remains so detailed and there is absolutely no evidence to suggest there is any attempt by the government to remove him from the case, despite what the defense attempts to implicate. Dismissing the charges in this case would not cure the alleged error of removing the judge when this has not in fact occurred. Second, as discussed above, there has been no egregious error or prejudice to the accused. The actions of the Convening Authority and the Deputy Secretary of Defense were “proper, official and lawful[],” and did not constitute unlawful influence or a violation of due process. Only if the Military Judge determines that unlawful influence existed or the Convening Authority overstepped his authority, could the Military Judge fashion a remedy. In such a situation, an alternative, and less extreme, remedy is available—amend the regulation. Accordingly, to dismiss the charges and specifications with prejudice would be drastic and inappropriate.

**7. Conclusion**

The defense claims of unlawful influence are fatally flawed, and are premised on an incorrect assumption that the Military Judge will be removed from this Commission. The Military Judge remains detailed to this Commission, and it remains to be seen whether Change 1 to the Regulation for Trial by Military Commission has any effect on these proceedings. The actions of the Convening Authority and the Deputy Secretary of Defense took into account a wide-range of challenges facing military commissions, from increased motion filings, to the additional demand for hearings, and to extended periods of trial. Anticipating that these demands will warrant additional resources, the Convening Authority requested the Deputy Secretary of Defense adequately staff all components of military commissions commensurate with the increased operational tempo that is expected. Having a fully functional trial judiciary, with dedicated personnel support, contributes to the efficient, fair, and just administration of the military commission system. Change 1 to the Regulation for Trial by Military Commission is simply a reflection of this lawful and proper objective. For these reasons, the promulgation of Change 1 to the Regulation for Trial by Military Commission does not constitute actual or apparent unlawful influence nor is it a violation of 10 U.S.C. § 948j(f) or notions of due process.

**8. Oral Argument**

The defense requests oral argument. The Commission can decide this matter without oral argument. *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 government requests an opportunity to do the same.

**9. Witnesses and Evidence**

The government does not intend to rely on any witnesses or evidence in support of this response.

**10. Additional Information**

The government has no additional information

**11. Attachments**

- A. Certificate of Service, dated 26 January 2015.
- B. Action Memorandum for Deputy Secretary of Defense, Subject: Recommendation to Revise the Regulation for Trial by Military Commission, dated 9 December 2014.
- C. Change 1 to Regulation for Trial by Military Commissions, Signed by Deputy Secretary of Defense, dated 7 January 2015.
- D. E-mail from Wendy A. Kelly to Fred P. Taylor and [REDACTED] Subject: FW: Augmenting OMC/WHs, dated 14 January 2015.
- E. E-mail from Convening Authority Vaughn A. Ary to Service TJAGs, Subject: Change 1 to Reg for Trial by Military Commission, dated 7 January 2015.

Respectfully submitted,

//s//

Justin T. Sher  
Maj Winston McMillan, USMC  
LT Bryan M. Davis, JAGC, USN  
LT Paul B. Morris, JAGC, USN  
Trial Counsel

Robert C. Moscati  
Deputy Chief Prosecutor

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 26th day of January 2015, I filed **AE 332A, Government Response To Defense Motion To Dismiss For Unlawful Influence And Denial Of Due Process For Failure To Provide An Independent Judiciary**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Justin T. Sher  
Trial Counsel  
Office of the Chief Prosecutor  
Military Commissions

# ATTACHMENT B

Filed with TJ  
26 January 2015

Appellate Exhibit 332A (Al-Nashiri)  
Page 24 of 56

~~FOR OFFICIAL USE ONLY~~

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

**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.**



OFFICE OF THE SECRETARY OF DEFENSE  
OFFICE OF MILITARY COMMISSIONS



Convening Authority and Director

**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

# TAB A

8. Military judges will preside over the military commissions. See 10 U.S.C. § 9301, and 28 U.S.C. 503(c).

## 62 DETAIL OF MILITARY JUDGES

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 judge for military commissions trials. See 10 U.S.C. § 948j(e).

2. 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 the State or the District of Columbia.

• Military judges must be on active duty at the time of their death as a military contribution.

Appellate Exhibit 332A (Al-Nashiri)  
Page 28 of 56

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**

- 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. 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).

#### **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).

# **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 Generals 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



OFFICE OF THE SECRETARY OF DEFENSE  
OFFICE OF MILITARY COMMISSIONS



Convening Authority and Director

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).



- 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

Filed with TJ  
26 January 2015

Appellate Exhibit 332A (Al-Nashiri)  
Page 40 of 56

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 of the date of my signature.

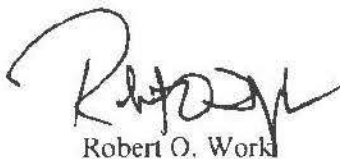
Pursuant to 10 U.S.C. § 949a(c), I hereby prescribe the following change to the Regulation for Trial by Military Commission (2011).

**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 commission 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  
Secretary of Defense

# ATTACHMENT D

Filed with TJ  
26 January 2015

Appellate Exhibit 332A (Al-Nashiri)  
Page 42 of 56

**COL USARMY OSD OGC (US)**

**From:** Kelly, Wendy A CIV OSD OMC CA (US)  
**Sent:** Wednesday, January 14, 2015 1:27 PM  
**To:** Taylor, Fred P CIV OSD OMC TJ (US); [REDACTED] CIV OSD OMC TJ (US)  
**Cc:** [REDACTED] COL USARMY OSD OGC (US); [REDACTED] CW4 USARMY  
OSD OMC CA (US)  
**Subject:** FW: Augmenting OMC/WHs  
**Attachments:** S378 - S387 (DLA).pdf  
**Signed By:** wendy.kelly [REDACTED]

Fred: New TJ billets established by WHS so TJ can begin to hire. The 4 security billets will follow soon for CSO/LSS.

-----Original Message-----

**From:** [REDACTED] CIV OSD ODAM (US)  
**Sent:** Wednesday, January 14, 2015 9:51 AM  
**To:** Schwartz, Robert S (Sparky) SES OSD OGC (US)  
**Cc:** Kelly, Wendy A CIV OSD OMC CA (US); [REDACTED] CTR OSD ODCMO (US); [REDACTED] CIV OSD ODAM (US)  
**Subject:** RE: Augmenting OMC/WHs

Sparky,

The attached Memo For Record documents the establishment of the 5 Attorney, 4 Paralegal and 1 Office manager billets for DLSA. WHS will be establishing the security related billets in a separate action. Please let us know if we can be of further assistance.

-----Original Message-----

**From:** Schwartz, Robert S (Sparky) SES OSD OGC (US)  
**Sent:** Wednesday, January 14, 2015 8:47 AM  
**To:** [REDACTED] CIV WHS EM (US); [REDACTED] CIV OSD ODAM (US)  
**Cc:** Kelly, Wendy A CIV OSD OMC CA (US)  
**Subject:** Augmenting OMC/WHs

Request that you take action to add the requested OMC temporary positions for the Judiciary. This request coordinates with positions in support, which would be added to the WHS component of the total effort. As in prior practice, OCO funding to the extent not available in WHS will be MIPRd from ORC 5003 for the WHS plus-ups. For background, we generally regard lawyers and paralegals to be part of DLSA; support and security to be part of WHS. Pls forward as you deem appropriate/necessary.

VR RSS

Robert S. Schwartz

Attorney-Manager  
DoD General Counsel / DLSA

A large black rectangular redaction box covering several lines of text.

OFFICE OF THE SECRETARY OF DEFENSE  
DIRECTORATE FOR ADMINISTRATION

January 14, 2015

## MEMORANDUM FOR RECORD:

SUBJECT: Temporary Manpower Billets to Support DLSA

- The following temporary civilian manpower billets have been established in DLSA IAW the OMC Director's request at Atch 1. Atch 2 is the office of the OGC's approval to take action.

<u>OMP Number</u>	<u>Position Title</u>	<u>Org Code</u>
S378	Trial Judiciary Attorney	90A000
S379	Trial Judiciary Attorney	90A000
S380	Trial Judiciary Attorney	90A000
S381	Trial Judiciary Attorney	90A000
S382	Trial Judiciary Attorney	90A000
S383	Paralegal	90A000
S384	Paralegal	90A000
S385	Paralegal	90A000
S386	Paralegal	90A000
S387	Office Manager	90A000

- Please adjust your records accordingly. If you have any questions, please give me a call at [REDACTED]

Attachment:  
As stated

cc: Mr. Robert Schwartz

S378 – S387

# Attachment 1



OFFICE OF THE SECRETARY OF DEFENSE  
OFFICE OF MILITARY COMMISSIONS

Convening Authority

ACTION MEMORANDUM

FOR: Director, Washington Headquarters Services


FROM: Director, Office of Military Commissions *LAA*

SUBJECT: Request for Additional Civilian Billets

- The Director, Office of Military Commissions (OMC) is responsible for resourcing all sections of OMC adequately, including the Office of Court Administration (OCA) and the Trial Judiciary (TJ). Currently, TJ has authorizations for two civilian attorneys and four military attorneys, as well as for three civilian and two military paralegals. The military staff has generally lacked the specialized experience to support the judges adequately.
- The Director, TJ, requests five additional civilian attorney billets, four additional civilian paralegal billets, three civilian billets for Court Security Officers (CSOs) who will replace two current contractors, and one office manager. I also request to replace one existing contractor who provides litigation security support in the OCA with a DoD civilian position at half the cost. I support these requests for additional billets (TAB A).
- These additional billets would allow the TJ to hire attorneys who have specialized skills that are generally not available among military personnel, such as capital litigation and national security law experience. These civilian attorneys and additional civilian paralegals would also provide critically needed support to the judges and provide continuity on cases. Past inadequate resourcing has contributed to the slow progress of military commissions proceedings, as the judges have not had the necessary staff to research and draft orders requiring mastery of complex and unique issues of law.
- OMC has no remaining vacant civilian billets; this request, therefore, is for five civilian attorney billets to be created at the GS 14/15 grade, four civilian paralegal billets at the GS-11/12 grade, 3 CSOs at the GS 13/14 grade, one office manager at the GS 11/12 grade, and one Litigation Security Specialist at the GS-12 grade for OCA. The billets would be needed through at least FY 2019. Attached is a summary of the costs associated with this request (TAB B).
- Defense Legal Services Agency (DLSA) has funding to support these additional billets.

RECOMMENDATION: Approve the additional requested civilian billets.

Approve \_\_\_\_\_ Disapprove \_\_\_\_\_ Other \_\_\_\_\_

Prepared by: Wendy A. Kelly 

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**OFFICE OF THE SECRETARY OF DEFENSE**  
**MILITARY COMMISSIONS TRIAL JUDICIARY**

**NOV 12 2014**

**MEMORANDUM FOR ACTING CHIEF OF STAFF, OFFICE OF MILITARY COMMISSIONS**

**SUBJECT: Trial Judiciary Comments Concerning "Resourcing of Attorney and Paralegal Requirements within the Office of Military Commission"**

1. The Trial Judiciary offers the following comments to OMC's proposed manning request. The justifications for the various authorizations and changes in structure in the Trial Judiciary's memorandum of 2 July 2014 remain valid. Because the Trial Judiciary was not aware of the six (6) "Anticipated/Possible OMC Cases" we suggest recalculating the manning for the Trial Judiciary. In order to facilitate growth as new cases are referred or cases return to an active status for sentencing, the Trial Judiciary recommends application of the following planning factors:

a. Single-Defendant Capital Case: A Team composed of 2 Attorney Advisors (1 GS-15 and 1 GS-14/Uniformed Judge Advocate), 2 paralegals (1 GS-11 and 1 Uniformed E-7 / Senior E-6) and a Court Security Officer;

b. Single-Defendant Non-Capital High - Value Detainee Case: A Team composed of 2 Attorney Advisors (1 GS-14 and 1 Uniformed Judge Advocate), 2 paralegals (1 GS-11 and 1 Uniformed E-7 / Senior E-6) and a Court Security Officer shared with a different Single-Defendant Case Team;

c. Current 5 Defendant Capital Case: A Team composed of 4 Attorney Advisors (1 GS-15 and a mix of 3 GS-14s / Uniformed Judge Advocates), 3 paralegals (2 GS-11 and 1 Uniformed E-7 / Senior E-6) and a dedicated Court Security Officer; and,

d. Multiple Defendant Non-Capital High - Value Detainee Case: A Team composed of 3 Attorney Advisors (Mix of 3 GS-14 / Uniformed Judge Advocates, with a GS-14 as the Team lead), 2 paralegals (1 GS-11 and 1 Uniformed Senior E-6/ E-7) and a Court Security Officer.

2. Consistent with the Trial Judiciary's memorandum of 2 July 2014, the Staff Director should be a GS-15. If the organization grows consistent with the above planning factors, the Director will not be able to lead and manage the organization and carry a single defendant case, even with assistance. As stated in Trial Judiciary's memorandum of 2 July 2014, the conversion of this position from a Uniformed Judge Advocate O-6 Colonel/Navy Captain is essential to achieving continuity in the leadership of the organization.

3. The Chief Paralegal remain a GS-12 in order to properly supervise the other civilian and military paralegals assigned to the organization.

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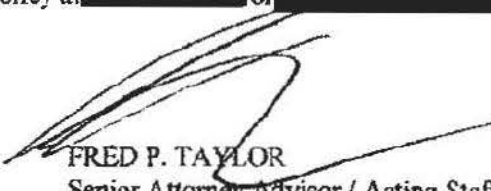
SUBJECT: Trial Judiciary Comments Concerning "Resourcing of Attorney and Paralegal Requirements within the Office of Military Commission"

4. The Administrative/Logistics Paralegal should remain a GS-12.
5. Given the current load of active cases, three (3) Court Security Officers (CSOs) are needed. As cases return to an active status for sentencing or new cases are referred, additional CSOs at a rate of one CSO per 2 cases will be required.
6. The attributes/characteristics we seek in the GS-14 / 15 attorney advisors:
  - a. Not Less than 10 years' experience as a Military Justice practitioner having held a combination of the following positions: Trial Counsel, Defense Counsel, Appellate Counsel, Appellate Court Commissioner, Senior or Circuit Defense Counsel, Chief, Military Justice, Regional Defense Counsel, Staff Judge Advocate, Trial or Appellate Military Judge;
  - b. Capable of holding a TS/SCI clearance;
  - c. Superior Writing Skills;
  - d. National Security Law Experience (one of the GS-14 counsel);
  - e. Federal Criminal Law Experience with either the Department of Justice or as a Federal Public Defender (one of the GS-14 counsel); and,
  - f. Proficient in on-line electronic legal research, Word, EXCEL, PowerPoint, and SharePoint.
7. The attributes/characteristics we seek in a Uniformed Judge Advocate:
  - a. Not less than 5 years' experience as a Military Justice practitioner having held a combination of the following positions: Trial Counsel, Defense Counsel, Appellate Counsel, Appellate Court Commissioner, Senior or Circuit Defense Counsel, Senior or Circuit Trial Counsel, Special Victim Trial Counsel, or Chief, Military Justice;
  - b. Appellate Counsel, Appellate Court Commissioner
  - c. Capable of holding a TS/SCI clearance;
  - d. Superior Writing Skills;
  - e. Proficient in on-line electronic legal research, Word, EXCEL, PowerPoint, and SharePoint; and,

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SUBJECT: Trial Judiciary Comments Concerning "Resourcing of Attorney and Paralegal Requirements within the Office of Military Commission"

- f. At least a two (2) year service commitment.
- 8. The attributes/characteristics we seek in a GS-11 / E-7 / Senior E-6 Paralegal:
  - a. Capable of holding a TS/SCI clearance;
  - b. Not less than 5 years' Military Justice experience at the General Court-Martial Convening Authority Office of the Staff Judge Advocate level;
  - c. Associates Degree, preferably in a paralegal studies or criminal justice related program;
  - d. Proficient in Word, EXCEL, PowerPoint, SharePoint, Adobe Acrobat;
  - e. Highly organized and detail oriented; and,
  - f. At least a two (2) year service commitment.
- 9. Questions should be directed to the undersigned at [REDACTED] or [REDACTED] or to Mr. Jim Polley at [REDACTED] or [REDACTED]

  
FRED P. TAYLOR

Senior Attorney Advisor / Acting Staff Director  
Trial Judiciary, Office of the Military  
Commissions

## COST DATA-OMC REQUEST FOR ADDITIONAL CIVILIAN BILLETS

Type of Employee (number of employees)	Section Requesting Additional Billet	Replacing current contractor, military billet, or new requirement?	General Schedule Employee Cost with DC locality pay	Contractor Cost (Current cost under SRA contract)
Court Security Officer (3)	Trial Judiciary	Replacing 2 current contractors and adding 1 new position	One GS 14, Step One/\$106,263/year AND Two GS 13, Step One/\$89,924 x 2=\$179,848	\$247,617/year x 2 =495,234
Litigation Security Specialist (1)	Office of Court Administration	Replacing current Contractor	GS12, Step One - \$75,593	\$197,184/year
Attorney (5)	Trial Judiciary	New Requirement	GS14/15 (\$106,263-\$124,995/year) x 5=\$531,315 - \$624,975)	N/A
Paralegal (4)	Trial Judiciary	New Requirement	GS 11/12 (\$63,091-75,621/year) x 4=\$252,364-\$302,484	N/A
Office Manager (1)	Trial Judiciary	New Requirement	GS 11/12 (\$63,091-75,621/year)	N/A
<b>TOTALS</b>			<b>\$1,364,784</b>	<b>\$692,418</b>
<b>TOTAL INCREASE IN COST</b> \$672,366 (\$1,364,784-\$692,418)				

\*Step 1 is used for planning purposes.

The Court Security Officers serve as advisors to the Trial Judiciary and also sit in court to monitor proceedings. If classified evidence is divulged in an unclassified hearing the CSO terminates the external feeds from the courtroom until the issue is resolved by the Judge.

The Litigation Security Specialist serves as an advisor and courier for the Office of Court Administration, which is responsible for creating trial transcripts and maintaining the official court records and evidence in each case.

# Attachment 2

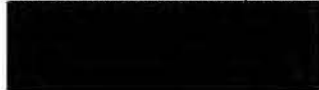
**From:** Schwartz, Robert S (Sparky) SES OSD OGC (US)  
**To:** [REDACTED] CIV WHS EM (US); [REDACTED] CIV OSD ODAM (US)  
**Cc:** Kelly, Wendy A CIV OSD OMC CA (US)  
**Subject:** Augmenting OMC/WHS  
**Date:** Wednesday, January 14, 2015 8:46:33 AM

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Request that you take action to add the requested OMC temporary positions for the Judiciary. This request coordinates with positions in support, which would be added to the WHS component of the total effort. As in prior practice, OCO funding to the extent not available in WHS will be MIPRd from ORC 5003 for the WHS plus-ups. For background, we generally regard lawyers and paralegals to be part of DLSA; support and security to be part of WHS. Pls forward as you deem appropriate/necessary.

VR RSS

Robert S. Schwartz  
Attorney-Manager  
DoD General Counsel / DLSA



# ATTACHMENT E

Filed with TJ  
26 January 2015

Appellate Exhibit 332A (Al-Nashiri)  
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UNCLASSIFIED//FOR PUBLIC RELEASE

From: [REDACTED] CIV (US)  
To: [Martins, Mark S BG USARMY \(US\)](#); ["Mayberry, Karen E COL OSD OMC Defense"; Taylor, Fred P CIV OSD OMC TJ \(US\)](#); [Polley, James D IV CIV \(US\)](#); [Wilkins, Donna L CIV OSD OMC CA \(US\)](#)  
Cc: [OSD Pentagon OMC List CA Legal Advisors](#)  
Subject: FW: Change 1 to Reg for Trial by Military Commission  
Date: Wednesday, January 07, 2015 7:21:00 PM  
Attachments: [OSD000152-15.pdf](#)

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Ladies and Gentlemen,

FYI: I just wanted to ensure you were informed of the DepSecDef's change to the Regulation for Trial by Military Commission.

V/r,

[REDACTED]

[REDACTED]

Deputy Legal Advisor  
Office of Military Commissions  
[REDACTED]

-----Original Message-----

From: Ary, Vaughn A SES OSD OMC CA (US)  
Sent: Wednesday, January 07, 2015 7:06 PM  
To: DeRenzi, Nanette M VADM USN JAG (US); Darpino, Flora D LTG USARMY HQDA (US); Burne, Christopher F Lt Gen USAF AF-JA (US); Ewers, John R Jr MajGen USMC USN (US); Poulin, Steven D RDML USCG (US)  
Cc: Preston, Stephen W HON OSD OGC (US); Kelly, John F Gen USMC SOUTHCOM SC-CC (US); Cozad, Kyle J RDML JTFGTMO/CMD; [REDACTED] US; Taylor, Robert S SES OSD OGC (US); Hostetler, Darrin A SES OSD OGC (US); Nettleton, John R CAPT USN GTMO  
Subject: Change 1 to Reg for Trial by Military Commission

Ladies and Gentlemen,

FYI, today DepSecDef approved Change 1 to the Regulation for Trial by Military Commission, revising a provision on the assignment of military judges. This change makes the military commissions the exclusive judicial duty for those military judges detailed to commissions. In addition, it provides that the judges be issued assignment orders for duty at the venue where the military commissions are to be convened. A copy of his action is attached.

This change effectively establishes a requirement for the military judges to serve at GTMO for the duration of their cases, but leaves to the Service some discretion in assignments, reassignments, and the timing of the moves. I sincerely hope that the three judges currently detailed can remain on their cases, because I know how difficult it is to replace judges with their exceptional qualifications and experience. This step is intended to support the military commissions in carrying out their mission to resolve these important cases in a manner consistent with the interests of justice.

As always, thank you for your continued support to the Office of Military Commissions.

V/r,

Vaughn

VAUGHN A. ARY  
Convening Authority/Director  
Office of Military Commissions  
[REDACTED]

