

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 332U

ORDER

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

4 MARCH 2014

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009) (hereafter MCA of 2009). He was arraigned on 9 November 2011.

2. The Defense filed AE 332 alleging the Convening Authority, Mr. Vaughn Ary, unlawfully influenced the military judges of the military commission trial judiciary in violation of 10 U.S.C. § 948b by having the Deputy Secretary of Defense (DEPSECDEF), the Honorable Robert O. Work, change paragraph 6-2 of the Regulation for Trial by Military Commission (April 2011 Edition) (R.T.M.C.) to “make military commissions the exclusive duty of the military judges assigned to the trial judiciary and, moreover, directing that they ‘shall be issued assignment orders for duty at the venue where the military commissions are to be convened.’” (AE 332 at 3-4).

4). The Defense requested “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.” (AE 332 at 1). The Prosecution response (AE 332A) argued Change 1 to the R.T.M.C. is not an example of unlawful influence. The Defense reply

continued to argue for dismissal of charges. Testimony was heard and the motion was argued between 23 and 27 February 2015.¹

3. FACTS:

a. On 10 July 2014, COL James Pohl, USA, Chief Judge, Military Commissions Trial Judiciary, detailed Col Vance Spath, USAF, Chief Trial Judge of the USAF, as the military judge in the case of *United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri*.²

b. On or about 1 October 2014, Mr. Vaughn A. Ary was appointed as the Convening Authority for the Military Commissions (CA).³ He also serves as the Director of the Office of the Convening Authority (Director, OCA).⁴

c. Mr. Ary believed his dual role of designated CA and Director, OCA gave him the authority to and required him to both resource the trial judiciary and recommend changes in the military commission process to DEPSECDEF for implementation. In this instance the

¹ See Unofficial/Unauthenticated Transcripts of the al Nashiri (2) Motions Hearing Dated: 23 February 2015 from 1:02 P.M. to 2:52 P.M. pp 5384-5458 (Military Judge Disclosures and Argument on AE 332C, AE 332K, AE 332E and AE 332G); 23 February 2015 from 4:01 P.M. to 4:14 P.M. pp 5459 – 68 (Decision on AE 332C, AE 332K, and AE 332E); 24 February 2015 from 1:32 P.M. to 2:36 P.M. pp 5469 – 5511 (Additional Argument on AE 332G); 25 February 2015 from 9:03 A.M. to 10:40 A.M. pp 5512 – 65 (Testimony Mr. Ary); 25 February 2015 from 11:04 A.M. to 11:13 A.M. pp 5566 – 73 (Testimony Mr. Ary); 25 February 2015 from 12:32 P.M. to 2:13 P.M. pp 5574 – 5643 (Testimony Mr. Ary); 25 February 2015 from 2:24 P.M. to 3:54 P.M. pp 5644 – 5700 (Testimony Mr. Ary); 25 February 2015 from 4:02 P.M. to 4:43 P.M. pp 5701 – 5732 (Testimony Mr. Little); 27 February 2015 from 08:31 A.M. to 08:55 A.M. pp 5733 – 5749 (Argument on Production of Service TJAGs (AE 332G)); 27 February 2015 from 11:31 A.M. to 12:02 P.M. pp 5750 – 68 (Argument on Mootness of AE 332 and Decision on Production of Service TJAGs); 27 February 2015 from 3:00 P.M. to 4:13 P.M. pp 5769 – 5824 (Argument on AE 332); and, 27 February 2015 from 4:24 P.M. to 5:39 P.M. pp 5825 – 5872 (Argument on AE 332).

² AE 302, Detailing Military Judge Memorandum, dated 10 July 2014.

³ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 2:24 P.M. to 3:54 P.M. at 5655.

⁴ *Id.*

recommended changes to the R.T.M.C. (i.e., Change 1)⁵ impacted the assignment location and “exclusivity of duty” of the currently detailed commission trial judges.⁶

d. Soon after being appointed as the Convening Authority, Mr. Ary did an assessment of the adequacy of resources in the Office of the Chief Prosecutor, Office of the Chief Defense Counsel, and Office of the Trial Judiciary.⁷

e. During the assessment, Mr. Ary became concerned with the pace of litigation in commission cases.⁸

f. As a result of his assessment Mr. Ary concluded the pace of litigation in commission cases was too slow. He also identified resourcing issues.⁹

g. Concerned with the pace of litigation and to improve the trial judges’ availability for hearings, Mr. Ary formulated the concept of both making the trial of commission cases the judges’ fulltime duty and moving them to Guantanamo Bay Naval Station (GTMO). This concept ultimately became Change 1.¹⁰ (Hereinafter “Change 1” refers to the proposed change to paragraph 6-2 of the 2011 Regulation for Trial by Military Commission (R.T.M.C.))

h. The final proposed (and signed) change to the R.T.M.C. consisted of two paragraphs. Paragraph 6-2a. states: “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...or reassignment by the appropriate Judge Advocate General. A

⁵ Attachment A, AE 332 and TAB B of Attachment B, AE 332A.

⁶ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 9:03 A.M. to 10:40 A.M. at p 5548 and Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 2:24 P.M. to 3:54 P.M. at 5655.

⁷ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 2:24 P.M. to 3:54 P.M. and from 4:02 P.M. to 4:43 P.M. at pp 5660-5672.

⁸ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 9:03 A.M. to 10:40 A.M. at pp 5526-37;

⁹ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 9:03 A.M. to 10:40 A.M. at pp 5526-27, 5529, and 5554 and Tab B of Attachment B AE 332A.

¹⁰ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 9:03 A.M. to 10:40 A.M. at pp 5534-5535, 5562, and from 11:04 A.M. to 11:13 A.M at p. 5575.

detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened.” Paragraph 6-2b. states: “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.”¹¹ The pre-Change 1 version of paragraph 6-2 of the 2011 R.T.M.C. does not make military commission trials the “exclusive judicial duty” of detailed military judges and does not require the issuance of assignment orders to the detailed military judges to “the venue where the military commissions are to be convened.”¹²

i. Mr. Ary conferred with the legal advisors assigned to his office concerning Change 1.¹³

j. Mr. Ary did not staff Change 1 with The Judge Advocate Generals (TJAGs) of the various services.¹⁴

k. Mr. Ary did not staff Change 1 or discuss Change 1 with the Chief Trial Judge of the Military Commissions.¹⁵

l. Mr. Ary knew that Change 1, if approved and signed by DEPSECDEF, might impact currently detailed and assigned commission judges. By impact he understood they might not continue as currently detailed and assigned judges in a case they were currently working. He recognized there might also be an impact on the pool of commission judges nominated by the service TJAGs.¹⁶

¹¹ Attachment C, AE 332A.

¹² TAB A of Attachment B, AE 332A.

¹³ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 9:03 A.M. to 10:40 A.M. at pp 5562; and from 12:32 P.M. to 2:13 P.M. at pp 5581-5587, 5612-5618, and 5620-5623.

¹⁴ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 12:32 P.M. to 2:13 P.M. at pp 5580, 5586, 5612, and from 2:24 P.M. to 3:54 P.M. at pp 5649, and 5676-5678.

¹⁵ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 12:32 P.M. to 2:13 P.M. at p 5612.

¹⁶ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 12:32 P.M. to 2:13 P.M. at pp 5580, 5583, 5689; and, Attachment E, AE 332A.

m. The only coordination of Change 1 outside the Office of the Convening Authority by Mr. Ary was with the DOD General Counsel's office (DOD OGC), specifically, Mr. Stephen Preston, the DOD General Counsel.¹⁷

n. Sometime prior to 21 November 2014, Mr. Ary directed Ms. Donna Wilkins, Director, Office of Court Administration, Office Military Commission, to gather information on "days on the record" for FY 2013 and 2014 for each of the currently referred commission cases. The reports attached to Ms. Wilkins' email to Mr. Ary were organized by individual case (and judge). When this information was ultimately submitted to DEPSECDEF, it was consolidated with no reference to individual judges. The information was used to support the proposed Change 1.¹⁸

o. On 21 November 14, Ms. Wilkins, emailed Mr. Ary. The email subject was "Hours and Numbers on the Record." The attachment was "On the Record 2014.xlsx." The email stated, "Sir[,] Per your request, please see the attached document. Sorry it took so long to get this information to you. It took longer than I had anticipated."¹⁹

p. The spreadsheet entitled "On the Record 2014.xlsx." contains the reports contained in AE 332O, Product 112 and individually marked with Bates Numbers 10015-00127556 – 10015-00127559. The reports are broken out by individual case and individual judge. The spreadsheet provides information on hours of audio, page count for the transcript, and days on the record.

q. On 24 November 2014, SFC [REDACTED] Office of Court Administration, followed up on the above reports, by email, stating, "Ms. Wilkins asked me to adjust the numbers on the chart that she sent you this past Friday..." These updates were to account for

¹⁷ Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 2:24 P.M. to 3:54 P.M. at pp 5688, and Attachment A, AE 332.

¹⁸ AE 332O, Product 112, Bates Numbers 10015-00127556 – 10015-00127559; and, TAB B of Attachment B, AE 332A.

¹⁹ AE 332O, Product 112, Bates Number 10015-00127554.

classified Military Commission Rule of Evidence (MCRE) 505(h) sessions held in pending commission cases.²⁰

r. On 9 December 2014, Mr. Ary personally approved an Action Memo that was forwarded to DEPSECDEF as evidenced by his initials.²¹

s. The Action Memo states in part, “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.” It also states, “I believe these actions will accelerate the pace of litigation...”²²

t. Finally, Mr. Ary recommended what ultimately became Change 1 to the R.T.M.C.²³

u. On 9 December 2014, Mr. Ary personally approved an Executive Summary that was forwarded to DEPSECDEF.²⁴

v. The Executive Summary starts with a conclusion of his assessment of the commission process and includes the statement, “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.”²⁵

w. The Executive Summary then details the days each commission was on the record in FY 14 and FY 13 along with actual hours on the record for each commission. The paragraph includes the statements, “in other words, during FY 14, 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

²⁰ AE 332O, Product 112, Bates Number 10015-00127565.

²¹ Attachment A, AE 332 and Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 12:32 P.M. to 2:13 P.M. at pp 5625-5626.

²² Attachment A, AE 332.

²³ *Id.*

²⁴ TAB B of Attachment B, AE 332A.

²⁵ *Id.*

the record for the days on which hearing[s] were held...An analysis of the FY13 hearing data yields a similar pattern.” Additionally, it states, “If you approve my recommendation (which includes Change 1], I believe the pace of litigation will accelerate.”²⁶

x. The Executive Summary includes the recommendation that ultimately became Change 1 to the RTMC.²⁷

y. On 7 January 2015, the DEPSECDEF approved the recommendation of Mr. Ary as to Change 1 to the R.T.M.C.²⁸

z. On 26 February 2015, the DEPSECDEF rescinded Change 1 to the R.T.M.C. in response to the ruling on a similar motion in *United States v. Khalid Shaikh Mohammad, et al.*²⁹

aa. Mr. Ary provided credible testimony to the Commission.

4. DETAILING OF MILITARY JUDGES.

a. A military judge presides over each military commission case. The assignment of a military judge to a commission case is the act of detailing. 10 U.S.C. §948j(a) states, “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.” 10 U.S.C. §948j(b) defines who is eligible to be a military judge - those commissioned officers certified by TJAG of their respective service who are qualified and certified under 10 USC §826 (Article 26 Uniformed Code of Military Justice (UCMJ)) to be a “military judge of a general court-martial.”

²⁶ *Id.*

²⁷ *Id.*

²⁸ Attachment A, AE 332.

²⁹ See AE 332S, DEPSECDEF Action Memo, Rescission of Change 1 to the Regulation for Trial by Military Commissions, dated 26 February 2015 for both the Ruling in *United States v. Khalid Shaikh Mohammad, et al.*(AE 343C), and for the DEPSECDEF action.

b. 10 U.S.C. §948j(e) requires consultation with the service TJAG should a third party desire to assign other duties, beyond presiding over a military commission to commission military judges. “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...”(emphasis added)

c. 10 U.S.C. §948j(f) makes it clear, the Convening Authority cannot formally or informally comment on how commission judges preside over the cases to which they are detailed. “The convening authority of a military commission 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.” *See also United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991).

d. The Secretary of Defense, exercising the authority given to him by Congress in 10 U.S.C. §948j(a), provided substance to the statutory requirements of 10 U.S.C. §948j (b), (e), and (f) in promulgating Rules for Military Commissions (R.M.C.) 503 and 505. The Secretary or his designee selects a Chief Trial Judge from the pool of military judges certified by the service TJAGs as competent to be detailed to a commission case. R.M.C. 503(b)(2) states, “The Secretary of Defense or designee shall select a military judge from the pool described in subsection (1) to serve as the Chief Trial Judge for the Military Commissions.” R.M.C. 503(b)(1) states, “A military judge shall be detailed to preside over each military commission by the Chief Trial Judge from a pool of certified military judges nominated for that purpose by The Judge Advocate General of each of the military departments.” It is within the discretion of the Chief Trial Judge to detail and remove trial judges from commission cases. “Before the military

commission is assembled, the military judge may be changed by the Chief Trial Judge, without cause shown on the record.” (R.M.C. 505(e)). The R.M.C. does not bestow this detailing or removal authority to the Convening Authority, the DEPSECDEF, or the service TJAGs.

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

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

Weiss, 510 U.S. at 180.

f. The Chief Trial Judge “is responsible for the supervision and administration of the Military Commissions Trial Judiciary.” The Chief Trial Judge is the Secretary’s sole designee for these matters. *See* Regulation for Trial by Military Commission (2011 Edition) (R.T.M.C.) 1-3(b). The Convening Authority, as Director, Office of the Convening Authority has the responsibility to “[e]nsure that the Trial Judiciary is properly staffed with a Chief Clerk of the Trial Judiciary...and any additional staff necessary to perform the 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 commissions[.]” R.T.M.C. 2-3(a)(6). The Convening Authority’s sole interaction with the Trial Judiciary is as a provider of resources, not a creator of requirements, not a supervisor of trial judges or staff, and most certainly not an entity to set the pace of litigation.

g. Consistent with the 2009 MCA provisions and the R.M.C. provisions discussed above, the R.T.M.C. at paragraph 6-2 clarifies that in the exercise of his supervisory function, “the Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary for each military commission trial.” Additionally, “Military judges in the Military Commission 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 the primary duty as military judges for military commissions trials.” Again the Convening Authority has no authority to assign duties to a military judge detailed to a military commission case.

5. UNLAWFUL INFLUENCE.

a. The 2009 MCA prohibits actual or attempted Unlawful Influence (UI).³⁰ The Act prohibits such influence regardless of source and thus provides greater protection than the Uniform Code of Military Justice (UCMJ)³¹ prohibition of Unlawful Command Influence (UCI) which focuses on the chain of command as the source of the influence.³²

b. Although the 2009 MCA provision is more expansive than the UCMJ, extensive UCI litigation in military courts provides a useful framework in analyzing the issue.

c. UCI is the improper use, attempted use or perception of use, of superior authority to interfere with the court-martial process. *See Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999).*

d. UCI is the “mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). UCI can manifest itself in a multitude of different situations and can affect

³⁰ 10 U.S.C. §949b.

³¹ Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. §§ 801–946.

³² No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case. Article 37(a), UCMJ, 10 U.S.C. §837(a) (2012).

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

e. UCI situations include actual UCI or apparent UCI. The R.T.M.C. specifically warns against the appearance of UI: “all persons...should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.”³³ Therefore, even if there is no actual UCI, there may still be apparent UCI, and the military judge must take affirmative steps to ensure that both forms of potential UCI are eradicated from the court-martial in question. *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006).

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

³³ R.T.M.C. Chapter 1, p. 1-4.

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

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

i. If actual or apparent UCI is found to exist, the Military Judge “has broad discretion in crafting a remedy to remove the taint of unlawful command influence,” and such a remedy will not be reversed, “so long as the decision remains within that range.” *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010). The judge may consider dismissal of charges when the accused would still be prejudiced despite remedial actions, or if no useful purpose would be served by

continuing the proceedings. *Douglas*, 68 M.J. at 354. C.A.A.F. elaborated: “However, we have noted that when an error can be rendered harmless, dismissal is not an appropriate remedy. Dismissal is a drastic remedy and courts must look to see whether alternative remedies are available.” *Id.* Indeed, the Court went on to say, “this Court has recognized that a military judge can intervene and protect a court-martial from the effects of unlawful command influence.” *Id.* Finally, the military judge should attempt to take proactive, curative steps to remove the taint of UCI, and therefore ensure a fair trial. *Id.* C.A.A.F. has long recognized once UCI is raised “...it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.” *United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004) (citations omitted).

DISCUSSION:

a. The purpose of Change 1 to the R.T.M.C. was to “accelerate the pace of litigation” and was specifically predicated upon analyzing judicial performance. Mr. Ary, although well intentioned, was concerned with influencing the process so that the various commission cases were concluded at an accelerated pace. Decisions on continuances and pace of litigation are within the sole discretion of the trial judge. “[A] judge is ultimately responsible for the control of his or her court and the trial proceedings...[p]roper case management during a trial...is encompassed within that responsibility.” *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014) (internal quotations and citations omitted). This is a complicated international terrorism case under a relatively new statutory scheme with an unprecedented amount of classified evidence.

There are numerous factors that impact the pace of litigation, none of which would be affected by relocating the trial judiciary. It will take time to try this case.³⁴

b. In the face of what was Change 1, any legitimate denial of a delay requested by the Defense immediately gives rise to an issue as to whether the Military Judge acted in the interests of justice, personal convenience, or an acknowledgement of the Convening Authority's belief that the pace of litigation is too slow. Even though the DEPSECDEF may not have intended for the Military Judge to adjust his trial schedule to limit any personal inconvenience caused by living at GTMO, his actions created the appearance of such an intent.³⁵ An "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding."³⁶

c. The Convening Authority was aware the implementation of Change 1 could have the direct effect of removing an otherwise properly detailed military judge from presiding over a military commission case to which they were currently detailed. He also knew the change had the potential to actually impact the available pool of judges who were available to be detailed to commission cases. The Convening Authority, in his e-mail³⁷ to the various service TJAGs expressed a desire that the currently detailed military judges would remain on their cases. However, this demonstrates that the Convening Authority was well aware of the potential impact of Change 1. There is no evidence these outcomes were made known to the General Counsel or the DEPSECDEF. This military commission case is in the pre-trial hearing phase. The members

³⁴ As a point of reference the trial of Zacarias Moussaoui began 2 January 2002 and concluded 4 May 2006. <http://www.npr.org/templates/story/story.php?storyId=5243788>. Last accessed 28 February 2015.

³⁵ See Attachments A and B, AE 332B.

³⁶ *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006)

³⁷ See Attachment E, AE 332A and Ary testimony in Unofficial/Unauthenticated Transcript Dated 25 February 2015 from 12:32 P.M. to 2:13 P.M at pp 5580, 5583, 5689.

have not been seated, thus the Commission is not assembled.³⁸ At this juncture, only the Chief Trial Judge can properly remove a detailed military judge.

d. The Defense has demonstrated that the motivation behind Change 1 was to ensure that trial judges would move cases along faster. This is evidenced by the history behind the change, the supporting documentation gathered in finalizing the recommendation, and the final package sent to DEPSECDEF for signature.³⁹

e. The Convening Authority's role is well defined in relation to the Military Commission Trial Judiciary. The Director, Office of Convening Authority is critical in relation to resourcing. Resourcing is defined in the R.T.M.C.⁴⁰ and clearly does not include the ability to impact the location or duties of currently assigned or detailed commission trial judges. Both the 2009 MCA and the Rules for Military Commissions are clear on this very fact.

f. Mr. Ary's recommended change, Change 1, was outside of his role as the Convening Authority for the commission cases. He clearly stepped into the arena of the Chief Trial Judge of the Military Commissions and the Service TJAGs. He did so without any coordination or discussion with them. Additionally, the language of Change 1 conflicts with the language of the 2009 MCA and the R.M.C.s related to the detailing of commission judges.

g. The recommendation, once approved, would have the very real potential to impact an outsider's view of the objectivity of the trial judiciary, future rulings and decisions made by any trial judge whether it involved Change 1, or not, and the fairness of the overall system. Any objective outsider watching the process may well have concerns that an impacted trial judge is making decisions in a manner that would allow them to depart GTMO and return to their previously assigned duty locations. They could easily wonder if decisions were made in the

³⁸ See R.M.C. 911.

³⁹ See Product 112, AE 3320.

⁴⁰ R.T.M.C. paragraph 2-3a(4) – (6), (10), and (11).

interests of speed, rather than a just fair outcome. This cannot be allowed; “any question of a judge’s impartiality threatens the purity of the judicial process and its institutions.” *United States v. Brewster*, ACM 37247 (A.F.Ct. Crim.App., May 7 2009) (unpub. Op.) (citations omitted).

h. The Convening Authority’s gathering data to document how much time a particular military judge spent on the record in a commission case⁴¹ to show his dedication to moving the pace of litigation forward at an acceptable level can be viewed as a commentary on the efficiency with which military judge “exercises one of his functions in the conduct of the proceedings.”⁴² His gathering of data occurred at the same time another commission judge made a comment about having conflicts with his two jobs. While possibly coincidental, again, an objective observer would have concerns about the timing of these events.

i. Whether purposeful or not, the timing of the request for reports and the issue in another commission case that had been highlighted by Mr. Ary’s staff, gives rise to a strong impression that Mr. Ary was requesting information specifically about commissions trial judges and their efficiency. This improper report or comment is compounded in reporting this data, in a repackaged format, to DEPSECDEF in the Executive Summary⁴³ in support of the need for the change.

j. This action directly impacted the Trial Judiciary and directly impacted the appearance of independence of that judiciary. In fact, any objective observer would wonder if this was a punitive measure taken against trial judges and if it would impact their substantive decisions in order to cause the relevant cases to move more quickly to conclusion. This appearance issue is

⁴¹ See AE 332O, Product 112, Bates Numbers 10015-00127556 – 10015-00127559 and AE 332O, Product 112, Bates Number 10015-00127565.

⁴² 10 U.S.C. 949b(a)

⁴³ See TAB B, Attachment B, AE 332A.

solidified as the trial judges were the only entities the Convening Authority recommended and DEPSECDEF directed to relocate.

k. Applying the *Biagase* analysis, the Defense more than met its initial burden to show “some evidence” that the actions of the Convening Authority and DEPSECDEF raised the issue of UI by attempting to accelerate the pace of the litigation and creating the appearance of improper pressure on the military judge to adjust the pace of the litigation. There is no dispute the Convening Authority formulated Change 1, did not staff Change 1 as proposed outside his circle of legal advisors in the Office of the Convening Authority and the General Counsel, recommended the change to DEPSECDEF, and that DEPSECDEF approved Change 1. As discussed earlier, the actions would affect the proceedings as they were directed solely at the military judge in these proceedings in the exercise of his sole discretion in managing the pace of litigation.

l. Finding that Mr. Ary set out to impact the pace of litigation, with acknowledgement of a likely impact on detailed judges, we turn to see if the Government presented any evidence to demonstrate no UI or that the actual, attempted or apparent UI will not taint the proceedings or was the taint was removed by corrective action taken by the Government. The Government chose to present no evidence to demonstrate the absence of UI or that the actual, attempted or apparent UI would not taint the proceedings when offered the opportunity to do so. The Government called no witnesses, but offered the DEPSECDEF rescission action,⁴⁴ and the military judge’s decision in *United States v. Khalid Shaikh Mohammad, et al.*⁴⁵ to lift the abatement order based on the DEPSECDEF rescission action as evidence of corrective action

⁴⁴ See AE 332S, DEPSECDEF Action Memo, Rescission of Change 1 to the Regulation for Trial by Military Commissions, dated 26 February 2015.

⁴⁵ See AE 332T, AE 343D, ORDER, *United States v. Khalid Shaikh Mohammad, et al.*, Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary, dated 27 February 2015.

and its sufficiency. The Government did not marshal any evidence to disprove the acts or their consequences, if implemented. There is no doubt the action of Convening Authority and his legal advisors at a minimum appeared to attempt to unlawfully influence the military judge in these proceedings.

m. The Commission does not understand how assigning the military judge at GTMO would make the litigation proceed at a faster pace. Hearings in this capital referred case require the presence of counsel, including Learned Counsel,⁴⁶ and a large number of support personnel, almost none of whom are, or in the case of Learned Counsel can be, permanently assigned to the Naval Station.⁴⁷ (*See* 10 U.S.C. § 949a(2)(C)(ii) granting an accused the right to “representation by ... counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian...”). Unless the intent is to make the military judge ignore his duty to exercise discretion under the law and instead move the case faster to shorten his stay at GTMO, the purported change would not, and could not, have its intended effect. Moreover, any legitimate denial of delay requested by the Defense immediately gives rise to an issue as to whether the military judge acted in the interests of justice or personal convenience. Though the Convening Authority, in developing the recommended course of action, working to obtain DEPSECDEF approval, and ultimately DEPSECDEF approving the change, may not have intended for the Military Judge to adjust his trial schedule to limit his personal inconvenience caused by living at GTMO, these actions did create the appearance of that intent. An “objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.”

⁴⁶ Learned Counsel in this case is a civilian, not an employee of the federal government. *See* R.T.M.C. paragraph 9-1a(6).

⁴⁷ *See* Rule 4, Military Commissions Rules of Court (5 May 2014).

n. As to whether the influence was removed, the Government did offer the DEPSECDEF rescission of Change 1. However, this only removes part of the appearance of unlawful influence. With Change 1 removed, the specific effort to speed the pace of litigation has been removed. However, the actions of the Convening Authority, outside of his appropriate field of action, cast a cloud over the independence of the Military Commission Trial Judiciary. The Convening Authority in this case believed he had the responsibility to recommend action to his superior, the DEPSECDEF, which would affect the location/duty assignment of the detailed trial judge. He went about making such a recommendation knowing it might result in the loss of this trial judge. As an experienced military attorney, he should have known this was an unwarranted intrusion into the sole province of the trial judge. A disinterested member of the public may always wonder whether this Convening Authority meant to have this particular judge removed or if it was an unintended consequence. No matter, it leaves doubt as to the independence of the Military Commission Trial Judiciary.

6. REMEDY

a. As noted in *Douglas*, the military judge “has broad discretion in crafting a remedy to remove the taint of unlawful command influence”⁴⁸ In crafting a remedy the Commission takes note of the 26 February 2015, action by DEPSECDEF to rescind Change 1. That action was taken in response to a ruling on a similar motion in *United States v. Khalid Shaikh Mohammad, et al.*⁴⁹ DEPSECDEF also required any future proposed changes to the Regulation or Rules be staffed with the Office of the General Counsel, the various DoD components, the service TJAGs, and the Trial Judiciary as appropriate. That action removes some of the UI from this case, however, the Commission also notes the Convening Authority testified he would act similarly if

⁴⁸ *Douglas*, at 354.

⁴⁹ See AE 332S, DEPSECDEF Action Memo, Rescission of Change 1 to the Regulation for Trial by Military Commissions, dated 26 February 2015.

presented with similar facts again in the future. He believed his recommendation was appropriate and thus the DEPSECDEF's action proper.

b. Dismissal with or without prejudice is a drastic remedy, and not appropriate at this juncture. Lesser measures can be taken to remove the taint of the unlawful influence from this military commission. DEPSECDEF has taken some action to purge the taint of unlawful influence. The Commission finds the Convening Authority did not act in bad faith in making the recommendation to change paragraph 6-2 of the R.T.M.C., however, they did step outside the boundaries of their customary, regulatory and statutory duties.

c. The actions of the Convening Authority and his legal staff are central to the cause of the unlawful influence. Due to the number of measures orchestrated outside of their scope, any further actions by the Convening Authority, or his legal staff, would still be viewed by the public as tainted as the Convening Authority impacting the "pace" of the litigation. The Convening Authority's approving of experts, additional staff, or funding for investigation, hearings, etc. that proves detrimental to either the prosecution or defense will carry with it taint that these decisions were based upon the Convening Authority wanting to quicken the pace of litigation, despite such denials generally creating additional litigation. In order to further absolve the proceedings of taint, the current Convening Authority (Mr. Vaughn Ary) and his staff of legal advisors (Mr. Mark Toole, Ms. Alyssa Adams, LTC Patricia Lewis, CDR Raghav Kotval,⁵⁰ and CPT Matthew Rich) are disqualified from taking any future action in this case. They are disqualified from all decisions related to this case and from providing recommendations specific to this case from this point forward. Similar to disqualifications of a convening authority in the traditional Military Justice scenario, the Secretary of Defense or his designee will appoint a new Convening

⁵⁰ CDR Raghav Kotval has left the legal staff of the Convening Authority in the normal course of business. See AE 3320, Product 112, Bates Number 10015-00127573.

Authority who will seek legal advice from a legal staff outside the Office of Military Commission/Office of the Convening Authority.

d. Furthermore, to ensure any last vestiges of taint from UI are totally expunged, the trial judge needs to affirmatively demonstrate there is no pressure to accelerate the pace of litigation or succumb to the pressures of the Convening Authority. To demonstrate this, any potential evidentiary session this week is postponed until at least our next session. Additionally, the currently scheduled April hearing in this case is truncated by one week. This is to further demonstrate that the pace and timing of litigation must remain solely within the trial judiciary's discretion and to demonstrate that this detailed trial judge does not feel pressure to accelerate the pace of litigation.

e. It is imperative that no similar efforts be undertaken in the future to improperly influence the trial judiciary as that will likely lead to more drastic remedies.

Accordingly, AE 332 is **GRANTED** in part and **DENIED** in part.

So **ORDERED** this 4th day of March, 2015.

//s//

VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary