MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE091** **Motion To Dismiss** Because The Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants 12 October 2012

1. Timeliness: This motion is timely filed.

2. Relief Requested: Defendants respectfully request dismissal of all charges with prejudice because the Military Commissions Act of 2009 ("MCA" or "Act") and Regulation for Trial of Military Commissions ("RTMC") are unconstitutional insofar as they require the Convening Authority to act as both judge and prosecutor of the accused.

3. Overview:

The principle that no one is permitted to decide a case where he or she has an interest in the outcome is a fundamental requirement of due process.[1] The position of Convening Authority established by the MCA and RTMC suffers from precisely this flaw insofar as it exercises the powers of both prosecutor and judge over the defendants. The Supreme Court has held that such an arrangement violates the Due Process Clause. Accordingly, the referrals in this case must be dismissed.

Regardless of whether the conflicting roles of the Convening Authority are justified in the military justice system, which is designed to discipline United States service members to ensure the good order and efficiency of the armed services, those conflicting functions are

[1] *In re Murchison*, 349 U.S. 133, 136 (1955).

unjustified and unconstitutional in the very different military commission system, which is designed solely for criminal prosecutions of enemy combatants for the commission of war crimes.

4. Burden of Proof and Persuasion: The motion presents a pure issue of law so that there is no burden of proof.

5. Facts: The motion presents a pure issue of law.

6. Argument.

A. The Military Commissions Act and Regulation for Trial by Military Commission are unconstitutional insofar as they require the convening authority to perform both prosecutorial and judicial roles.

1. Due process prohibits an individual from acting as both prosecutor and judge in a criminal case.

"It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process."[2] A decision maker who is free of bias is the first requirement of a "fair tribunal." "Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."[3] Accordingly, "[b]efore one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true."[4] Thus, "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided."[5]

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[2] *Caperton v. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison,* 349 U.S. 133, 136 (1955)).
[3] *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).
[4] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 617 (1993) (internal citations omitted).
[5] *Tumey v. Ohio,* 273 U.S. 510, 522 (1927).

The requirement of impartiality applies regardless of whether the proceeding is criminal; it must be satisfied in civil[6] and administrative[7] proceedings as well. Moreover, while due process is clearly violated in cases of personal financial conflicts of interest,[8] the Supreme Court has also found violations in cases of conflicting governmental roles without regard to personal interest.[9] An official motive for desiring a particular outcome, or an executive responsibility that is furthered by a particular outcome, also creates an unacceptable risk of bias.

Accordingly, a decision maker's role in an adjudicative process can violate due process without a finding that he was actually biased.[10] Rather than actual bias, the question is whether the facts give rise to a situation in which the average decision maker would be tempted to deviate from absolute neutrality.[11] In such cases "a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm . . . . [A]ctual motivations are hidden from review, and we must presume that the process was impaired."[12]

Applying these principles, the Supreme Court has held that an official who plays both prosecutorial and judicial roles in a case violates the principal of impartiality as a matter of law.

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[6] *Concrete Pipe*, at 617.

[7] *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("most of the law concerning disqualification because of interest applies with equal force to … administrative adjudicators;" citation omitted).

[8] *See, e.g.*, *Commonwealth Coatings Corp v. Continental Casualty Co.*, 393 U.S.145, __ (1968) (member of a board providing voluntary arbitration services had sporadic but significant financial dealings with a party before the board,), *Gibson v. Berryhill*, 411 U.S. 564, __ (1973) (members of a state licensing board were competitors of persons brought before the board for de-licensing); *Tumey v. Ohio,* 273 U.S. 510, __ (1927) (traffic court judge had a financial interest in the fines levied).

[9] *Ward v. Village of Monroeville*, 409 U.S. 57, __ (1972) (traffic court judge had "executive responsibilities for village finances" and those finances were largely reliant on the fines the judge levied); *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 799 (1987) (attorney for commercial competitor who was the beneficiary of a court order was subsequently appointed to undertake a civil contempt prosecution for alleged violations of that order).

[10] *Murchison*, at 136.

[11] *Vasquez v. Hillery*, 474 U.S. 254 (1986).

[12] *Id.*, at 263 (*citing Tumey*, 273 U.S. at 535).

In *Murchison*, a judge conducting a "one man grand jury" (provided for under Michigan law) interrogated two witnesses as part of his investigation. Convinced that they had perjured themselves, he held them in contempt and then tried and convicted them on the charges. On appeal to the Supreme Court, the defendants asserted that "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of the fair and impartial trial required by the Due Process Clause."[13] Agreeing, the Supreme Court explained:

> It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.[14]

In sum, "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."[15]

2. The MCA requires the convening authority to play conflicting prosecutorial and judicial roles.

The Military Commissions Act violates this principle of a fair tribunal by assigning to the Convening Authority both judicial and prosecutorial functions.

First, the Act explicitly provides that the Convening Authority will (1) detail the commission's panel members, 10 U.S.C. § 948i(b); (2) employ the commission's court reporters and interpreters, 10 U.S.C. § 948l(a) and (b); (3) prepare and maintain the transcript of proceedings, 10 U.S.C. § 948l(c); (4) following a verdict against the accused, receive submissions from the accused, modify the findings or sentence, order a rehearing, 10 U.S.C. § 950b, or suspend the sentence, 10 U.S.C. § 950i(d); and (5) extend the time for an accused to file

[13] *Murchison*, at 135.
[14] *Id.*, at 137.
[15] *Id.*

a waiver of review by the Court of Military Commission Review, 10 U.S.C. § 950c(b)(3). These are all indisputably judicial functions.

At the same time, the MCA, as interpreted by the RTMC, grants the CA powers that are also indisputably prosecutorial in nature. Thus, under the RTMC, the Convening Authority initiates the prosecution of the accused by convening a military commission in the first instance;[16] decides whether to refer the charges against the accused for trial by the commission;[17] decides whether the charges will be capital;[18] decides whether to grant immunity to witnesses;[19] controls the prosecution's contacts and interactions with the media;[20] controls negotiations and final approval of pre-trial agreements, including the decision whether to enter into them at all;[21] ; and, receives legal advice from a Legal Advisor who supervises the Office of the Chief Prosecutors.[22] Both military[23] and federal[24] courts have concluded that the Convening Authority acts as a prosecutor in the military justice context. If anything, his prosecutorial role is even clearer in the military commissions system.

These dual roles create conflicts at virtually every step of the military commission process. Upon referral—held to be a prosecutorial function by both military and federal

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[16] RTMC ¶ 2-3.a.2 (2011).
[17] *Id.*, ¶ 2-3.a.1; *Id.*, ¶ 4-1.b.
[18] ¶ 4-3.a.
[19] ¶ 15-1.b.1.
[20] ¶ 8-7.
[21] ¶ 12-1.
[22] RTMC, Reg. 2-1.
[23] *See, e.g., United States v. Green*, 37 M.J. 380, 384-385 (C.M.A. 1993) (referral is a prosecutorial function); *United States v. Fernandez*, 24 MJ 77, 78 (C.M.A. 1987) (same); *compare, also, U.S. v Rexroat*, 38 M.J. 292, 298 (C.M.A. 1993) (CA can make probable cause determination for purposes of pretrial confinement of accused if not otherwise involved in law-enforcement function of command) *with U.S. v. Lynch*, 13 M.J. 394, 396-397 (C.M.A. 1982) (CA may not make subsequent decision whether to continue pretrial confinement).
[24] *Curry v. Secretary of the Army*, 595 F.2d 873, 878 (D.C. Cir. 1979) (equating CA decision to refer charges to "prosecutorial discretion").

courts[25]—the Convening Authority becomes responsible in the first instance for deciding whether the accused's requests for appointment of experts and other resources are necessary for his defense,[26] a blatant conflict of roles.[27] Having decided that there is sufficient evidence against the accused to refer charges against them for trial, the Convening Authority then gets to hand-pick the panel members who will evaluate these charges – that is to say, who will agree or disagree with his own preliminary evaluation.[28]

These conflicts are especially egregious in the context of the current military commission prosecutions because of the interlocking nature of so many of the charges against so many of the detainees. Take for example a case in which the Convening Authority enters a pretrial agreement with an accused that gives the accused a more favorable sentence but requires that he testify against another accused in an another case (which may in fact be the same case, where both are charged as co-conspirators).[29] In such a situation, the Convening Authority will have decided that the first accused is sufficiently credible that it is worth the trade-off of a lower sentence to procure his testimony against the second accused. Then, upon conviction of the second accused, the Convening Authority must decide whether the evidence against the accused requires a dismissal or amendment of the findings, or a lesser sentence.[30] Because of the Convening Authority's prior immunity decision, that evidence will include the testimony of the first accused, including the CA's evaluation of credibility of the testimony – an issue that the CA has prejudged. This situation is not speculative; the Convening Authority has already approved a

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[25] *Green*, at 384-5; *Fernandez*, at 79; *Curry*, at 878.
[26] RTMC, ¶ 2-3a.9 and 10.
[27] *See* AE036 – Motion to Declare RMC 703 Unconstitutional.
[28] *Compare Murchison*, at 136 ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.").
[29] *See* RTMC, ¶¶ 15-1.b.1 (pretrial agreements) and 12-1 (immunity).
[30] 10 U.S.C. § 950b.

pretrial agreement with Majid Khan in exchange for his testimony against others, presumably including the accused in this case.

In fact, the issues are even more complex than this simplified example suggests. Any immunized witness is likely to be important to the prosecution's case; consequently, undermining the witness's credibility may well be key to the defense. In that situation, the accused will almost certainly have to seek resources – for experts, for travel to the witness's home territory, and so on – in order to discredit him. Requests for those resources, however, go to the Convening Authority – who has already decided that the witness is credible. To make matters worse, those requests must, under RMC 703, be disclosed to the prosecution as well before the Convening Authority will consider them.[31]

On the basis of the same factors identified here, the D.C. Circuit has recognized that "the [Convening Authority] system established in the UCMJ would be inconsistent with due process if instituted in the context of a civilian criminal trial."[32] Nevertheless, in the same case, the court upheld the Convening Authority's dual roles as implemented in the military justice system under the UCMJ. As we explain in the next section, however, the constitutional status of the Convening Authority's role in the military justice system is irrelevant to the constitutionality of the MCA's Convening Authority position. The latter can and should be ruled unconstitutional regardless of the constitutionality of the former.

[31] This concern is not merely hypothetical. The Convening Authority has actively opposed the defense efforts to obtain ex parte treatment of resourcing requests in *United States v. al Nashiri* by filing an amicus brief opposing the defense's motion.

[32] *Curry*, at 877.

B. The Convening Authority Position Established by the Military Commissions Act is Unconstitutional Regardless of the Constitutionality of the Position Under the Uniform Code of Military Justice

The service member-appellant in *Curry v. Department of the Army* challenged his court-martial conviction on the ground that the Convening Authority in his case had both referred the charges to trial and selected the members to sit on his panel. The D.C. Circuit acknowledged that this would violate due process in any civilian trial.[33] It nevertheless upheld the conviction on the basis of the longstanding principle that the "unique circumstances and needs [of the military] justify a departure from civilian legal standards."[34]

None of the special characteristics of military justice that the D.C. Circuit relied upon in *Curry* to exempt military justice from ordinary due process requirements, however, apply to prosecutions brought under the MCA.

First, and most fundamentally, the UCMJ was enacted under Congress's power to "make Rules for the Government and Regulation of the land and naval Forces."[35] The overriding purpose of this power is not punitive but to ensure that the armed forces are "ready to fight wars."[36] The military justice system serves this purpose by maintaining service members' "[o]bedience, discipline, and centralized leadership and control."[37]

These concerns do not apply to military commissions established under the MCA. Law-of-war military commissions are enacted under the Define and Punish Clause, which gives

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[33] *Id*.
[34] *Id*. at 877; *see, also, e.g., Parker v. Levy*, 417 U.S. 733, 743-744 (1974).
[35] Const., art. I, § 8, cl. 14.
[36] *Toth v. Quarles*, 350 U.S. 11, 17 (1955).
[37] *Curry*, at 877; *see also* Manual for Courts-Martial, Part I (Preamble), ¶ 3 (2012) ("Nature and Purpose of Military Law ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

Congress the power to "define and punish . . . Offenses against the Law of Nations,"[38] not the Government and Regulations Clause.[39] Enemy combatants are not members of the "land and naval Forces," and thus the notion of imposing "discipline and good order" on them—the original and still primary purpose of the courts-martial system—is meaningless. Unlike courts-martial, law-of-war military commissions are genuinely criminal tribunals, the sole purpose of which is punishment of enemy combatants who violate the law of war.

The two different purposes of these systems, authorized by two different constitutional powers, means that the constitutional "process due" provided the accused in one system is not necessarily sufficient for the other. These differences are particularly clear with respect to the Convening Authority's function within each system. Under the UCMJ, the Convening Authority is typically the commander of a military unit. The primary job is not military justice, but combat readiness. He or she is responsible for the efficient deployment of resources for all activities that fall within the command, of which military justice is only a minor part. The commander's interest in military justice is less in retributive punishment than in the maintenance of unit discipline, which is necessary for its fighting effectiveness. Finally, unlike in any other judicial system, the commander has a vested interest in and responsibility for the accused, who is a subordinate member of the unit and a soldier, sailor, or Marine who has taken the same oath to defend the Constitution.

These special considerations are invariably cited when courts have upheld the dual role of the Convening Authority in the face of constitutional challenges. In *Curry*, for example, the D.C. Circuit upheld the Convening Authority's dual functions of initiating the criminal proceedings

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[38] Const., Art. I, § 8, cl. 10.

[39] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 661 (2006); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *In re Yamashita*, 327 U.S. 1, 7 (1946).

(through referral) and selecting the panel on precisely these grounds. With respect to the prosecutorial role of the referring authority, the court explained:

> First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second, as we previously have stated, maintenance of discipline and order is imperative to the successful functioning of the military. The commanding officer's power to refer charges may be necessary to establish and to preserve both.[40]

The court's justification for the judicial role of selecting the panel also turned on "unique military needs":

> In order for the command to function effectively, the officer in charge must be assured that he has capable personnel available to perform various tasks. The duties his troops will be called upon to carry out may be difficult, if not impossible, to predict in advance. . . . The commanding officer is well situated to determine whether the various needs of the service will be best served by the selection and participation of particular individuals in a court-martial proceeding. If, on the other hand, court-martial members were required to be chosen from a broad panel of military personnel, a large number of men would be immobilized and effectively removed from the direct control of the commanding officer pending completion of the selection process. Strategic success and human safety could be jeopardized by so impeding the commanding officer's ability to deploy troops. In addition, assembling a panel is frequently a logistic impossibility in combat situations, . . . or if the jury is chosen from troops dispersed over a widespread geographic area.[41]

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[40] *Curry,* at 878. Apart from the considerations offered to justify the Convening Authority's broad prosecutorial discretion under the UCMJ, the UCMJ also includes a very important procedural check on his prosecutorial power that is deliberately omitted from the MCA. Article 32 of the UCMJ provides for a pre-trial hearing before an investigating officer independent of the Convening Authority who conducts an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." 10 U.S.C. § 832(a). That preliminary and independent inquiry is specifically barred from MCA proceedings, leaving the Convening Authority's prosecutorial decision whether to refer charges up to his unchecked discretion. *See* 10 U.S.C. § 948b(d)(1)(C).

[41] *Id.*

Thus, the sole fact justifying the dual role (that would be "inconsistent with due process if instituted in the context of a civilian criminal trial")[42] is that under the UCMJ, the Convening Authority is a military commander whose primary responsibilities are military, not judicial or prosecutorial.

In stark contrast, the Convening Authority under the MCA is a civilian position in a civilian bureaucracy whose *only* responsibilities are judicial and prosecutorial. As a result, not a single one of the factors that might save the UCMJ position from unconstitutionality applies to him. Thus, with regard to the prosecutorial role of deciding whether to refer charges for trial, the MCA Convening Authority needs no "expertise" to make "efficient use of limited supplies and manpower" in order to "weigh the benefits to be gained from such a [military commission] proceeding against those that would accrue if men and supplies were used elsewhere," because its sole authority is over military commission proceedings; it has no authority to use "men and supplies" for any other purpose. Nor are his resources "scarce," nor are "discipline and order . . . imperative to the successful functioning" of the Office of Military Commissions, any more than they are to the functioning of any other civilian bureaucracy.[43]

For the same reasons, no special military needs justify the Convening Authority's simultaneous judicial function of selecting the commission's panel members. "The duties his [personnel] will be called upon to carry out" are emphatically *not* "difficult . . . to predict in advance;" in fact these duties are specified in their [civilian position job descriptions] filed in his office. Moreover, unlike in courts-martial, under the MCA military commission panel members are "required to be chosen from a broad panel of military personnel"[44] – in fact, the CA may

[42] *Id*. at 877.
[43] *Id*. at 878.
[44] *Id*.

select "*any* commissioned officer of the armed forces on active duty" in any of the armed services to serve.[45] Finally, under the MCA, there is no "logistic impossibility" in a assembling a panel to serve on a military commission, both because the hearings take place at Guantanamo Bay Naval Station, not in "combat situations," and because, in direct contrast to the UCMJ, the Convening Authority in fact does select "troops dispersed over a widespread geographic area."[46]

In sum, not a single consideration that exempts the Convening Authority's role under the UCMJ from the ordinary requirements of due process applies to the Convening Authority position established under the MCA. As the Supreme Court has explained in another military case, due process requires "an analysis of the interest of the individual and those of the regime to which he is subject."[47] In the specialized "regime" of military justice, courts have held that even some of the most fundamental principles of due process must bend to accommodate the overwhelming importance of the military mission. But the MCA creates a "regime" that has no military mission, and in which there are no necessities that require deviation from these principles. As explained *supra*, those principles dictate unequivocally that the MCA Convening Authority's simultaneous role as prosecutor and judge of the accused is unconstitutional. The referrals must therefore be dismissed.

7. Oral Argument: The defense requests oral argument.

8. Witnesses: None.

9. Conference with Opposing Counsel: The government opposes the relief requested in this motion.

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[45] 10 U.S.C. § 948i.
[46] *Id.*
[47] *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

10. List of Attachments:

A. Certificate of Service

Very respectfully,

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CERTIFICATE OF SERVICE

I certify that on the 12th day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
JAMES G. CONNELL, III,
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