

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

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| UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI | AE 031BBB ORDER Joint Defense Motion to Dismiss For Unlawful Influence 5 April 2016 |
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1. PROCEDURAL BACKGROUND

a. The Defense filed this motion,¹ moving the Commission to “dismiss all charges and specifications with prejudice based on unlawful influence” or in the alternative “remove death as a potential sentence.”² In this pleading and subsequent supplements,³ the Defense asserted that, in contravention of 10 U.S.C. § 949b(a)(2):⁴

Political leadership in the United States—beginning with the Commander in Chief and appointed officials speaking on his behalf as well as influential elected politicians - through their public comments that are both prejudicial and inflammatory, have irrevocably tainted and unlawfully influenced every

¹ AE 031, Joint Defense Motion to Dismiss for Unlawful Influence, filed 11 May 2012.

² The Defense also moved for the disqualification of the Convening Authority, Admiral (Ret) Bruce MacDonald; the Legal Advisor, Mr. Michael Chapman; and the Deputy Legal Advisor, Mr. Michael Breslin. *See* AE 031 (MAH Sup) Defense Supplement to Motion to Dismiss due to Unlawful Influence, filed 3 August 2012. The Commission notes that all three are no longer with the Office of Military Commissions and thereby considers the issue MOOT.

³ AE 031, Joint Defense Motion to Dismiss for Unlawful Influence, filed 11 May 2012, as factually supplemented by AE 031 (MAH Sup), filed 3 August 2012; AE 031 (MAH 3rd Sup), filed 3 April 2013; AE 031 (WBA Sup), filed 5 April 2013; AE 031 (MAH 5th Sup), filed 30 May 2013 (classified/*ex parte*/under seal); and AE 031YY (MAH Sup) Supplement to Defense Motion for Appropriate Relief Based on Unlawful Influence Directed at the Military Judge, filed 18 November 2015.

⁴ § 949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review

(a) MILITARY COMMISSIONS.—

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

aspect of this case... [thus] unlawfully influencing or coercing the action of a military commission, the convening authority...”⁵

They further asserted, both prior to the commencement of this trial and since arraignment, that a number of differing actions by the Government, or its representatives, have inhibited the “exercise of professional judgment by ... defense counsel,” again in contravention of 10 U.S.C. § 949b(a)(2).⁶

b. In Response⁷ the Government requested the Commission deny the Defense motion asserting they failed to provide “facts, or even ...an adequate synopsis of testimony, which, if true, would constitute unlawful influence, or that the alleged unlawful influence has a logical connection to the commission in terms of its potential to cause unfairness in the proceedings” thereby failing to meet the Defense burden of raising the specter of unlawful influence. The response specifically goes to the impact, if any, on potential members of the “panel”⁸ arguing “it is unknown at this point whether potential members (of the panel) are even aware of these statements, or whether the facts asserted in the statements will even be contested at trial.”⁹

⁵ AE 031, para 2.

⁶ These allegations of unlawful influence have also been the subjects of separate motions; e.g. *see* AE 018PP (MAH), Defense Motion for Government to Show Cause For Its Violation of AE 018U, filed 12 February 2015 as supplemented by AE 018PP (MAH Sup), filed 27 May 2015 (*ex parte*/under seal), AE 018QQ (AAA Sup), filed 18 March 2015 and AE 018QQ (KSM Sup) filed 29 April 2015, AE 018LLL (MAH Sup) Defense Supplement, filed 5 November 2015; AE 032 *et seq.*, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, filed 11 May 2012; AE 133 *et seq.*, Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 31 January 2013; AE 144A *et seq.*, Notice of Filing of Proposed Interim Order Regarding Seizure and Inspection of Accused’s Legal Materials, filed 21 February 2013; AE 155, Defense Motion to Abate Proceedings due to the Government’s Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation, filed 12 April 2013, *et seq.*; AE 192 (MAH) *et seq.*, Motion to Disqualify the Legal Advisor Due to Unlawful Interference with the Professional Judgment of the Chief Defense Counsel and Detailed Military Learned Defense Counsel, filed July 23, 2013; and AE 193 *et seq.*, Emergency Defense Motion to Compel Appointment of Military Learned Counsel as Civilian Learned Counsel, filed July 23, 2013.

⁷ AE 031A, Government Response To Joint Motion to Dismiss for Unlawful Influence, filed 25 May 2012.

⁸ The military and Commission, a panel is equivalent of a jury.

⁹ AE 031A (Gov) at 20-21.

c. The Defense Reply¹⁰ advances the argument that the Government's Response, in agreeing the purported public statements were made, establishes the factual predicate thereby requiring the Government to now refute the allegation of unlawful influence beyond a reasonable doubt.

d. Argument on the motion was heard on 10 and 11 December 2015.¹¹ During argument, counsel for Mr. Hawsawi advanced two new remedies if the Commission was disinclined to dismiss the charges or remove capital punishment as a possible sentence.

I think that would be one remedy. I think another one would be dismissal of the charges. I think another remedy would be -- not in isolation, but in concert, I think these would have to be -- I think they would have to all be used to some extent in concert -- severance.¹² I think you would have to have a great deal of latitude if you were inclined not to discharge these -- not to dismiss these charges. You would have to provide us a great deal of latitude -- or whomever the military judge were, have to provide us a great deal of latitude in *voir dire*, in jury selection, in testing the bias of potential jurors.¹³

During argument, Mr. Swann, on behalf of the Government, seemingly concurred with the vitality of the latter remedy:

So counsel will be given an opportunity to inquire about the President's statements, they will be given the opportunity to inquire about Mr. Holder's predictions, and it will be only at that time -- and by the time we get there -- given what the defense says, kind of indicated, we may be a little bit away from that time. So that's the time for all of that to occur...¹⁴

¹⁰ AE 031B (MAH), Defense Reply to Government Response to Joint Defense Motion to Dismiss For Unlawful Influence, filed 1 June 2012.

¹¹ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 12/10/2015 from 3:26 PM to 5:03 PM, pp 9924-9975; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 12/11/2015 from 9:06 AM to 10:42 AM, pp 9976-10037; and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 12/11/2015 from 11:01 AM to 11:37 AM, pp 10038-10061.

¹² The issue of severance is already before the Commission; *see* AE 299(MAH) *et seq.*, Mr. al Hawsawi's Motion To Sever, filed 21 May 2014.

¹³ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing dated 12/10/2015 from 3:26 PM to 5:03 PM, at 9945.

¹⁴ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing dated 12/10/2015 from 3:26 PM to 5:03 PM, at 10036.

2. FACTS

a. In formulating this order the Commission considered the pleadings of all parties: the exhibits¹⁵ submitted to the Commission for consideration; the declaration¹⁶ of and testimony

¹⁵ AE 031(MAH 6th Sup), Attachment B,

United States v. Johnson, Finding and Conclusions re: Defense Motion to Dismiss for Unlawful Command Influence, 12 June 2013.

AE 031(MAH 7th Sup), Attachment B

Declaration of Colonel Karen Mayberry, Chief Defense Counsel.

AE-031(MAH 8th Sup), Attachment B

Ryan J. Reilly, "Eric Holder: 9/11 Defendants 'Would Be On Death Row' if Case Proceeded In Federal Court Instead Of Gitmo," *Huffington Post* (November 4, 2013).

AE 031(MAH 9th Sup), Attachment B

Johnson, C. (2014, March 11). Holder Speaks Out on Snowden, Drone Policy, Softening Sentences [Radio interview]. In *Morning Edition*, Washington, D.C: National Public Radio.

AE 031(MAH 10th Sup)

Nordstrom v. Ryan, No. 12-15738 (9th Cir. Aug. 11, 2014).

AE 031A (GOV): Attachments:

B. Usama bin Laden's publicly issued "Declaration of Holy War Against the Americans Who are Occupying the Land of the Two Holy Places," dated on or about 23 August 1996;

C. Usama bin Laden's Fatwa entitled, "The International Islamic Front for Jihad Against the Jews and the Crusaders," publicly issued on 12 February 1998;

D. Usama bin Laden's statement entitled, "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," issued on 29 May 1998

E. The 9/11 Commission Report, Executive Summary, printed from the Archive of the National Commission on Terrorist Attacks upon the United States;

F. U.S. Department of State, Designation of Foreign Terrorist Organizations, Public Notice 3130, dated 8 October 1999;

G. United Nations Press Release, dated 12 September 2001;

H. White House Press Release, dated 18 September 2001;

I. DoD Press Release, dated 7 October 2001;

J. New York Times Magazine article, entitled "When Al Qaeda Calls," dated 2 February 2003; Scalable Context Timeline from "History Commons," entitled, "Before September 11, 2002: US Search for KSM and Bin Al-Shibh Focuses on Karachi, Pakistan;" and Amazon.com Book Description of "Masterminds of Terror: The Truth Behind the Most Devastating Terrorist Attack the World Has Ever Seen," by Fouda and Fielding;

K. Verbatim Transcript of CSRT Hearing for ISN 10024 dated 10 March 2007;

L. Referred charge sheet accused the five accused, dated 18 April 2008;

M. The White House Blog, "President Barack Obama's Inaugural Address," dated 21 January 2009;

N. Executive Order 13492 of 22 January 2009;

O. Joint Department of Defense and Department of Justice Press Release, dated 13 November 2009;

P. Prosecution Notice of Forum Election ICO U.S. v. Mohammed, et. al., dated 16 November 2009;

Q. CA's Dismissal of Charges Without Prejudice, dated 21 January 2010;

R. Department of Defense News Release, dated 25 March 2010;

S. Statement of the AG on the Prosecution of the 9/11 Conspirators, dated 4 April 2011;

T. Department of Defense News Release, dated 31 May 2011;

U. Department of Defense News Release, dated 23 June 2011;

V. Additional Sworn Charge Sheet, dated 25 January 2011;

W. Department of Defense News Release, dated 4 April 2012;

X. Transcript of President Bush's Speech on Terrorism, dated 6 September 2006;

Y. Chuck Todd's Interview with President Obama, dated 18 November 2009; and

Z. Public statements cited by the defense in AE031, included here in their entirety.

AE-031C (MAH) Attachments:

a) Affidavit of Ms. [REDACTED], dated 5 May 2012;

b) Affidavit of LNI [REDACTED], dated 4 May 2012;

from the (then) Convening Authority (CA)¹⁷ and, as they pertain to the sundry issues alleged to have inhibited the “exercise of professional judgment,” the other motions,¹⁸ testimony;¹⁹ and

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- c) E-mail from Convening Authority’s Office cancelling Protective Order, dated 18 March 2011;
 - d) Convening Authority’s Legal Advisor Memorandum re: Ex Parte Requests, dated 28 December 2011;
 - e) Convening Authority’s Protective Order, dated 4 March 2011;
 - f) Email forward from Department of Defense General Counsel to Chief Defense Counsel dated 20 December 2011;
 - g) Email forward from Department of Defense General Counsel to Chief Defense Counsel dated 21 December 2011;
 - h) Excerpt of Transcript (pp. 101-157), *United States vs. al Nashiri*, dated 9 November 2011; and
 - i) Excerpt of Transcript (pp. 247-297), *United States vs. al Nashiri*, dated 17 January 2012.

AE 0310(MAH), Attachments:

- B. Statement of then Rear Adm. Bruce E. Macdonald, USN, as The Judge Advocate General, U.S. Navy before the Senate Judiciary Committee on August 2, 2006;
- C. Statement of then Rear Adm. Bruce E. Macdonald, USN, as The Judge Advocate General, U.S. Navy before the House Armed Services Committee September 7, 2006;
- D. Statement Of Vice Adm. Bruce E. Macdonald, USN, as The Judge Advocate General, U.S. Navy before the Senate Armed Services Committee July 7, 2009; and
- E. Statement Of Vice Adm. Bruce E. Macdonald, USN, as The Judge Advocate General, U.S. Navy before the House Armed Services Committee July 16, 2009.

AE 070A, Mr. Hawsawi’s UNCLASSIFIED Notice of AE 032SS/AE070A(MAH) Defense Notice in Relation to AE 032B, AE 032E and AE 070, filed 17 Dec 2013.

AE 144B, Attachment C

Commanders Inquiry Summary of Findings dated 21 February 2013 (filed Under Seal).

AE 031AA (Exhibit)

MEMORANDUM FOR RECORD, SUBJECT: JTF-J2/ Joint Intelligence Group (JIG) Force Structure Realignment dated 26 April 2011.

AE 031LL (MAH) Privileged Communication: Attorney-Client Information.

AE 031ZZ (MAH) PowerPoint Presentation

¹⁶ AE 031A (Gov Sup) Government Exhibit in Support of Opposition to Defense Motion to Dismiss For Unlawful Influence, filed 24 January 2013; Declaration of Mr. Bruce MacDonald dated 23 January 2013.

¹⁷ **Mr. Bruce MacDonald:**

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/14/2013 from 9:01 AM to 10:19 AM at 2445-2491;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/14/2013 from 10:37 AM to 11:59 AM pp 2492-2545;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/17/2013 from 9:04 AM to 10:42 AM at 2739-2788;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/17/2013 from 11:05 AM to 12:33 PM at 2792-2846;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/17/2013 from 1:38 PM to 3:15 PM at 2849-2918;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/17/2013 from 3:57 PM to 5:07 PM at 2920-2970;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 9:08 AM to 10:20 AM at 2982-2029;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 10:43 AM to 12:17 PM at 3031-3035;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 1:02 PM to 3:25 PM at 3094-3196; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 3:43 PM to 6:40 PM; 3198-3326.

¹⁸ See fn 6.

¹⁹ **Lieutenant Alexander Homme, U.S. Navy:**

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/13/2013 from 9:00 AM to 10:10 AM at 2126-2168.

Lieutenant Colonel Ramon Torres, U.S. Army:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 from 2:47 PM to 5:19 PM at 2064-2112.

Mr. Maurice Elkins

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 from 9:02 AM to 10:07 AM 1847-1888; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 from 10:25 AM to 11:42 AM 1889-1941.

Colonel John V. Bogdan, U.S. Army:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/13/2013 from 10:28 AM to 12:02 PM at 2169-2247; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/13/2013 from 1:02 PM to 2:36 PM at 2248-2295.

Captain Thomas J. Welsh, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 from 1:00 PM to 2:37 PM at 1954-2029;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 from 2:47 PM to 5:19 PM at 2030-2061;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/20/2013 from 3:20 PM to 4:35 PM at 3689-3749;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/21/2013 from 9:01 AM to 12:30 PM at 3765-3856;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/21/2013 from 1:49 PM to 2:42 PM at 3858-3899;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/21/2013 from 3:00 PM to 4:50 PM at 3900-3984;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/21/2013 from 5:23 PM to 8:23 PM at 3992-4083.

Ms. Robin Maher, Director, ABA Death Penalty Representation Project:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/13/2013 from 2:54 PM to 5:09 PM at 2333-2416.

Lieutenant Commander George Massucco, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/14/2013 from 1:11 PM to 3:06 PM at 2602-2642;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/24/2013 from 9:05 AM to 10:25 AM at 6821-6891;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/24/2013 from 10:47 AM to 12:33 PM at 6892-6985;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/24/2013 from 1:50 PM to 4:06 PM at 6988-7027.

Admiral David B. Woods, U.S. Navy:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/19/2013 from 9:05 AM to 12:19 PM at 3351-3386;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/19/2013 from 1:36 PM to 4:23 PM at 3451-3550;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/20/2013 from 9:03 AM to 9:56 AM at 3553-3575, 3631-3681;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/20/2013 from 11:29 AM to 12:35 PM at 3592-3630;

argument²⁰ before the Commission. The *gravamen* of the Defense argument is three fold. First, the CA, in rendering his decision to refer the subject charges and specifications to trial, and,

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/20/2013 from 1:36 PM to 2:59 PM at 3631-3681.

Commander Jennifer A. Strazza, U.S. Navy:

AE 008QQ Stipulation of Expected Testimony filed 18 September 2013.

Paul Scott Parr, Office of Military Commission, U.S. Naval Station, Guantanamo Bay, Cuba:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 10:16 AM to 12:46 PM at 5614-5727.

Wendy Kelly, Chief of Operations, Office of the Convening Authority, Office of Military Commissions:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 10:16 AM to 12:46 PM at 5731-5741; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 2:08 PM to 4:24 PM at 5742-5746.

Brent Glover, Washington Headquarters Services Identity Protection and Management Team:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 2:08 PM to 4:24 PM at 5752-5848; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 4:50 AM to 5:55 PM at 5850-5860.

Ronald G. Bechtold, Chief Information Officer, Office of the Secretary of Defense:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/19/2013 from 4:50 AM to 5:55 PM at 5862-5902;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 9:06 AM to 9:59 AM at 5945-5947;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 10:13 AM to 12:04 PM at 5949-6037;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 1:04 PM to 3:01 PM at 6038-6136;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 3:06 PM to 4:36 PM at 6137-6198; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 4:49 PM to 7:30 PM at 6199-6260.

Bryan Brovles, Principal Chief Deputy Defense Counsel, Office of Military Commissions

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/25/2013 from 10:15 AM to 12:18 PM at 7109-7132.

²⁰ **AE 032 et seq, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, filed 11 May 2012:**

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/21/2013 from 9:05 AM to 10:29 AM at 4641-4683;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/21/2013 from 10:49 AM to 12:43 PM at 4741-4747;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/21/2013 from 10:49 AM to 12:43 PM at 4736;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/12/2013 at 1955-2063 and 2112-2117; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 2/14/2013 at 2702.

AE 144A , et seq, Notice of Filing of Proposed Interim Order Regarding Seizure and Inspection of Accused's Legal Materials, filed 21 February 2013:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/21/2013 from 10:49 AM to 12:43 PM at 4732-4768;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/22/2013 from 9:04 AM to 10:20 AM at 6332-6355; and

moreover, as capital offenses, was subjected to unlawful military and political pressure in making his decision. Second, the panel members are, or will be, subjected to the same military and political pressures in rendering their decision both as to guilt or innocence and as to any sentence that might be imposed. Lastly, a number of incidents that have occurred prior to and during the course of these proceedings have unlawfully inhibited the “exercise of professional judgement” by defense counsel.

b. Mr. Bruce MacDonald, the (former) CA avowed in a declaration,²¹ provided under penalty of perjury, the decision to refer the charges and specifications to trial as capital offenses was his alone. Further, he had not been swayed or influenced by the political statements and rhetoric outlined in the Defense motion:

All of my decisions regarding the referral of United States v. Mohammad, *et al.* to a capital military commission, and to have the 5 accused tried jointly, were uninfluenced by anything other than the charges and additional charge, the transmittal letters, the referral binder and all materials contained therein, the submissions of each defense counsel, oral counsel from my staff of legal advisors, and the written pretrial advice of my legal advisor, as required by R.M.C. 406.

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/24/2013 from 1:50 PM to 4:06 PM.

AE 155 et seq, Defense Motion to Abate Proceedings due to the Government’s Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation, filed 12 April 2013:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/19/2013 from 9:07 AM to 10:32 AM at 4196-4206;

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 8/23/2013 from 3:02 PM to 4:08 PM at 5251-5293; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 9/20/2013 from 4:49 PM to 7:30 PM at 6260-6324.

AE 192 (MAH) et seq, Motion to Disqualify the Legal Advisor Due to Unlawful Interference with the Professional Judgment of the Chief Defense Counsel and Detailed Military Learned Defense Counsel, filed July 23, 2013:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing dated 2/12/2015 from 9:04 AM to 10:31 AM; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/25/2013 from 1:48 PM to 3:43 PM.

AE 193(MAH) et seq Emergency Defense Motion to Compel Appointment of Military Learned Counsel as Civilian Learned Counsel, filed July 23, 2013:

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing dated 2/12/2015 from 9:04 AM to 10:31 AM; and

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 10/25/2013 from 1:48 PM to 3:43 PM.

²¹ AE 031A (GOV Sup).

My decisions were my own, and were not impacted by any improper outside influences.²²

Called by the Defense as a witness,²³ Mr. MacDonald's sworn testimony buttressed his earlier declaration²⁴ that he alone made the decision to refer the charges and their specifications to trial and that he had not been swayed by outside influences. No further evidence was offered by the Defense to support their claim the CA made his referral decision based upon unlawful influence.

²² AE 031A (GOV Sup) Attachment B.

²³ AE 031, para 8g.

²⁴ Under cross examination by the Government, Mr. MacDonald testified:

Q. In the course of your career, Admiral, specifically inside the military and especially in your final position as TJAG, did you come to understand the concept of unlawful influence very well?

A. Yes, I mean, it was a part of our Staff Judge Advocate duties to advise the commanders that we served of unlawful command influence.

Q. You feel you were capable at all times during the course of your time as Convening Authority to act on proper materials as opposed to any extraneous statements made by any other government officials?

A. Yes, I did.

Q. Was your decision to refer this case involving the murder of 2,976 men, women and children influenced or impacted in any way by the statements contained in Appellate Exhibit 031?

A. No, they were not.

Q. Beyond that, have you ever received any oral or written communications from any of the government officials I mentioned?

A. No, I have not.

Q. Have you communicated with any of them that might be considered an attempt by them to influence your decision to refer this case to trial?

A. I -- since being appointed as Convening Authority, I have never spoken or communicated in any way with any of the individuals who are listed in the defense motion.

Q. Did you consider anything other than the charges, any additional charge, the transmittal letters, the referral binder and all materials contained therein, the submissions of defense counsel, or all counsel from your staff and legal advisor and the written and pretrial advice of your legal advisor?

A. Yes, that's all I considered.

Q. Your legal advisor in this case was Mr. Michael Chapman who was a retired Army colonel with almost 30 years of active service to this nation and a former appellate judge of the Army Court of Criminal Appeals.

LDC [CDR RUIZ]: Objection to the form of the question.

A. That's correct.

MJ [COL POHL]: Overruled. You said that's correct, right?

Q. That's correct, Admiral?

A. Yes, that's correct.

Q. Finally, was the decision to refer this case to trial yours and yours alone?

A. Yes, it was.

Q. Was it impacted by any outside influence?

A. No, it was not.

Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 3:43 PM to 6:40 PM at 3198-3326.

c. The Defense offered, and the Government acknowledged, the accuracy of, a number of statements, media articles, and public documents, highlighting the potential for the panel to be “irrevocably tainted” in their ability to make a fair and just determination based upon the evidence before them in the Commission. The Commission accepts the referenced exhibits as accurately portraying what they are purported to demonstrate; namely there has been inordinate publicity about the attacks on 9/11, the Accused and their treatment while detained, and the Military Commission process writ large.

d. The Defense alludes to a *mélange* of actions they allege to have interfered with the exercise of their professional judgment. These alleged encumbrances’ are also the subject of separate motions,²⁵ the majority of which have already been addressed by the Commission.²⁶ Insofar as necessary for consideration of this motion, the Commission will rely upon the pleadings, facts and arguments brought forth in each of the remaining motions.

4. LAW

a. The concept of unlawful influence is one readily recognized by military justice practitioners, however, there is an additional facet to be considered in the context of a Military Commission. The Uniform Code of Military Justice (UCMJ) defines unlawfully influencing the action of the court stating:

No person subject to the code 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 or the action of

²⁵ See fn 6.

²⁶ See AE 032 *et seq*, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, filed 11 May 2012; AE 144A *et seq*, Notice of Filing of Proposed Interim Order Regarding Seizure and Inspection of Accused’s Legal Materials, filed 21 February 2013; AE 155 *et seq*, Defense Motion to Abate Proceedings due to the Government’s Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation, filed 12 April 2013, AE 192 (MAH) *et seq*, Motion to Disqualify the Legal Advisor Due to Unlawful Interference with the Professional Judgment of the Chief Defense Counsel and Detailed Military Learned Defense Counsel, filed July 23, 2013, and AE 193 *et seq*, Emergency Defense Motion to Compel Appointment of Military Learned Counsel as Civilian Learned Counsel, filed July 23, 2013.

any convening, approving or reviewing authority with respect to his judicial acts.²⁷

The Military Commissions Act of 2009 (M.C.A. 2009) sets forth the same principles but adds a third:

No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) *the exercise of professional judgment by trial counsel or defense counsel*²⁸ (emphasis added)

Thus the M.C.A. 2009 prohibits unauthorized influence regardless of source²⁹ and provides greater protection³⁰ than the UCMJ prohibition of Unlawful Command Influence (UCI) provides service members. Although the M.C.A. 2009 provision is more expansive than the UCMJ provision, extensive litigation in military courts provides a useful framework in analyzing the issue of unlawful influence. UCI is the improper use, or perception of use, of superior authority to interfere with the court-martial process.³¹

b. UCI has been called “the mortal enemy of *military justice*.” *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006). An accused has the initial burden of raising the issue of unlawful command influence; they must “show facts which, if true, constitute unlawful

²⁷ 47 U.S.C. §837.

²⁸ 10 U.S.C. §949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review.

²⁹ “any person” v. a person “subject to the code” (UCMJ) i.e. a member of the military.

³⁰ This third tenant was also in the Military Commissions Act of 2006 and was the basis for several commission orders. For a political and legal history see: *United States v. Hamden*, AE 191, Ruling on Motion To Dismiss (Unlawful Influence) dated 9 May 2008; *United States v. Jawad*, D-004, Ruling on Motion To Dismiss -Unlawful Influence, dated 14 August 2008; *United States v. Khadr*, D-075, Ruling Defense Motion to Dismiss, 3 September 2008; *United States v. al Darbi*, D-011, Ruling on Defense Motion to Dismiss for Unlawful Influence, 2 October 2008; and An Abbreviated Legislative History and Timeline Regarding the Development of Section 949(b) of the Military Commissions Act of 2006, Gregory S. McNeal, <http://works.bepress.com/gregorymcneal/17/> (last accessed 29 March 2016).

³¹ See Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999).

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.” *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009), cert. denied, 130 S. Ct. 1536, 176 L. Ed. 2d 115 (2010). The threshold for raising the issue at trial is low, but more than a mere allegation or speculation. *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), *United States v. Johnston*, 39 MJ 242, 244 (CMA 1994). Once the issue of UCI is properly raised, the burden then shifts to the Government. The Government may show either that there was no UCI, or that any UCI would not taint the proceedings. If the Government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based, or by persuading the Court the facts do not constitute UCI. The Government may choose not to disprove the existence of UCI, but prove that it will not affect these specific proceedings. The Government must meet their burden beyond a reasonable doubt, despite which tactic they choose. *United States v. Stoneman*, 57 M.J. at 41 (citing *Biagase*, 50 M.J. at 151).

c. UCI can manifest in a multitude of different situations and can affect the various phases of the court-martial process in one of two ways either through actual UCI or apparent UCI. See *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). The Department of Defense Regulation for Trial By Military Commission (2011 Edition) (R.T.M.C.) specifically warns against the appearance of unlawful influence: “all persons...should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.”³² 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).

³² R.T.M.C. Chapter 1, p. 1- 4.

d. The “appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial.” *Id.* at 407. Thus, the disposition of an issue involving UCI, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of UCI. *Id.* at 416. The question of whether there is apparent UCI is determined “objectively.” *Id.* This objective test for apparent UCI is similar to the tests 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.*

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

4. ANALYSIS

a. The first issue before the Commission is the allegation that the CA was unlawfully influenced during the referral process. To support their claim the Defense called the CA as a witness and he was subjected to extensive examination over several sessions of the Commission.

During his testimony the CA indicated both his awareness of the specter of unlawful influence on his referral decision and specifically that his decision was not “impacted” by any outside influence.³³ The Defense offered no other evidence to refute the sworn assertions of the CA and thus did not support, by any evidence, their belief the CA was unlawfully influenced. During Mr. MacDonald’s testimony, he indicated that it took him several months to go through the voluminous materials provided as the referral binders. He was most adamant that the decision to refer the Accused to a capital trial was his alone. Moreover, Mr. MacDonald made an effort to reach out to Defense Counsel for their input as to his decision.³⁴ This was neither required by law nor usual practice³⁵ and further supports the independence of his action. The time and effort the CA made in reaching his decision, coupled with his outreach to the Defense, refutes any reasonable doubt as to the independence of his referral decision.

b. With the advent of social media and 24 hour, worldwide news coverage, courts of criminal jurisdiction must be ever vigilant to preserve the right of an accused to be judged by an impartial jury.³⁶ In the recent “Boston Bomber” trial the First Circuit addressed this challenge opining:

Thus, any high-profile case will receive significant media attention. It is no surprise that people in general, and especially the well-informed, will be aware of it. Knowledge, however, does not equate to disqualifying prejudice. Distinguishing between the two is at the heart of the jury selection process.

Trials have taken place in other high-profile cases in the communities where the underlying events occurred. After the 1993 World Trade Center bombing, which killed six and injured over a thousand people and inflicted hundreds of millions of dollars in damage, the six conspirators charged were each tried in the Southern District of New York. The district court denied change-of-venue motions in each

³³ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing dated 6/18/2013 from 3:43 PM to 6:40 PM at 3198-3326.

³⁴ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Hearing dated 2/14/2013 from 10:37 AM to 11:59 AM p. 2504.

³⁵ See AE 008, Defense Motion To Dismiss For Defective Referral, filed 19 April 2012 *et seq.*

³⁶ *Reynolds v. United States*, 98 U.S. (1878).

case, the first less than a year after the bombing. *See United States v. Yousef*, No. S12 93–Cr.0180, 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997); *United States v. Salameh*, No. S5 93–Cr.0180, 1993 WL 364486, (S.D.N.Y. Sept. 15, 1993) (finding less than a year after the bombing that a jury in New York would be “willing to try this case with an open mind” and able to “render a decision based solely upon the evidence, or lack thereof,” even if the jurors had heard of the bombing before). After the conviction in *Yousef*, the Second Circuit affirmed. *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir.2003).

Indeed, after the September 11 terrorist attacks in 2001, the prosecution of Zacharias Moussaoui was brought in the Eastern District of Virginia, minutes by car from the Pentagon. The district court denied a change of venue motion, and the Fourth Circuit dismissed Moussaoui’s interlocutory appeal. *United States v. Moussaoui*, 43 Fed.Appx. 612, 613 (4th Cir.2002).³⁷

This same concern has been expressed in courts-martial:

Members of the armed forces are entitled to have their cases adjudged by fair and impartial court-martial panels whose evaluation is based solely upon the evidence, and not upon prejudice that may occur as a result of pretrial publicity.³⁸

At trial the Defense may show actual prejudice if “members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused.”³⁹ Dismissal of charges is appropriate only when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings. *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978).

Military appellate courts have made it clear that not only can a military judge intervene but they favor decisions that intervene and protect a court-martial from the effects of unlawful command influence by “taking proactive, curative steps to remove the taint of unlawful command influence and ensure a fair trial.” *United States v. Douglas*, 68 M.J. 349, 354. (C.A.A.F. 2010), *Ashby*, 68 M.J. 122. In circumstances where potential members of a jury or panel have been exposed to real or assumed taint courts have deferred to a liberal *voir dire* process, including permitting lengthy

³⁷ *In re Tsarnaev*, 780 F.3d 14 (1st Cir, 2015).

³⁸ *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003)

³⁹ *Id.* At 6.

questionnaires and additional challenges.⁴⁰ In the instant case the impact of the publicity, statements by public figures, and academic opinions can only be accurately determined when the panel is to be seated; prior to that time any impact, real or imaginative, is speculative.

c. The third facet of the Defense's UI motion goes to the impact, if any on the exercise of the "professional judgement" by counsel in defense of their clients, by "unlawful" actions of the Government. The issue has not been addressed by appellate courts in either the military or Commission context. Previous interpretations at trial have centered on the lawfulness of the actions perpetrated by those alleged to have attempted to influence the "exercise of professional judgement" by the prosecution. The majority of the trial decisions⁴¹ found that regulatory provisions, establishing the role of the Legal Advisor as the supervisor for the prosecution, negated the allegations of unlawful influence; *cf United States v Hamden*. In this instant, the fact patterns of each allegation differ as would the possible remedies if UI were established; Coupling this with the decisions already issued on a number of the allegations militates the remainder be resolved as standalone motions rather than be addressed as a conglomerate.

5. RULING

a. As to the Defense's challenge to the decisions of the CA to refer the charges and specifications to trial as capital offenses, the Commission finds beyond a reasonable doubt there

⁴⁰ In *United States v Stoneman*, 57 M.J. 35 (C.A.A.F 2002) the court distinguished, without ruling, between the burden for challenging the seating of a panel member as opposed to addressing such a challenge predicated upon unlawful influence stating:

Unlike the law pertaining to unlawful command influence, there is no burden shifting in the law pertaining to challenges. RCM 912(f)(3), Manual for Courts-Martial, United States (2000 ed.), places the burden of establishing the grounds for challenge on the challenging party. However, RCM 912(f)(3) does not define the quantum of proof required to establish a ground for challenge. This Court has not addressed the quantum of proof required under Rule 912(f)(3), and we need not precisely define it in this case. We are satisfied, however, that the quantum of proof required under RCM 912(f)(3) is higher than the "some evidence" required to raise an issue of unlawful command influence. Thus, a military judge's determination that the defense has not sustained the greater burden of establishing a challenge under RCM 912(f)(3) does not answer the question whether the defense has met the lesser burden of presenting "some evidence" of unlawful command influence, thereby shifting the burden to the Government.

⁴¹ *United States v. Jawad*, *United States v. Khadr*, and *United States v. al Darbi*.

was no actual UI, or the appearance of such so as to bring the fairness of the decision into serious concern. That portion of AE 031, alleging UI on the decision of the CA, is **DENIED**;

b. The Commission agrees there is the potential for statements and other sources of public information, made outside the Commission process, to taint the panel. The Defense motion, as amended during argument, is **GRANTED** in part. The Commission will afford the Defense the opportunity to address the need for expanded *voir dire* and liberal challenges when the issue of seating the panel is properly before the Commission. Moreover, the Commission will be continually attentive, both during *voir dire* and during trial itself, as to any inklings of unlawful influence that may arise; and

c. As to the allegations concerning the adverse impact on decisions made by Defense Counsel the motion is **DENIED**, but only in so far as being addressed in this motion. As appropriate allegations of UI will be examined as part of the separate motions.

So **ORDERED** this 5th day of April, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge