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	AE355(WBA) **Defense Motion** to Compel Provision of Adequate Representation and Ensure Continuity of Counsel Date Filed: 26 March 2015

1. Timeliness:

This filing is timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7(b) and Rule for Military Commissions (R.M.C.) 905.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission direct the Department of Defense and all of its subordinate components, including the Department of the Army, the Department of the Navy, and the Department of the Air Force, to refrain from initiating any personnel action with respect to a detailed military defense counsel or detailed assistant military defense counsel that would result in severance of the attorney-client relationship without the express written consent of both the military defense counsel and Mr. bin 'Atash or order of the Commission after the opportunity for a hearing on the matter. Prohibited personnel actions include but are not limited to permanent change of station (PCS), involuntary separation or removal from the reserve active-status list for any reason, and demobilization. This order will not apply to personnel actions initiated voluntarily by the servicemember with consent of Mr. bin 'Atash.

Additionally, Mr. bin 'Atash requests that the Commission direct the Convening Authority to request two additional Department of Defense civilian attorney billets to be assigned to Mr. bin 'Atash's defense team and to be filled by experienced and qualified criminal defense attorneys interviewed, vetted, and selected by counsel for Mr. bin 'Atash.

3. Overview:

Within the next six weeks, Mr. bin 'Atash will lose the services of a military lawyer, leaving him represented by a total of three lawyers: two military counsel with no capital experience, and a single learned counsel. Then, in a little over one year, Mr. bin 'Atash will lose one more military lawyer who cannot be adequately replaced. By the end of 2016, Mr. bin 'Atash may have no assigned counsel other than Learned Counsel. The loss of counsel is through no fault of Mr. bin 'Atash and without his consent. In a very short time, the Government-mandated severance of the attorney-client relationships between Mr. bin 'Atash and his military counsel will render Mr. bin 'Atash effectively unrepresented.

The Chief Defense Counsel has exercised her authority under the Regulation for Trial by Military Commission to detail military defense counsel to Mr. bin 'Atash's defense team. These defense counsel, some of whom have been assigned to Mr. bin 'Atash for years, have worked hard to develop trust and rapport with Mr. bin 'Atash, to understand the facts of this complex case, to cultivate contacts with witnesses and experts, and to develop an understanding of the law and strategy applicable to the specialized field of capital defense. Yet, these defense counsel are subject to removal by the United States Department of Defense at any time. Military defense counsel are subject to the whims of the military personnel system, which values breadth of geographic and subject matter experience over the needs of a capital defense case that, unlike most military justice cases, is now certain to last many years. Because of the unique nature of

the military, military defense counsel are frequently forced off of the defense team involuntarily. The concern is not merely hypothetical. The past several years have witnessed the involuntary and erroneous removal of Mr. bin 'Atash's senior military defense counsel from active duty, the threatened involuntary removal of this counsel a second time, and finally this counsel's involuntary forced retirement and removal (without consent of counsel or Mr. bin 'Atash) in January 2015. Additionally, the Government has threatened removal of Mr. bin 'Atash's second-most senior military defense counsel. Mr. bin 'Atash's co-accused face the same issue. Mr. Mohammad recently lost a senior detailed military defense counsel after he was forced off of active duty. At the same time, the Prosecution has access to a virtually limitless supply of civilian prosecutors from the Department of Justice – individuals immune from the vagaries and idiosyncrasies of the military personnel system. Those military attorneys that are detailed to the Prosecution have also received preferential treatment. For example, the Chief Prosecutor (a detailed member of the Prosecution) was extended an additional three years on active duty specifically to prosecute the instant case, while the United States military forced the separation of LCDR James Hatcher – severing the relationship with counsel that had represented Mr. bin 'Atash since 2008.

Defense counsel, unlike prosecutors, are not "fungible items" to be removed and replaced on a whim. *United States v. Baca,* 27 M.J. 110, 119 (C.M.A. 1998). When the Chief Defense Counsel details military defense counsel to represent Mr. bin 'Atash, and counsel develop an attorney-client relationship with Mr. bin 'Atash, the law sets out that counsel may only be removed under extremely limited circumstances: upon request of Mr. bin 'Atash, upon application of counsel, or for "good cause shown on the record." R.M.C. 505(d)(2)(B). This Rule is consistent with federal capital practice, wherein counsel "*shall* represent the defendant

throughout every subsequent stage of available judicial proceeding" and may only be replaced "upon the attorney's own motion or upon motion of the defendant." 18 U.S.C. § 3599(e) (emphasis added).

This motion does not concern circumstances wherein defense counsel makes a bona fide, voluntary request to depart the defense team and where Mr. bin 'Atash consents to the attorney's departure. Absent those circumstances, the Government must demonstrate "good cause" to force involuntary severance. Military jurisprudence is clear that "good cause" does not include matters of administrative convenience or routine personnel actions such as PCS, demobilization, or separation – the root cause of the various Government-mandated personnel actions in this case to date. This is particularly true, the courts have indicated, where the case is a capital case, where the attorney in question has a longstanding relationship with the client, where counsel had made substantial contributions to the defense, and where the client desires counsel's services. All of these factors are and have been present with respect to the Government-mandated severances of the attorney-client relationship in Mr. bin 'Atash's case.

Where the Government manages to affect an involuntary severance without good cause, the impact can be devastating. When Mr. bin 'Atash loses a lawyer, he loses a body of accumulated knowledge, loses continuity with witnesses and experts, and loses an attorney with whom he has built trust and a rapport. Even when a severance is only threatened, the threat itself can be equally crippling. Senior military defense counsel for Mr. bin 'Atash have been prevented from performing necessary tasks because of the threat of their Government mandated severance from the defense team. Military counsel have been unable to perform certain investigations, witness and expert interviews, and long-term defense tasks due to the threat of severance; Mr. bin 'Atash cannot be certain any of his military lawyers will be there when

information the military attorney developed or learned might be needed. Mr. bin 'Atash cannot be certain any of his military lawyers will be there when his case is tried. Mr. bin 'Atash cannot be certain any of his military lawyers will be there when he is litigating his sentence – a sentence that might result in his death. As with a conflict of interest or other external impediment to representation, counsel's ability to zealously represent Mr. bin 'Atash is threatened where counsel is encumbered with the looming threat of removal, impacting counsel's abilty to provide effective representation.

Given that even the threat of severance can undermine counsel's ethical responsibilities, cause structural error, and cause long-term, unquantifiable harm to the defense, it is incumbent upon counsel to raise this issue to the Commission before any further damage can be done. It is not enough that counsel be able to raise the matter to the Commission's attention at the very last moment, when there may be little practical assistance that the Commission can offer. Instead, the obvious solution is to prevent a looming Government mandated severance of the attorney-client relationship from becoming an emergency threat to the attorney-client relationship, by ensuring that the Commission has visibility on and control over military personnel actions that will directly impact the Commission. Specifically, the Commission should prohibit any Government action that would result in severance (such as the issuance of separation orders) without written permission of counsel and Mr. bin 'Atash or leave of the Commission after an opportunity for a hearing on the matter. This is a practical solution that will afford the Government the opportunity to demonstrate "extraordinary circumstances" that might justify involuntary severance in a manner that also adequately protects the constitutional and statutory counsel rights of Mr. bin 'Atash. The Commission has authority to enter this relief because the

Military Judge has broad discretion to take measures to ensure a fair trial with respect to the case over which he is presiding.

Common sense measures to protect the sanctity of the attorney-client relationship with regard to military defense counsel are only one part of the solution; the other part of the solution is the detail of civilian defense counsel for Mr. bin 'Atash. As early as 2012, both Mr. bin 'Atash and the Chief Defense Counsel placed requests to the Convening Authority for additional Department of Defense civilian defense counsel billets for the Office of the Chief Defense Counsel, to be assigned to the various capital defense teams. These requests specifically and presciently noted the "significant and disruptive turnover" that would result from the primary use of military defense counsel. However, the Convening Authority denied Mr. bin 'Atash's request, and requests placed by successive Chiefs Defense Counsel have yet to be fulfilled.

The passage of time, and the departure or threatened departure of military counsel, has emphasized the wisdom and necessity of these requests. In addition to protecting the continuity of counsel in the course of a protracted case by utilizing individuals not susceptible to Government mandated removal, utilizing civilian defense counsel will also help to remedy the appearance of unlawful influence engendered by the Government's actions with respect to military counsel, and utilizing civilian counsel will help to bring Mr. bin 'Atash's counsel resources into somewhat closer parity with those of the Prosecution. The Convening Authority and the Trial Judiciary recently recognized the value and importance of expertly-qualified civilian defense counsel when the Trial Judiciary requested and the Convening Authority obtained five additional civilian defense counsel billets to be assigned to the Trial Judiciary and filled by individuals "who have specialized skills that are generally not available among military personnel, such as capital litigation and national security law experience." Attachment E at

MEA-AE344-000017. The Convening Authority has made some suggestion that the Office of Chief Defense Counsel will receive eight such positions for all of the various defense teams and functions; a woefully inadequate number and a suggestion that, as of yet, is unfulfilled.

The Commission has the power to direct the Convening Authority to assign two experienced and qualified DoD civilian defense attorneys to OCDC for further assignment to Mr. bin 'Atash. The Commission should take this action in addition to enacting measures designed to protect the sanctity of the attorney-client relationship with respect to detailed military defense counsel.

4. Burden of Proof:

As the moving party, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

a. Mr. bin 'Atash is currently represented by a single learned counsel and three detailed military defense counsel (two of whom have entered an appearance with the Commission). Mr. bin 'Atash has in the past has been represented by other military defense counsel who have departed due to permanent change of station (PCS), separation, demobilization, or retirement. In May 2014 a military defense counsel departed the defense team due to retirement. In January 2015, Mr. bin 'Atash's senior military defense counsel (who had represented Mr. bin 'Atash since 2008) was forced off of the defense team due to involuntary retirement (discussed in additional detail below). In addition to counsel, other servicemembers also serve as integral components of the defense team and are within the defense privilege, including paralegals and investigators. These servicemembers are also subject to routine personnel actions including PCS, separation, and demobilization. For example, in September

2014, Mr. bin 'Atash's sole military investigator departed the defense team due to demobilization. Mr. bin 'Atash's defense team is still operating without a military investigator.

b. While some departures of defense team members have been with the consent of Mr. bin 'Atash, the United States Government has also engaged or attempted to engage in a series of involuntary personnel actions that have substantially impacted Mr. bin 'Atash's representation and severed existing and long-standing attorney-client relationships.

c. LCDR James Hatcher served as defense counsel for Mr. bin 'Atash and maintained an attorney-client relationship with Mr. bin 'Atash since charges were initially preferred against Mr. bin 'Atash in 2008. LCDR Hatcher maintained a relationship with Mr. bin 'Atash longer than any other attorney that has ever represented or is currently representing Mr. bin 'Atash. On 6 May 2011, LCDR Hatcher, a Navy Reservist, was involuntarily and erroneously separated from active duty due to "higher tenure." Navy Personnel Command (PERS) later admitted that it mistakenly ordered LCDR Hatcher's removal from active duty, but it took more than a year (until 3 September 2012) to re-mobilize LCDR Hatcher to his position on the bin 'Atash defense team. *See* AE305(WBA) at 4-6; AE305(WBA), Attachment B. During the intervening year, LCDR Hatcher was forced to endure significant personal hardship and incur significant unreimbursed expense in order to maintain his attorney-client relationship with Mr. bin 'Atash while acting as pro bono counsel.

d. On 18 February 2014, LCDR Hatcher signed a Voluntary Service Agreement (VSA) requesting to remain on active duty for an additional year, until at least 20 August 2015. However, on 5 May 2014, PERS issued orders directing LCDR Hatcher's detachment from the Office of Military Commissions and demobilization to occur no later than 15 August 2014. AE305(WBA), Attachment L.

e. On 13 June 2014, Mr. bin 'Atash filed AE305(WBA), Emergency Defense Motion to Prevent Severance of Attorney-Client Relationship. The motion asserted that LCDR Hatcher's involuntary demobilization would amount to an unauthorized severance of the attorney-client relationship without good cause. Mr. bin 'Atash sought the Commission's assistance in retaining LCDR Hatcher is his position. On 19 June 2014, Mr. Binalshibh supplemented AE305(WBA) with AE305(RBS Sup), providing additional facts concerning the impending involuntary demobilization of CDR Tri Nhan, military defense counsel for Mr. Binalshibh.

f. On 20 June 2014, shortly after the filing of AE305(WBA) and AE305(RBS Sup), the Navy appeared to reverse course on the plan to demobilize both LCDR Hatcher and CDR Nhan. The Director of Fleet Personnel Development and Allocation for U.S. Fleet Forces Command (USFF) indicated in an email to the Chief Defense Counsel that, with the personal concurrence of the Judge Advocate General of the Navy, he was directing the cancellation of LCDR Hatcher's demobilization orders and the extension of LCDR Hatcher for one additional year on active duty.

g. Based upon the Navy's unqualified assurance that LCDR Hatcher's extension would now be approved, LCDR Hatcher made various personal decisions including enrolling his children in private school in Virginia, extending his lease agreement on his home and Virginia, and making commitments to the family residing in his home in South Carolina.

h. Between 20 June 2014 and 16 July 2014, the Navy failed to publish any extension orders for LCDR Hatcher. On 16 July 2014, without warning, USFF retracted its endorsement of LCDR Hatcher's one year mobilization extension. USFF used as pretext for the retraction a supposed dispute concerning alleged overpayment of family separation allowance (FSA). On 17

July 2014, the Chief Defense Counsel then requested a temporary, 90 day extension of LCDR Hatcher's mobilization orders. USFF initially appeared to support a 90 day interim extension and provided instructions on signing a 90 day VSA, but the following day USFF walked back its support and indicated that the Chief Defense Counsel would be required to "provide a request letter on command letter head" addressing various issues including LCDR Hatcher's FSA payment status. USFF indicated that only then would a 90 day temporary extension "be considered."

i. Subsequent to the Navy's apparent decision to revoke his one year mobilization extension, LCDR Hatcher concluded that remaining on active duty was no longer a viable option for him, his wife, and his children. While LCDR Hatcher wished to continue his representation of Mr. bin 'Atash and maintain his attorney-client relationship with Mr. bin 'Atash, he reasoned that he needed to provide some measure of stability and certainty for his family and for Mr. bin 'Atash. LCDR Hatcher informed the defense team that, due to the actions of the Government, he would likely demobilize on or about 20 August 2014. At that time, the bin 'Atash defense team was forced to mitigate the apparent forced departure of LCDR Hatcher. Counsel took measures including curtailing LCDR Hatcher's investigative work and removing LCDR Hatcher from a planned investigative trip in early August 2014. The defense team expended significant effort attempting to ensure some semblance of transition on short notice given LCDR Hatcher's extensive involvement in all aspects of case preparation and, in particular, his role as the primary point of contact for a number of defense experts.

j. On 7 August 2014, the Navy reversed course again. The Secretary of the Navy signed a memorandum personally approving the extension of LCDR Hatcher and CDR Nhan on active duty, with LCDR Hatcher's extension not to exceed 14 August 2015. Mr. bin 'Atash then

withdrew AE305(WBA), temporarily concluding a saga that had resulted in hundreds of hours spent by many people attempting to secure a one year extension for LCDR Hatcher.

k. LCDR Hatcher desired to remain a member of the defense team through and beyond 14 August 2015, and Mr. bin 'Atash wanted LCDR Hatcher to remain his counsel. However, the Navy notified LCDR Hatcher that he was subject to the mandatory attrition provisions of 10 U.S.C. § 14701 and would be removed from the reserve active duty list on 1 April 2015. Attachment B. On 22 October 2014, the Navy issued separation orders for LCDR Hatcher, directing his detachment from the Office of Military Commissions no later than 31 January 2015. LCDR Hatcher's final day with the Office of the Chief Defense Counsel was 30 January 2015. LCDR Hatcher's relationship with Mr. bin 'Atash was severed, without consent of Mr. bin 'Atash, shortly before hearings scheduled for 9-20 February 2015. *See* AE305E(WBA). Severance of Mr. bin 'Atash's relationship with LCDR Hatcher, Mr. bin 'Atash's longest-serving counsel and the individual with arguably the deepest personal rapport with Mr. bin 'Atash, has once again disrupted and impeded Mr. bin 'Atash's representation.

l. Additional involuntary personnel actions will occur in the near future, and they are also necessitating strategic choices and resulting in diminished representation with respect to other military members on the bin 'Atash defense team. Capt Michael Schwartz, with LCDR Hatcher's departure, is now Mr. bin 'Atash's longest-serving military defense counsel; he has been detailed to the instant case since 25 July 2011, prior to referral. In March 2014, an Air Force Central Selection Board (CSB) convened to consider Capt Schwartz's promotion to Major. However, because of a chain of administrative errors outside of Capt Schwartz's control, he was not selected for promotion to Major.[1] Because of these administrative errors and Capt

[1] The records made available for the Management Level Review (MLR) completed prior to Capt Schwartz's CSB erroneously omitted the fact that Capt Schwartz had completed Squadron Officer School (despite Capt Schwartz's

Schwartz's subsequent non-selection, he may be required to separate from active duty by the end of 2015 in accordance with Air Force Instructions 36-2501 and 36-3207. Capt Schwartz's involuntary separation would be particularly devastating to Mr. bin 'Atash's defense given that Capt Schwartz maintains a strong working relationship with Mr. bin 'Atash and is intimately involved in every aspect of Mr. bin 'Atash's defense, from in-court advocacy to motions preparation, administrative matters and travel arrangements, and relationships with witnesses and experts. Even if Capt Schwartz is promoted to Major and permitted to remain on the defense team, this will provide only temporary relief; if promoted, the Air Force will require Capt Schwartz to sever his relationship with Mr. bin 'Atash due to PCS in the Summer of 2016.

m. Government mandated severance of attorney-client relationships are not unique to Mr. bin 'Atash. Other defense teams also face continuing problems with involuntary severance of the attorney-client relationship. For example, on 26 February 2014, the Army notified MAJ Jason Wright, detailed military defense counsel for Mr. Mohammad, that he would either be required to report [redacted] no later than [redacted] August 2014 to attend a graduate course in military law, or resign from the Army. *See* AE283(Mohammad), Notice of Governmental Directed Severance of the Attorney-Client Relationship. Either option would result in involuntary severance. Ultimately, MAJ Wright opted to resign from active duty, which permitted him to extend his relationship with Mr. Mohammad for only a short additional period of time.

n. While the bin 'Atash defense team has been either subject to or threatened by a continuous stream of involuntary personnel actions, members of the Prosecution have received different and more preferential treatment. The Chief Prosecutor (a detailed member of the

timely notification that he had completed this required course), resulting a recommendation of "Promote" rather than a recommendation of "Definitely Promote."

Prosecution on the instant case) was due to retire in November 2014 but was recently extended on active duty until 2017 "specifically for him to continue performing the duties of Chief Prosecutor, Office of Military Commissions, Washington, D.C., for an additional three years." *See* Carol Rosenberg, *Due to retire, Guantanamo prosecutor gets 3 more years on job,* Miami Herald (September 19, 2014), available at http://www.mcclatchydc.com/2014/09/19/240506/due-to-retire-guantanamo-prosecutor.html.

o. Other members of the Office of the Chief Prosecutor have also received apparent preferential treatment. For example, one Army Reservist prosecutor was retained on active duty with OCP for approximately nine years despite having been passed over three times for promotion to Lieutenant Colonel.

p. In addition to apparent preferential treatment, the Prosecution team on the instant case is largely immune from the effects of involuntary military personnel actions because it is composed of civilian prosecutors from the Department of Justice in whatever number requested by the Chief Prosecutor. While DoJ attorneys may be detailed to OCP without restriction, OCDC has no such resource to draw upon and instead must rely on civilian positions authorized, created, and funded by the Department of Defense.

q. The bin 'Atash defense team has in the past requested that the Convening Authority fund experienced DoD civilian attorneys to be assigned to the team. Nearly three years ago, on 24 August 2012, the defense submitted a memorandum to the Convening Authority requesting "the addition of two qualified civilian attorneys who are not forecast to rotate out of the position or retire before 2016." Attachment C. In the request, counsel noted that, even if the defense team were to be assigned qualified military counsel, "the likelihood of a PCS or retirement almost guarantees that the additional military attorney would not remain on the case

for its duration." *Id.* On 30 August 2012, the Convening Authority denied the defense request and suggested that counsel "contact the Chief Defense Counsel, who is the authority responsible for detailing qualified defense counsel to military commission cases, for resolution of [counsel's] concerns." Attachment D. The denial did not address continuity concerns raised in the request.

r. The Chief Defense Counsel has no inherent authority to authorize civilian billets or hire qualified civilian counsel. The Chief Defense Counsel has on multiple occasions requested additional civilian attorney billets for OCDC, and the requests have been consistently rebuffed by the Convening Authority. In July 2012, the Chief Defense Counsel noted in a memorandum to the Convening Authority that the "primary use of military personnel has already resulted in significant and disruptive turnover in both attorneys and paralegals on these highly complex cases…Whereas prosecutors are generally fungible and can come and go on a particular case, defense counsel cannot." AE030(MAH Sup), Attachment B. In the same memorandum, the Chief Defense Counsel requested "authority to hire and [sic] additional five civilian attorneys to be employed within the Office of the Chief Defense Counsel and to be assigned to each of the requesting teams that are currently defending a referred capital case." *Id.* On 3 August 2012, the Convening Authority denied the Chief Defense Counsel's request for additional qualified civilian defense counsel. AE030B.

s. In an affidavit signed on 22 August 2012, the Principal Deputy Chief Defense Counsel reiterated the need for "additional civilian counsel with complex litigation experience." AE030C at 2. The Deputy noted a need for "continuity of counsel" and stated that "lengthy delay…combined with the necessarily lengthy trial period equals a period that exceeds the normal tour for a military lawyer. The change in counsel due to retirement, permanent change of station or separation of military attorneys can be mitigated with the additional employment of

civilian counsel who would remain with these cases to their completion. Unlike the Chief Prosecutor, our Office has no ready pool of government attorneys, trained in this type of complex litigation who can be plugged in at will." *Id.*

t. Subsequent to the Chief Defense Counsel's July 2012 request, additional requests for funded DoD civilian defense counsel positions have been placed to the Convening Authority, and to date no additional civilian attorneys have been made available for assignment to Mr. bin 'Atash's defense team. Although there has been some suggestion of an additional eight civilian defense counsel to be provided to the entire Office of the Chief Defense Counsel, to date this suggestion is unfulfilled.

u. The Office of the Chief Defense Counsel is undermanned even with respect to currently authorized and funded military billets. The Office is presently at approximately 68% manning for military attorneys. The shortage of military attorneys is not expected to be rectified in the near term; current projected departures will only intensify the problems of undermanning.

v. In addition to refusing to create additional civilian defense counsel positions to mitigate the continuity of counsel issues created by the use of military defense counsel, the Convening Authority has also refused to appoint and fund additional learned counsel and refused to appoint any other civilian defense counsel through any means, including the expert appointment process. Although the Convening Authority acknowledges that he has the authority to fund additional learned counsel and additional DoD civilian defense attorneys assigned to the Office of the Chief Defense Counsel, he maintains that he otherwise [redacted] *See, e.g.* AE309(WBA), [redacted]

w. On 9 February 2015, the Prosecution provided Mr. bin 'Atash with discovery pertaining to the assignment of additional civilian and military personnel to the Trial Judiciary. Attachment E. The discovery includes a memorandum to the Convening Authority from the Senior Attorney Advisor and Acting Staff Director for the Trial Judiciary, wherein the Trial Judiciary sought five additional civilian attorney billets, in addition to new billets for support staff and military personnel. The Trial Judiciary indicated that it sought GS-14 or GS-15 attorneys with "[n]ot less than 10 years' experience," including experience in, *inter alia*, federal criminal law and national security law. *Id.* at MEA-AE344-000019. The Convening Authority endorsed the Trial Judiciary's request to Washington Headquarters Services, indicating that the billets "would allow the [Trial Judiciary] to hire attorneys who have specialized skills that are generally not available among military personnel, such as capital litigation and national security law experience." *Id.* at MEA-AE344-000017. The Convening Authority further noted that the additional civilian attorneys would provide "continuity on cases." *Id.* The Convening Authority indicated that the Military Commissions Trial Judiciary handles cases requiring "mastery of complex and unique issues of law." *Id.*

x. On 14 January 2015, Washington Headquarters Services approved the Convening Authority and Trial Judiciary's request and created five additional civilian attorney billets for the Trial Judiciary.

6. Law and Argument:

Mr. bin 'Atash has both statutory and constitutional rights to counsel before this capital Military Commission. *See e.g.* 10 U.S.C. § 948k, 10 U.S.C. § 949c, *Strickland v. Washington,* 466 U.S. 668 (1984). Statutorily, Mr. bin 'Atash has "*at a minimum*" the following non-exclusive counsel rights: to be represented by "*at least one*" learned counsel, to be represented

by civilian counsel retained by Mr. bin 'Atash at no expense to the Government (non-DoD counsel), and to be represented by at least one military defense counsel (either assigned by the Chief Defense Counsel or selected by Mr. bin 'Atash, if reasonably available). 10 U.S.C. § 948a(b)(2)C); § 949c(b) (emphasis added). The statute sets forth only minimum "rights" applicable to *all* capital cases (regardless of scope or complexity), and it does not define these rights as exclusive, nor does it purport to encapsulate the entire scope of an accused's constitutional right to counsel before a military commission in any particular case. In this regard, the statute is similar to 18 U.S.C. § 3005 and 18 U.S.C. §3599, pertaining to a defendant's counsel rights in a capital proceeding before an article III tribunal. Federal law requires that courts appoint two attorneys, "of whom *at least* 1 shall be learned in the law applicable to capital cases," to each capital defendant. 18 U.S.C. § 3005 (emphasis added). While 18 U.S.C. § 3005 requires assignment of *at least* two attorneys and *at least* one learned counsel, other provisions make plain that a capital defendant may be entitled to the appointment of additional counsel where circumstances warrant. *See, e.g.,* 18 U.S.C. § 3599(a)(1); *see also* United States Courts, *Guide to Judicary Policy – Volume 7: Defender Services,* § 620.10.10(b) ("[u]nder 18 U.S.C. § 3599(a)(1), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case."). In practice, additional attorneys, including a second learned counsel, are almost always detailed in order to ensure constitutionally-adequate representation on complex capital cases. *See* AE030, Attachments F and G.

While an accused before a military commission does not have a *per se* statutory right to be represented by more than one *military* defense counsel, "the person authorized under regulations prescribed by R.M.C. 503 to detail counsel, in such person's sole discretion, may

detail additional military counsel to represent the accused." R.M.C. 506(a); *see also* 10 U.S.C. § 949c(b)(5). Per the Regulation for Trial by Military Commission (2011), ¶ 9-1(a)(4),(5), it is the function of the Chief Defense Counsel to detail defense counsel and assistant detailed defense counsel to represent an accused before a military commission. With respect to Mr. bin 'Atash's defense team, the Chief Defense Counsel has detailed at present three military defense counsel to represent Mr. bin 'Atash – selecting from the limited pool of military defense counsel made available by the Convening Authority and the military departments. Of the military counsel currently detailed to Mr. bin 'Atash, one attorney is departing due to demobilization in June 2015, and one attorney (Mr. bin 'Atash's longest-serving military counsel after the recent departure of LCDR Hatcher) will likely be required to involuntarily separate from active duty in late 2015 (or be required to move in approximately one year, if promoted to Major). Mr. bin 'Atash's lone remaining military attorney is then likely to end his relationship with Mr. bin 'Atash due to a Government mandated permanent change of station (PCS) move in the Summer of 2016. The Chief Defense Counsel has advised that additional military attorneys will likely not be available to Mr. bin 'Atash in the near term, and when such attorneys are made available, they, like their predecessors, will be hamstrung by limited experience and qualifications and limited-duration duty assignments.

Recognizing the problems inherent in reliance upon military defense counsel in cases as lengthy and complex as the instant case, as early as July and August 2012, both the bin 'Atash defense team and the Chief Defense Counsel began placing requests to the Convening Authority for qualified civilian defense counsel to be assigned to OCDC and the Office's active capital cases. These requests to the Convening Authority consistently noted that "the likelihood of a PCS or retirement almost guarantees that [military attorneys] would not remain on the case for

its duration, that the primary use of military attorneys would result in "disruptive turnover," and that the office had a requirement for "continuity of counsel" in a case expected to last many years. *See, e.g.* AE030(MAH Sup), Attachment B; AE030C at 2. The Convening Authority consistently spurned every attempt by the Office of the Chief Defense Counsel to secure additional funded DoD civilian attorney positions, instead simply referencing the various military attorneys already assigned to OCDC.

The concerns expressed by the Chief Defense Counsel and the bin 'Atash defense team in 2012 now seem particularly prescient, as time passes and the case slowly progresses with no end in sight. Military counsel who have been detailed to the bin 'Atash defense team since the case's inception are now either being forced to leave (overtly or constructively) or are departing largely due to the particularities of the military's personnel system, which includes rigid rules regarding retirement and attrition and which generally values breadth of experience, duty stations, and assignments over the needs of a single, long-lasting capital case.

Most recently, LCDR Hatcher, Mr. bin 'Atash's longest-serving counsel, was involuntarily removed from active duty and participation on the instant case without leave of counsel, the Commission, or Mr. bin 'Atash. Mr. bin 'Atash's now longest-serving military counsel faces a similar threat of imminent removal. The coming months will likely see Mr. bin 'Atash left with a single military defense counsel, who himself will be required to PCS long before the conclusion of this case. As military defense counsel are forced to depart the defense team, the need for continuity is more urgent than ever. The case grows in complexity by the day, with the defense already in possession of over 48 gigabytes of unclassified discovery – a figure that will undoubtedly grow exponentially in coming months and years. *See* AE175E at 4. Complex issues with long-term implications for pretrial litigation, the merits, and sentencing

arise on a daily basis with events such as the release of the Senate Select Committee on Intelligence's Executive Summary of its Study of the CIA's Detention and Interrogation Program. Trial Counsel has noted that a "tremendous amount of work" is being conducted behind the scenes and out of sight of the Commission, for example, with respect to discovery. *Tr.* at 8331. Yet, at the same time, the Commission remains mired in a growing list of Government-caused delays – delays that underscore the need for counsel available for the long term and potentially years to come. *See, e.g,* AE312 (noting that "[t]he resolution of the conflict-of-interest issue (AE 292) and the determination of Mr. bin al Shibh's mental capacity to participate (AE 152) are not expected to be completed in the near term."); AE350 (delays caused by revelation of CIA interpreter assigned to the defense); AE343C at 9 (with regard to change in Regulation for Trial by Military Commission, Commission finds that "[t]he actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion").

A. Necessity of Proactive Measures to Protect Sanctity of Attorney-Client Relationship with Respect to Detailed Military Defense Counsel

The law recognizes that an attorney's relationship with her client is "personal and privileged" and involves "confidence, trust, and cooperation…" *United States v. Iverson,* 5 M.J. 440, 443 (C.M.A. 1978). Military attorneys detailed to Mr. bin 'Atash's defense team have worked tirelessly to improve trust and rapport with Mr. bin 'Atash, to gain a basic understanding of the facts of this complex and multi-faceted case, to cultivate contacts with witnesses and experts, and to develop a rudimentary understanding of the law concerning the defense of capital cases. Defense counsel "are not fungible items." *United States v. Baca,* 27 M.J. 110, 119

(C.M.A. 1988); *see also United States v. Spriggs,* 52 M.J. 235, 239-40 (C.A.A.F. 2000). When a military defense counsel departs the team (for whatever reason), the team loses not simply a warm body to sit at counsel table but also a wealth of institutional knowledge, continuity with witnesses and experts, and a trusted confidant with Mr. bin 'Atash. The effect of the loss can be to set the defense team back months or years in trial preparation. Moreover, because defense counsel are not fungible, the loss cannot be remedied simply by dropping a new military attorney into the departed attorney's position, as the Convening Authority might suggest.

The impact of the loss of military defense counsel is amplified by the constant turnover of other military personnel. In Mr. bin 'Atash's case, this has been especially true with respect to military investigators. While the Prosecution is supported by the full investigative might of the FBI and the various intelligence agencies, Mr. bin 'Atash recently lost his sole remaining military investigator to demobilization. It is difficult to imagine how a freshly-detailed military attorney might be expected to train and supervise a freshly-detailed investigator when the attorney himself has little to no understanding of the case's history.

The impact of the loss of military defense counsel is felt even prior to the member's loss. The potential loss of servicemembers through Government mandated PCS, separation, retirement, or demobilization impacts decisions as to the assignment of tasks and the ability of counsel to go "in depth" on topics and with witnesses and experts even many months prior to the member's expected departure. In one extreme example, LCDR Hatcher was removed on short notice from overseas investigative travel in August 2014 when he had been informed his departure was imminent. Other cases are less obvious but no less damaging; for example, counsel and Mr. bin 'Atash must now question Capt Schwartz's participation on long-term

projects such as discovery organization, motion argument or witness preparation, because those tasks are unlikely to be completed before his Government mandated departure.

Because of the real-world impact on representation, the loss or potential loss of vital and longstanding team members also raises grave ethical concerns for the defense team. Counsel have the duty to advocate zealously on behalf of Mr. bin 'Atash and to act with the requisite "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rule of Professional Conduct 1.1; ABA Model Rule of Professional Conduct 1.3, Comment; *see also* R.T.M.C. ¶ 9-1(b)(2)(A); R.T.M.C. 9-1(a)(9) ("[t]he Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation…"); R.M.C. 502(d)(7), Discussion ("defense counsel must "guard the interests of the accused zealously" and "represent the accused with undivided fidelity."). However, as with a conflict of interest or other external impediment to representation, these duties are impeded where counsel must refrain from participating in important long-term projects, witness and expert interviews, or discussions with Mr. bin 'Atash because of impending involuntary departure.

These ethical concerns are particularly acute in a capital case, because ethical failures can lead to a client's wrongful execution. The Supreme Court has noted that, in determining what constitutes ineffective assistance of counsel, standards promulgated by the American Bar Association may serve as "guides to determining what is reasonable. *Strickland,* 466 U.S. at 688; *see also Wiggins v. Smith,* 539 U.S. 510, 524 (2003) (citing ABA Guidelines as establishing "well-defined norms" for the defense of capital cases). The ABA indicates as a foundational principle of capital representation that "[i]t is essential that both full-time defenders and assigned counsel be fully independent [and] free to act on behalf of their clients as dictated by their best

professional judgment" because "[a] system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 941 (2003). This precept is important here because counsel encumbered by the prospect of imminent separation from the defense team are not "independent" or "free to act on behalf of their clients as dictated by their best professional judgment." Instead, they are beholden to a military personnel system that has priorities entirely different from that of a longstanding capital defense team. The Guidelines go on to note that "any acceptable Legal Representation Plan must assure that individual lawyers are not subject to formal or informal sanctions (e.g., through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation." *Id.* Yet, that is precisely the driving influence behind many "voluntary" or involuntary military departures – the sense that military attorneys must move on, PCS, and rotate into new assignments in order to remain competitive for promotion and future service. *See, e.g,* AE283(Mohammad) at 5 (Army JAG Personnel Office advised detailed military defense counsel for Mr. Mohammad that remaining as counsel for Mr. Mohammad would "adversely affect [counsel's] ability for future promotions to higher grades of rank.").

Because the attorney-client relationship is sancrosanct and because there exist myriad practical and ethical issues when the relationship is severed, both military and civilian law place great emphasis upon ensuring continuity of defense counsel on capital cases. Under federal law with respect to the appointment of counsel on capital cases, "[u]nless replaced by similarly qualified counsel *upon the attorney's own motion or upon motion of the defendant*, each attorney

so appointed *shall represent the defendant throughout every subsequent stage of available judicial proceeding*, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court…and all available post-conviction process…" 18 U.S.C. § 3599(e) (emphasis added). Guidelines for the appointment of capital defense counsel published by the Administrative Office of the U.S. Courts emphasize this point under a section titled "continuity of representation." United States Courts, *Guide to Judiciary Policy – Volume 7 (Defender Services)*, § 620.70; *see also Harbison v. Bell,* 556 U.S. 180, 193 (2009) (noting that "[s]ubsection (e) [of 18 U.S.C. § 3599] emphasizes continuity of counsel…").

The Rules for Military Commissions place similar emphasis on protection of the attorney-client relationship. Military law recognizes that "[a]n accused's right to be represented by defense counsel appointed in his behalf is a fundamental principle of military due process." *United States v. Murray,* 1970 WL 7062 (C.M.A. 1970). As such, R.M.C. 505(d)(2)(B) dictates that, after formation of the attorney-client relationship, the detailing authority may excuse counsel only "(i) Upon request of the accused or application for withdrawal by such counsel" or "(ii) For other good cause shown on the record." The present motion does not concern instances covered by "(i)," insofar as the application for withdrawal by defense counsel is truly initiated by defense counsel of counsel's own free will, with consent of Mr. bin 'Atash, and made without interference by or influence of the Department of Defense. However, with respect to "(ii)," the Government's options for demonstrating "good cause" to force involuntary severance of the attorney-client relationship are extremely limited.

In particular, the Government cannot simply initiate a routine personnel action such as PCS, separation, or demobilization and then claim that the action constitutes "good cause" for

severance. "Once entered into, the relationship between the accused and his appointed counsel may not be severed or materially altered for administrative convenience" because "[t]he right to counsel is a basic right, and cannot be manipulated in the name of expeditiousness without endangering that right to the status of an empty formality." *United States v. Eason,* 21 C.M.A. 335, 338 (C.M.A. 1972); *see also United States v. Murray,* 20 U.S.C.M.A. 61, 62 (C.M.A. 1970) (overturning conviction where attorney-client relationship involuntarily severed due to PCS of defense counsel because the attorney-client relationship "may not be severed or materially altered for administrative convenience.") (citing *United States v. Tellier*, 13 U.S.C.M.A. 323 (1962). *Eason* involved the PCS of both the accused and his defense counsel on a capital case. In determining that severance was inappropriate, the Court considered the fact that the accused had a longstanding professional relationship with his counsel, that the accused was "on trial for his life," that the accused preferred the services of his severed counsel, and that the severance was purely "for the convenience of the Government and not because of a problem personal to defense counsel…" *Id.* at 339.

Eason is far from alone in reaching this result; in reality the military courts have been loath to sanction involuntary severance under any circumstances but particularly where the charges are serious and where the attorney has a well-evolved relationship with his client. In *United States v. Roman,* 2 M.J. 1189, 1194-95 (N.C.M.R. 1976), the attorney had "established a lawful attorney-client relationship with [his client]," the attorney's contribution to the defense had been "substantial," and the attorney "desired to continue to represent his client and [the client] desired that he do so." Nevertheless, the Government refused to appoint the attorney as assistant detailed defense counsel. In reversing this capital case, the Court concluded that the detailing authority "would be required to detail as assistant defense counsel the lawyer who had

been lawfully engaged for a substantial period in actively participating in the preparation of his client's defense to a charge of premeditated murder." *Id.* at 1195.

While it is not impossible to conceive of circumstances that would amount to "good cause" for involuntary severance, the law requires that it be an "extraordinary circumstance rendering virtually impossible the continuation of the established relationship…" *Iverson,* 5 M.J. at 442-43. Such "extraordinary" circumstances might include, for example, serious and debilitating illness or military exigencies involving an ongoing conflict. However, absent such extraordinary circumstances (which are not present in this case), courts simply will not accede to an involuntary departure that is based only upon convenience or administrative considerations. Even a cursory review of recent Government actions with respect to detailed counsel for Mr. bin 'Atash and his co-accused reveal that the actions aimed at severing the attorney-client relationship are based purely upon obscure and technical administrative factors – considerations that pale in comparison to Mr. bin 'Atash's life and that, in any event, could be waived without great detriment to the Government. *See, e.g.* AE283 at 2-5 (noting that the Judge Advocate General of the Army may grant deferrals of Graduate Course attendance for "compelling reasons," but that MAJ Wright's deferral was denied in part due to the "diminished promotion potential" that might result from a deferral). In fact, the Chief Prosecutor himself has been granted an additional three year "deferral" of his retirement from the U.S. Army, while Mr. bin 'Atash's senior detailed military counsel (until his recent departure) was twice involuntarily removed from active duty in the course of his participation on this case.

Given that even the threat of a pending involuntary severance creates tangible, practical difficulties in managing a capital defense team and maintaining effective representation in a case expected to last many years, it is not enough that the defense be able to raise a complaint to the

Commission at the very last moment, when there may be little that the Commission is able to accomplish in order to halt the administrative momentum of a military department's personnel action. For example, by the time Mr. bin 'Atash filed AE305(WBA), Navy Personnel Command had already issued separation orders for LCDR Hatcher, and the defense was required to take immediate steps to curtail LCDR Hatcher's involvement on the case while at the same time hoping that the Commission would have opportunity to hear the matter during its August 2014 session. Had the Navy not cancelled LCDR Hatcher's separation orders at the last moment, the Commission's options to address the matter would have been limited, as LCDR Hatcher's separation would have occurred on 15 August 2014, in the midst of hearings week. As the Commission has noted, there are numerous "matters of immediate concern to all parties" that are pending resolution, and emergency motions filed at the last moment "do not permit the Commission sufficient time or information upon which to issue a meaningful decision" or "enough time for a factual predicate to be established. AE254X at 2.

The obvious solution to this problem is to prevent a severance issue from becoming an emergency, and to prevent the damage that occurs to Mr. bin 'Atash's defense due to the looming threat of severance. This can be accomplished by prohibiting any action that would result in severance (such as issuance of separation orders) without specific leave of the Commission. This practical solution does not foreclose the possibility of severance, should the Government be able to articulate "significant government interests" beyond simple administrative concerns that would demonstrate the existence of an "extraordinary circumstance;" the solution simply ensures that the Commission has an opportunity to "establish on the record" the predicate facts, has an opportunity under R.M.C. 813(c) to accurately ensure that the "records reflects the change [in defense personnel] and the reason for it," and has an

opportunity to take appropriate prophylactic measures if necessary (including directing the military member's retention on the defense team in a reserve status or otherwise). *United States v. Hutchins,* 69 M.J. 282, 290 (C.A.A.F. 2011).

Government mandated severance of the attorney-client relationship without good cause is a structural issue because it implicates a fundamental right and because it has the real potential to cause long-lasting, unquantifiable harm to the defense. *See, e.g. United States v. Baca,* 27 M.J. 110, 119 (C.M.A. 1988) (Court declined to engage in prejudice analysis because "[a]lthough an accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause."); *United States v. Catt,* 1 M.J. 41, 48 (C.M.A. 1975) ("we have consistently held that the unlawful severance of an existing attorney-client relationship dictates reversal without regard to the amount of prejudice sustained); *United States v. Dickinson,* 65 M.J. 562, 566 (N-M. Ct. Crim App. 2006); *United States v. Bevacqua,* 37 M.J. 996, 1001 (C.G.C.M.R. 1993). Given the structural taint that results from an improper severance of military counsel, it is essential that the Commission have visibility on and oversight over any actions that could disrupt the continuity of Mr. bin 'Atash's relationship with properly-detailed military defense counsel.

In AE283B, the Commission questioned whether it would have the authority to order specific forms of relief with respect to the personnel status of military defense counsel. The Commission undoubtedly has this authority. "The military judge is the presiding authority in a court-martial and is responsible for ensuring that a fair trial is conducted." *United States v. Quintanilla,* 46 M.J. 37, 41 (C.A.A.F. 2001). It is true that, unlike federal civilian judges, military judges do not exercise plenary authority, as a "military judge's functions and duties are limited to the court-martial over which the judge presides." *United States v. Reinert,* 2008 WL

8105416 at 10 (A.C.C.A. 2008). However, even though a military judge's authority is confined to a particular court-martial or military commission, the judge has "broad discretion" in carrying out his duties with respect to the case over which he or she is presiding. *Quintanilla,* 56 M.J. at 41; *see also United States v. Stringer,* 55 M.J. 92 (C.A.A.F. 2001) (per curiam) (Court upheld Military Judge's order to post Staff Judge Advocate to publish article in newspaper concerning incorrectness of unlawful pretrial punishment). The relief sought herein is not *ultra vires* because it falls well within the Commission's authority to regulate these proceedings and ensure that a fair trial is conducted in this case. The relief does not seek to influence wider personnel policy; it is narrowly targeted at ensuring continuity of counsel only in the course of this ongoing capital case. To suggest that the Commission has no authority would be to simply render meaningless the Commission's unquestionable responsibility under R.M.C. 505(d)(2)(B)(ii) to regulate the departure of detailed counsel – a result that none would have intended.

B. Necessity of Civilian Attorneys

While taking action to prevent the involuntary severance of detailed military defense counsel and assistant defense counsel is a positive step towards rectifying a growing problem, it alone is not sufficient to solve Mr. bin 'Atash's continuity of counsel conundrum. Even where military defense counsel are not forced to PCS or forced off of active duty, the military encourages short assignments or mobilizations over long-term "homesteading," and military defense counsel are therefore far more prone to "voluntarily" depart for career reasons than would be similarly-situated civilian defense counsel. Moreover, as Mr. bin 'Atash has consistently noted, military attorneys frequently have "little or no experience in criminal defense, even on a misdemeanor level," and very few military attorneys have "significant experience in complex criminal trials of any kind." Attachment C. Recent events demonstrate that these

problems concerning both experience and continuity are not unique to Mr. bin 'Atash's defense team. On 12 November 2014, the Trial Judiciary placed a request to the Convening Authority for five additional civilian attorneys to be employed at the GS-14 or GS-15 level. Attachment E, MEA-AE344-000021. Trial Judiciary indicated that it sought civilian attorneys with "[n]ot less than 10 years' experience," including experience in federal criminal law and national security law. *Id.* at MEA-AE344-000019. Acting on Trial Judiciary's request, the Convening Authority acted with uncharacteristic speed and within one month forwarded a request for the creation of five civilian attorney billets to Washington Headquarters Services (WHS). The Convening Authority's request to WHS noted that the billets "would allow the TJ to hire attorneys who have specialized skills that are generally not available among military personnel, such as capital litigation and national security law experience." *Id.* at MEA-AE344-000017. The Convening Authority further noted that the billets were necessary to provide "continuity on cases." *Id.* In addition to forwarding a written request to WHS, the Convening Authority personally spoke with the Director of WHS in order to expedite the creation of Trial Judiciary's new civilian billets. *Id.* at MEA-AE344-000016.

Mr. bin 'Atash faces the same concerns as the Trial Judiciary, except that Mr. bin 'Atash's concerns are amplified because he is not merely a neutral arbiter (as is the Trial Judiciary) but is actually on trial for his life, responsible for investigating and defending this massively-complex case. Mr. bin 'Atash's concerns are also amplified because, unlike the Trial Judiciary, his counsel must work within a team-specific privilege and he cannot rely upon a larger pool of counsel shared amongst the office as a whole. Recognizing these concerns, the bin 'Atash defense team as far back as 2012 requested that the Convening Authority assign "two qualified civilian attorneys who are not forecast to rotate out of the position or retire before

2016." Attachment C at 1. The Convening Authority, in his response, did not deny his authority to assign additional Department of Defense civilian defense counsel to OCDC and the bin 'Atash team; instead, he simply indicated that he was "not persuaded that [counsel] have demonstrated a need for additional civilian counsel." Attachment D at 1. In addition to the bin 'Atash team's specific request, multiple requests for additional civilian counsel have been placed by successive Chief Defense Counsel, noting the "primary use of military personnel has already resulted in significant and disruptive turnover in both attorneys and paralegals on these highly complex cases…" *See, e.g.,* AE030(MAH Sup), Attachment B. However, these requests continue to be inadequate and have gone unfulfilled. *See, e.g,* AE030B.

The Chief Defense Counsel is authorized to "detail, in addition to military defense counsel, a DoD civilian attorney performing duties with the OCDC, as an assistant defense counsel." R.T.M.C. § 9-1(b)(1)(B). Although the Chief Defense Counsel has this authority, she has no power to create additional civilian defense counsel billets for OCDC. The Convening Authority has taken the position that the Military Commissions Act of 2009 prohibits the funding of non-DoD defense counsel with the limited exception of learned counsel. Mr. bin 'Atash disputes this flawed proposition.[2] Nevertheless, it is uncontroverted that the Convening

[2] As support for his untenable position, the Convening Authority cites to 10 U.S.C. § 949(b)(2)(C)(i) and (C)(ii), which provides an accused the right to be represented by a "civilian counsel if provided at no expense to the Government," and additionally by civilian or military learned counsel in a capital case. However, 10 U.S.C. § 949(b)(2) defines only baseline, "minimum" rights to be afforded *all* military commissions accused. It does not purport to define the entire scope of any particular accused's constitutional right to counsel, nor does it specifically prohibit Commission or Convening Authority-appointed non-DoD civilian counsel where justified. As the question of the appointment and funding of additional civilian counsel on a capital case involves "weighty and constant values" such as the constitutional right to the effective assistance of counsel and the Fifth Amendment right to due process, Congress would, at a minimum, have had to make a "plain statement" as to its desire to restrict funding only to civilian learned counsel. *See, e.g. Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108-109 (1991); *United States v. Seale,* 542 F.3d 1033 (5th Cir. 2008) ("[a]bsent a clear statement from Congress that an amendment should apply retroactively, we presume that it applies only prospectively to future conduct, at least to the extent that it affects 'substantive rights, liabilities, or duties'") (citations omitted); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006); *see also McNally v. United States,* 483 U.S. 350, 359-360 (1987) (ambiguous criminal statutes are to be resolved in favor of the harsher result "only when Congress has spoken in clear and definite language"); *Clark v. Suarez Martinez,* 543 U.S. 371, 381 (2005) (explaining that the "constitutional avoidance canon" is a "tool for

Authority has the power to obtain additional DoD civilian attorney billets from WHS, as demonstrated by the creation of five additional billets for the Trial Judiciary. Where the Convening Authority fails to act, the Prosecution has acknowledged that it is "within the Court's discretion" to direct the Convening Authority to make available to the defense additional civilian counsel. AE030A at 1. The Commission should exercise its authority at this time and direct the Convening Authority to obtain two additional civilian attorney billets for assignment to Mr. bin 'Atash's defense team – to be filled by experienced and qualified attorney interviewed and vetted by counsel for Mr. bin 'Atash.

C. Unlawful Influence and Equitable Resourcing

The assignment of qualified DoD civilian defense counsel and measures aimed at protecting the sanctity of the attorney-client relationship with respect to military defense counsel will serve two additional and important purposes beyond continuity and effective representation. First, the Commission's actions will help to rid the tribunal of the specter of unlawful influence. 10 U.S.C. § 949b(a)(2)(c) prohibits any person from attempting to influence "the exercise of professional judgment by trial counsel or defense counsel." *See also* R.M.C. 104. Unlawful influence is the "mortal enemy of military justice," and when it is directed at defense counsel it "affects adversely an accused's right to effective assistance of counsel." *United States v. Thomas,* 22 M.J. 388, 393 (C.M.A. 1986). Importantly, even the threat or appearance of unlawful influence is prohibited because "the fact that the system appears vulnerable to command pressures may be as damaging as the occasional exercise of such pressures." *United*

choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); *Almendarez-Torres v. United States,* 523 U.S. 224, 238 (1998) ("constitutional doubt" seeks to "minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections."); *Al Bahlul v. United States,* 2014 U.S. App. LEXIS 13287 at 33 (D.C. Cir. 2014) (explaining concept of "constitutional avoidance" in context of ex post facto challenge to Military Commissions Act).

States v. Rosser, 6 M.J. 267, 273 n.19 (C.M.A. 1979) (citations omitted); *see also* AE343C at 5 (Commission notes that "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."). Where unlawful influence is present or threatened, the Commission has the obligation to nullify the taint using whatever means necessary. *See generally United States v. Gore,* 60 M.J. 178 (C.A.A.F. 2004) (sanctioning various remedies to include dismissal with prejudice); AE343C at 7 ("the Military Judge should attempt to take proactive, curative steps to remove the taint of UCI, and therefore ensure a fair trial.").

In the instant case, the Government's repeated actions with respect to various defense counsel amount to at least the appearance of unlawful influence. An outside observer would question the legitimacy and neutrality of a system that permits defense counsel on an ongoing capital case to be removed on short notice without cause by administrative officials who should be far removed from the litigation. These personnel actions, taken without consent of counsel or Mr. bin 'Atash, are somewhat akin to the Convening Authority and Deputy Secretary of Defense's attempt to force the Military Commissions Trial Judiciary to relocate to Guantanamo Bay – an action that the Commission found constituted, at minimum, the appearance of unlawful influence. AE343C. Indeed, outside observers *have* raised serious questions about the fairness of the proceedings in light of the forced departure of defense counsel, as evidenced by a slew of headlines concerning MAJ Wright's involuntary severance. *See, e.g., Army lawyer for alleged 9/11 mastermind resigns after being pulled from the case,* Stars and Stripes, Sept. 2, 2014, available at http://www.stripes.com/army-lawyer-for-alleged-9-11-mastermind-resigns-after-being-pulled-from-the-case-1.301079. Without action to ensure that the Commission, not other elements of the Government, has visibility over and control of the removal of detailed counsel

from this ongoing case, the Commission can not only expect additional short-notice departures but also additional stories and articles which will only feed the perception that the Government manipulates the military commissions system to affect its own goals. That perception and that reality will be diminished where the Commission takes measures to prevent unlawful influence with respect to military counsel and where the Commission assigns civilian defense counsel and additional learned counsel that are, in both perception and reality, less susceptible to unlawful influence.

In addition to helping to prevent or remedy unlawful influence, the requested relief will also help to bring Mr. bin 'Atash's attorney resources a step closer to parity with the resources of the Prosecution. In the National Defense Authorization Act for 2014, § 1037(c), Congress reiterated its intent that "the office of the chief defense counsel and the office of the chief prosecutor receive equitable resources, personnel support, and logistical support for conducting their respective duties in connection with any military commission…" With respect to "personnel support," the Chief Prosecutor himself was extended on active duty for an additional three years expressly to serve on this and other military commissions cases. Other trial counsel have received similar, apparently preferential treatment. At the same time, the Prosecution is largely composed of civilian prosecutors from the Department of Justice – individuals immune from military personnel actions – while Mr. bin 'Atash has no such resources available. The authority and influence of the Chief Defense Counsel pales in comparison to that of the Chief Prosecutor. For example, even with the full assistance of the Chief Defense Counsel and the Convening Authority, it took more than a year to restore LCDR Hatcher to active duty after his first erroneous and involuntary removal. *See* AE305(WBA) at 6-7. By acting on the instant

request, the Commission can help to narrow this gap in personnel support and ensure that the positions of non-fungible defense counsel are at least as secure as those of fungible trial counsel.

D. Conclusion

For the foregoing reasons, Mr. bin 'Atash requests that the Commission direct the Department of Defense and all of its subordinate components, including the Department of the Army, the Department of the Navy, and the Department of the Air Force, to refrain from initiating any personnel action with respect to a detailed military defense counsel or detailed assistant military defense counsel that would result in severance of the attorney-client relationship without the express written consent of both the military defense counsel and Mr. bin 'Atash or leave of the Commission after the opportunity for a hearing on the matter. Prohibited personnel actions include but are not limited to permanent change of station (PCS), involuntary separation or removal from the reserve active-status list for any reason, and demobilization. This order will not apply to personnel actions initiated voluntarily by the servicemember with consent of Mr. bin 'Atash.

Additionally, Mr. bin 'Atash requests that the Commission direct the Convening Authority to request two Department of Defense civilian attorney billets to be assigned to Mr. bin 'Atash's defense team and to be filled by experienced and qualified criminal defense attorneys interviewed, vetted, and selected by counsel for Mr. bin 'Atash.

7. Oral Argument: Mr. bin 'Atash requests oral argument.

8. Witnesses: None at this time. Mr. bin 'Atash reserves the right to add to or amend this list.

9. Conference with Opposing Counsel: The Prosecution indicates that it will defer stating its position on this motion until it reads the motion.

10. Attachments:

A. Certificate of Service
B. Memorandum from Navy Personnel Command dtd 18 Jul 14
C. Request for Qualified Civilian Attorneys dtd 24 Aug 12
D. Denial of Request for Qualified Civilian Attorneys dtd 30 Aug 12
E. Discovery MEA-AE344-000016 through MEA-AE344-000021

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 26 March 2015, I electronically filed the attached **Defense Motion to Compel Provision of Adequate Representation and Ensure Continuity of Counsel** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment B

DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1920
PERS-911
18 Jul 14

LCDR JAMES E HATCHER JAGC USNR
[redacted]

Subj: YOUR STATUS IN THE NAVY RESERVE

Ref: (a) COMNAVPERSCOM ltr 1920 PERS-911 of 1 Apr 13
(b) 10 U.S.C., Chapter 1407
(c) 10 U.S.C. §12646

Encl: (1) Resolution of status form

1. Per reference (a), we notified you that you had become subject to the attrition provisions of reference (b) but, per reference (c), you would be retained in an active status in the Navy Reserve until you were credited with 20 years of qualifying service or until 1 April 2016, whichever occurred first. We have reviewed your record and you have now earned enough retirement points to be credited with 20 years of qualifying service in March 2015. Accordingly, your separation from the Navy Reserve will be required on 1 April 2015.

2. Because you are qualified for a Reserve retirement, you may request transfer to the Retired Reserve by completing enclosure (1) and returning it to PERS-911 in the envelope provided. Endorsement by your Navy Reserve Activity is not required; however, please provide them a copy of your request for their records.

3. The order-issuing authority is directed to remove LCDR Hatcher from his unit assignment and terminate any orders which may be in effect not later than 31 March 2015.

4. If you have questions regarding this letter, please contact PERS-911 at [redacted]

S. G. RODRIGUEZ
By direction

Copy to:
NR Southeast RRC
NOSC Orlando

Attachment C

August 24, 2012

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: REQUEST FOR QUALIFIED CIVILIAN ATTORNEYS

I am writing to request your assistance in providing for a team of qualified counsel to represent Mr. bin 'Attash. Specifically, I am requesting the addition of two qualified civilian attorneys who are not forecast to rotate out of the position or retire before 2016.

For the three years before I was hired by DoD and assigned to represent Mr. Walid bin 'Attash, I directed the three offices responsible for the investigation, preparation and litigation of death penalty cases throughout the State of Illinois. In this capacity, I made decisions regarding the resourcing of capital cases in the State of Illinois. I supervised the representation of dozens of clients charged with murder and other related crimes where the government was seeking the death penalty; planned and administered a multi-million dollar budget involving the use of funds for the trial of capital matters; hired, evaluated, and when necessary, disciplined and terminated employees in the three offices; and assigned, supervised and directed a staff comprised of attorneys certified to try capital cases, mitigation specialists, investigators, paralegals and other support personnel representing defendants in capital cases. When the death penalty was abolished in Illinois effective July 1, 2011, my agency was defunded. My staff lost their positions and so did I.

I arrived at the Office of the Chief Defense Counsel (OCDC) in July 2012. I was detailed to represent Mr. bin 'Attash, replacing his former lead counsel of four months, Air Force Lieutenant Colonel Barry Wingard. At that time, my team was composed of one Navy Lieutenant Commander and one Air Force Captain, Michael Schwartz. The Navy Lieutenant Commander, who had no experience whatsoever as a criminal defense attorney, asked to be "undetailed" shortly after my arrival, and the former Chief Defense Counsel obliged. In September 2011, the Chief Defense Counsel (CDC) detailed Marine Major Bill Hennessy to our team. Since then, Maj Hennessy, Capt Schwartz and I have represented Mr. bin 'Attash. Maj Hennessy, the senior-ranking military attorney on the case, has litigated a total of three courts-martial before a panel and has never practiced as a civilian. Capt Schwartz has been out of law school for five years and has never practiced as a civilian. I have attached to this request affidavits detailing their criminal defense experience.

I have previously requested your assistance in getting LCDR Hatcher detailed to the bin 'Attash defense team, and thus far that detailing has not occurred.

Because of my job resourcing capital cases prior to this position and my 24 years as a criminal defense attorney, when I was assigned to represent Mr. bin 'Attash, I was appalled at the lack of resources available to him. The most obvious of those deficits was the lack of qualified counsel. I have read in various documents your office's position that the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) are not law. While that is true, the Guidelines are recognized as the standard for capital representation. I am disturbed and disappointed that you seem so comfortable breaking from

the widely-accepted ABA Guidelines in a variety of areas, particularly given your apparent lack of experience with capital litigation.

On the subject of the qualifications of defense counsel in capital cases, the ABA Guidelines require that the agency responsible for monitoring resources in a capital case (the Responsible Agency) insure the quality of defense counsel. In my previous position I directed the Responsible Agency. You are now tasked with directing the Military Commissions version of the Responsible Agency. Guideline 5.1B requires you to perform the following:

1. That every attorney representing a capital defendant has:
    a. obtained a license or permission to practice in the jurisdiction;
    b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
    c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
    a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
    b. skill in the management and conduct of complex negotiations and litigation;
    c. skill in legal research, analysis, and the drafting of litigation documents;
    d. skill in oral advocacy;
    e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
    f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
    g. skill in the investigation, preparation, and presentation of mitigating evidence; and
    h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

OCDC is staffed by attorneys with a variety of levels of experience. Many attorneys have little or no experience in criminal defense, even on a misdemeanor level. Some have experience as military defense attorneys who may have defended service members at courts-martial during a two- or three-year assignment. Very few have significant experience in complex criminal trials of any kind. Even for those who are experienced military justice practitioners, the skills needed for the practice of traditional military justice cases are not the same skills required for the capital commission my client is facing. The Chief Prosecutor is able to fill this void by utilizing his access to the Department of Justice's cadre of experienced capital and national security case litigators. For the prosecution, these trials are "military commissions" in name only. In fact, the Chief Prosecutor has, in large part, chosen to forgo military judge advocates in building the prosecution team in this case and, instead, has built a team primarily around experienced civilian attorneys from the Department of Justice. It is apparent that the Chief Prosecutor recognizes that the skills and experience necessary to try capital cases of this magnitude are not readily found among military judge advocates.

I will be accused of gross understatement in positing the following: Neither of the two military counsel detailed to the defense team of Mr. bin 'Attash satisfies the requirements of 1(b), nor any of the requirements of Section 2. Maj Hennessy and Capt Schwartz are not qualified to try this case. I am, but I cannot do it alone.

A sufficient investigation and effective defense of this case will require an unprecedented effort. The government has been investigating and preparing this case for trial for more than a decade. Despite my requests, I have not been provided a single page of what I expect to be more than 250,000 pages of discovery. The alleged acts of conspiracy occurred in various countries and continents and a legitimate investigation of this case requires the defense to travel to more than 15 countries.

Despite your recent authorization for ten additional military attorneys to be assigned to OCDC, I find it difficult to believe that any of the intelligent, experienced attorneys who may fill these positions will be able to fill the role I am looking to fill with this request. While my experience with military attorneys is limited to my role with OCDC since July, 2011, I am becoming convinced that DoD lacks judge advocates skilled and experienced in the litigation of complex cases, let alone capital cases. In the unlikely event that one of the ten new billets provides my team with an attorney qualified in accordance with the ABA Guidelines, the likelihood of a PCS or retirement almost guarantees that the additional military attorney would not remain on the case for its duration. The judge in this case has acknowledged that the tentative May 2013 trial date is a fiction. In reality, this case is unlikely to begin trial before 2015. The Chief Prosecutor frequently refers to the trial of Zacaria Moussaoui (a civilian terrorism trial), and notes that it took four years for this case to be tried to conclusion at the trial level.

The Military Commissions Act of 2009, recognizing that military judge advocates are not equipped to try capital commissions without assistance, provides the accused the right to "*at least one* additional counsel who is learned in the applicable law relating to capital cases. . ." in addition to detailed military counsel. The Act thus contemplates the need for more than one additional counsel in some circumstances and provides you legal authority to fund such counsel with a proper showing of necessity. Given the complexity and national security implications of these cases, and the resources available to the prosecution, a single experienced civilian counsel for a detainee facing the death penalty in a military commissions case is simply insufficient to ensure both a fair trial and the level and quality of representation that the rule of law demands.

While additional military attorneys may be assigned to OCDC and detailed to represent Mr. bin 'Attash at some point in the future, the former Chief Defense Counsel's July 13, 2012 request to hire five civilian attorneys reflected his opinion that more civilian attorneys are required for defense teams representing detainees facing the death penalty. Your response to this request noted your concern for the former CDC's allocation of resources, as well as statutory prohibitions on your ability to pay for a non-DoD civilian being requested by the Nashiri defense team. While I respect your responsibilities, I frankly have no concern over either of these issues. My concern is my client's access to qualified counsel, which he currently does not have, and which you have the ability to provide. I have attempted to resolve this within OCDC; I am now turning to you.

This case might be the most significant criminal prosecution in the history of our country. You are well aware—likely far more than I—of the resources that have been devoted to the prosecution between 2002 and today. However, this request is not an attempt to "level the playing field." In this case, the playing field will never be level because of the government's opportunity for nine years of trial preparation. Regardless, whether the playing field is level is collateral to the fact that Mr. bin 'Attash has the right to the effective assistance of counsel at all stages of the trial process, and that right is currently being denied. Your approval of this request will be a step toward curing this violation.

Cheryl T. Bormann
Learned Counsel

Attachments:
Statement of Maj William Hennessy, dtd August 16, 2012
Statement of Capt Michael Schwartz, dtd August 16, 2012

SWORN AFFIDAVIT OF MAJOR WILLIAM T. HENNESY

I hereby swear that the following is a true and complete statement regarding my experience as a lawyer, specifically as defense counsel:

Number of cases litigated in Article III courts?
0

Number of jury trials and the most serious charge for each jury trial: 3
- damaging a government vehicle
- rape
- rape, false official statement

Number of homicide cases tried to jury:
0

Number of capital cases tried to jury:
0

Number of expert witnesses consulted before trial and their area of expertise:
4
- accident reconstruction mechanic
- geologist specializing in water evaporation and drainage
- 2 psychologists

Number of expert witnesses called and directed by you at motion hearing/trial and the areas in which they were qualified:
1 (psychologist)

Number of expert witnesses cross-examined by you at motion hearing/trial and the areas in which they were qualified:
0

Number of criminal matters tried involving more than one defendant, the name of the case and charges:
0

Number of criminal matters litigated involving discovery in excess of 1000 pages and the name of the case:
0

Number of matters tried involving the development of forensic social histories for use at sentencing:
0

Number of matters tried involving members of the defense team who were not lawyers or paralegals:
0

Number of motions litigated alleging the unconstitutionality of a statute:
0

Number of motions litigated alleging physical coercion and/or torture of the defendant at the hands of the government:
0

Number of clients represented who spoke another language and needed a translator:
0

Number of clients represented who were born outside of the United States:
0

Number of clients who came from cultural or religious backgrounds that were not Christian:
0

Number of clients who came from non-Western cultural backgrounds:
0

Number of juror questionnaires your team composed and tendered to the court?
0

Number of death qualified juries selected under *Morgan/Witherspoon*:
0

Number of cases with more than local media interest:
0

William T. Hennessy, Maj, USMC
Defense Counsel

16 August 2012

SWORN AFFIDAVIT OF CAPTAIN MICHAEL A. SCHWARTZ

I hereby swear that the following is a true and complete statement to the best of my knowledge regarding my experience as a criminal trial attorney:

Number of cases litigated in Article III courts:
0

Number of jury trials and the most serious charge for each jury trial:
13

- fraud
- aggravated assault
- drug possession
- DUI and fleeing
- malingering
- AWOL
- adultery/disobey order

Number of homicide cases tried to jury:
0

Number of capital cases tried to jury:
0

Number of expert witnesses consulted before trial and their area of expertise:
14

- neurologist
- 2 accident reconstruction experts
- 3 psychologists
- 6 toxicologists
- breath analysis expert
- orthopedic surgeon

Number of expert witnesses called and directed by me at motion hearing/trial and the areas in which they were qualified:
4

- 2 toxicologists
- breath analysis expert
- orthopedic surgeon

Number of expert witnesses cross-examined by me at motion hearing/trial and the areas in which they were qualified:
5
- 4 toxicologists
- breath analysis expert

Number of criminal matters tried involving more than one defendant, the name of the case and charges:
0

Number of criminal matters litigated involving discovery in excess of 1000 pages and the name of the case:
0

Number of matters tried involving the development of forensic social histories for use at sentencing:
0

Number of matters tried involving members of the defense team who were not lawyers or paralegals:
0

Number of motions litigated alleging the unconstitutionality of a statute:
0

Number of motions litigated alleging physical coercion and/or torture of the defendant at the hands of the government:
0

Number of clients represented who spoke another language and needed a translator:
0

Number of clients represented who were born outside of the United States:
0

Number of clients whose cultural or religious background was not that of a typical American service member:
0

Number of clients who came from non-Western cultural backgrounds:
0

Number of juror questionnaires your team composed and tendered to the court?
0

Number of death qualified juries selected under *Morgan/Witherspoon*:

0

Number of cases with more than local media interest:
0

Michael A. Schwartz, Capt, USAF
Defense Counsel

16 August 2012

Attachment D

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

Convening Authority

August 30, 2012

MEMORANDUM FOR MS. CHERYL T. BORMANN, OCDC

SUBJECT: Request for Two Civilian Counsel to Represent Mr. bin'Attash

I considered carefully your memorandum dated August 24, 2012, requesting authorization and funding for two additional civilian attorneys to represent your client, Mr. bin 'Attash through at least 2016. For the reasons discussed below, I decline to grant your request. Instead, I urge you to contact the Chief Defense Counsel, who is the authority responsible for detailing qualified defense counsel to military commission cases, for resolution of your concerns.

As you know, under the rules applicable to trials by military commission, the Convening Authority is generally responsible for assuring the various offices involved in military commissions—including the Office of the Chief Defense Counsel—have adequate resources. In the Military Commissions Act of 2009, Congress imposed limits on the authority of the Convening Authority to provide resources. The MCA specifically provides, *inter alia*, that "military defense counsel shall be detailed for each military commission." The MCA also states that an accused may be represented by civilian counsel "if provided at no expense to the government"; the only exception being for "learned counsel," who may be a non-DoD civilian attorney compensated in accordance with the Regulation for Trial by Military Commission. Furthermore, only the Chief Defense Counsel may detail defense counsel, assistant defense counsel, DoD civilian defense counsel, and—when necessary—outside learned counsel, to military commission cases. Thus, even if I were persuaded that additional defense counsel were required, the Chief Defense Counsel would have to detail them to the case. In your memorandum you state that you "frankly have no concern over either of these issues," but these are statutory and regulatory requirements that are binding on everyone working on military commissions.

I am not persuaded that you have demonstrated a need for additional civilian counsel. You are the detailed learned counsel in this case, thus you are the lead counsel, responsible for directing the efforts of the entire defense team and overseeing its progress. In your memorandum, you indicated that you have extensive experience supervising multiple defense teams handling capital cases. I conclude that you are especially well-equipped to supervise and direct a single team handling one case as your full-time job.

In your memorandum you assert that the military counsel detailed to your team do not meet the requirements of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. However, as you concede, these guidelines are not the law. As the Supreme Court has stated repeatedly, the American Bar Association standards are "only guides" to what constitutes an objective standard of reasonableness for the performance of

defense counsel, "not its definition." *Bobby v. Van Hook,* 558 U.S. 4, 17 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 688, and *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

Even if the ABA Guidelines applied, you have not demonstrated the assigned military counsel do not meet the standards for representation. Guideline 5.1, ¶ B.1, which you cited, differentiates between the requirements for individual attorneys and the requirements for "the pool of defense counsel as a whole." Under Guideline 5.1, ¶ B.1, individual attorneys must (a) have a license; (b) demonstrate commitment to zealous representation; and (c) satisfy training requirements. It is my understanding that the detailed assistant defense counsel are properly licensed to practice law, and you have not indicated they lack commitment to zealous representation. Also, the two military defense counsel detailed to your team recently received additional training related to death-penalty litigation and may receive more, if necessary. The longer list of specific skills in ¶ B.2 applies only to "the pool of defense counsel as a whole," which, of course, includes you and—soon—LCDR Hatcher. Finally, I note that the ABA Guidelines are not inflexible. The Commentary following this Guideline explains:

> There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases. . . . These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

I also reject your assertion that this office is tasked with fulfilling the duties of the "Responsible Agency" under the ABA Guideline 3.1. The proposed functions of a Responsible Agency are not analogous to the functions of this office. The Office of the Convening Authority for Military Commissions is not a "Defender Organization" or an "Independent Authority" run by defense counsel, and this office does not certify counsel as competent to represent an accused, detail counsel to represent the accused, monitor the defense counsel's performance, or take appropriate corrective action. To the contrary, these functions are most analogous to the duties of the Chief Defense Counsel.

The statutory requirements for defense counsel in capital cases that apply to trials by military commission are in the Military Commissions Act of 2009, 10 U.S.C. § 949a(b)(2)(C). That section provides that an accused shall be represented by: (1) detailed defense counsel, or military counsel of his own selection, if reasonably available, or civilian counsel, if provided at no expense to the government; and (2) to the greatest extent practicable, by at least one additional counsel who is learned in the applicable law relating to capital cases, and who, if necessary may be a civilian.

As you acknowledge, you have all the necessary qualifications to serve as learned counsel in this case. You previously asked for my assistance in making LCDR Hatcher available to be detailed to the defense team for your client, Mr. bin 'Attash. Acting on your request, I obtained the assistance of the Navy and LCDR Hatcher is scheduled to report in early September 2012. At that time, the specific military counsel you requested will be available for service on your defense team. Additionally, the Chief Defense Counsel has already detailed two military defense counsel to assist you; with the arrival of LCDR Hatcher you will have three assistant

defense counsel for your team. Under Rule for Military Commission 506(a) an accused is not entitled to be represented by more than one military counsel (other than learned counsel), but the Chief Defense Counsel may, in his or her sole discretion, detail additional military counsel to represent the accused. The Chief Defense Counsel has already detailed more military defense counsel than is required; however, if you believe still more defense counsel are needed, you may request additional resources from the Chief Defense Counsel.

I am not persuaded that there are no military counsel assigned to the Office of the Chief Defense Counsel who are qualified to support you in the role of assistant defense counsel. As you know, the armed services nominate counsel for assignment to military commissions, and the Office of the Chief Defense Counsel, after reviewing their background and qualifications, has the authority to accept or reject the candidate. I profess I am at a loss to understand how a Chief Defense Counsel could review a candidate, accept them for assignment to the Office of the Chief Defense Counsel, and assign them to a capital case, if the military counsel was not qualified even to act as an assistant defense counsel for a more experienced learned counsel. I also have difficulty understanding why only now you assert that Major Hennessey is not qualified to serve as an assistant defense counsel, when he has been assigned to this case and working with you since September 2011—almost one year.

If you have concerns about the abilities of members of your defense team, or the adequacy of the defense team as a whole, I encourage you to address your concerns to the Chief Defense Counsel. There are over 50 attorneys assigned to the Office of the Chief Defense Counsel and—according to a recent list of detailed defense counsel provided by the former Chief Defense Counsel—only a fraction of these defense counsel are detailed to active cases. At this time, it appears that the Chief Defense Counsel has both the resources and the authority to make those resources available to you. For these reasons, I deny your request.

Bruce MacDonald
Convening Authority
for Military Commissions

cc:
Chief Defense Counsel
Chief Prosecutor

Attachment E

[redacted]COL USARMY OSD OGC (US)

From: Kelly, Wendy A CIV OSD OMC CA (US)
Sent: Monday, December 15, 2014 10:47 AM
To: Taylor, Fred P CIV OSD OMC TJ (US); Polley, James D IV CIV (US); Wilkins, Donna L CIV OSD OMC CA (US)
Cc: [redacted]CW4 USARMY OSD OMC CA (US); [redacted]COL USARMY OSD OGC (US)
Subject: TJ/OCA Billet Request
Attachments: 2014-12-11 Request for Additional Civilian Billets.pdf
Signed By: wendy.kelly[redacted]

FYI: This is what we sent to WHS on Friday to add the new TJ billets and to convert the CSO and LSS positions to GS billets. You can start working on the PD's now (we can help). Usually it takes about a week to get billet numbers from WHS. Mr. Brazis (Director, WHS) is leaving soon, so he should be acting on this quickly. Mr. Ary has already spoken to him about the request.

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

Convening Authority

ACTION MEMORANDUM

FOR: Director, Washington Headquarters Services

FROM: Director, Office of Military Commissions

SUBJECT: Request for Additional Civilian Billets

- The Director, Office of Military Commissions (OMC) is responsible for resourcing all sections of OMC adequately, including the Office of Court Administration (OCA) and the Trial Judiciary (TJ). Currently, TJ has authorizations for two civilian attorneys and four military attorneys, as well as for three civilian and two military paralegals. The military staff has generally lacked the specialized experience to support the judges adequately.

- The Director, TJ, requests five additional civilian attorney billets, four additional civilian paralegal billets, three civilian billets for Court Security Officers (CSOs) who will replace two current contractors, and one office manager. I also request to replace one existing contractor who provides litigation security support in the OCA with a DoD civilian position at half the cost. I support these requests for additional billets (TAB A).

- These additional billets would allow the TJ to hire attorneys who have specialized skills that are generally not available among military personnel, such as capital litigation and national security law experience. These civilian attorneys and additional civilian paralegals would also provide critically needed support to the judges and provide continuity on cases. Past inadequate resourcing has contributed to the slow progress of military commissions proceedings, as the judges have not had the necessary staff to research and draft orders requiring mastery of complex and unique issues of law.

- OMC has no remaining vacant civilian billets; this request, therefore, is for five civilian attorney billets to be created at the GS 14/15 grade, four civilian paralegal billets at the GS-11/12 grade, 3 CSOs at the GS 13/14 grade, one office manager at the GS 11/12 grade, and one Litigation Security Specialist at the GS-12 grade for OCA. The billets would be needed through at least FY 2019. Attached is a summary of the costs associated with this request (TAB B).

- Defense Legal Services Agency (DLSA) has funding to support these additional billets.

RECOMMENDATION: Approve the additional requested civilian billets.

Approve _____ Disapprove _____ Other _____

Prepared by: Wendy A. Kelly [redacted]

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MEA-AE344-000017

OFFICE OF THE SECRETARY OF DEFENSE
MILITARY COMMISSIONS TRIAL JUDICIARY
4800 Mark Center Drive, Suite 11F09-02
Alexandria, VA 22350-2100

NOV 1 2 2014

MEMORANDUM FOR ACTING CHIEF OF STAFF, OFFICE OF MILITARY COMMISSIONS

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

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

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

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

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

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

2. Consistent with the Trial Judiciary's memorandum of 2 July 2014, the Staff Director should be a GS-15. If the organization grows consistent with the above planning factors, the Director will not be able to lead and manage the organization and carry a single defendant case, even with assistance. As stated in Trial Judiciary's memorandum of 2 July 2014, the conversion of this position from a Uniformed Judge Advocate 0-6 Colonel/Navy Captain is essential to achieving continuity in the leadership of the organization.

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

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

4. The Administrative/Logistics Paralegal should remain a GS-12.

5. Given the current load of active cases, three (3) Court Security Officers (CSOs) are needed. As cases return to an active status for sentencing or new cases are referred, additional CSOs at a rate of one CSO per 2 cases will be required.

6. The attributes/characteristics we seek in the GS-14 / 15 attorney advisors:

a. Not Less than 10 years' experience as a Military Justice practitioner having held a combination of the following positions: Trial Counsel, Defense Counsel, Appellate Counsel, Appellate Court Commissioner, Senior or Circuit Defense Counsel, Chief, Military Justice, Regional Defense Counsel, Staff Judge Advocate, Trial or Appellate Military Judge;

b. Capable of holding a TS/SCI clearance;

c. Superior Writing Skills;

d. National Security Law Experience (one of the GS-14 counsel);

e. Federal Criminal Law Experience with either the Department of Justice or as a Federal Public Defender (one of the GS-14 counsel); and,

f. Proficient in on-line electronic legal research, Word, EXCEL, PowerPoint, and SharePoint.

7. The attributes/characteristics we seek in a Uniformed Judge Advocate:

a. Not less than 5 years' experience as a Military Justice practitioner having held a combination of the following positions: Trial Counsel, Defense Counsel, Appellate Counsel, Appellate Court Commissioner, Senior or Circuit Defense Counsel, Senior or Circuit Trial Counsel, Special Victim Trial Counsel, or Chief, Military Justice;

b. Appellate Counsel, Appellate Court Commissioner

c. Capable of holding a TS/SCI clearance;

d. Superior Writing Skills;

e. Proficient in on-line electronic legal research, Word, EXCEL, PowerPoint, and SharePoint; and,

f. At least a two (2) year service commitment.

8. The attributes/characteristics we seek in a GS-11 / E-7 / Senior E-6 Paralegal:

a. Capable of holding a TS/SCI clearance;

b. Not less than 5 years' Military Justice experience at the General Court-Martial Convening Authority Office of the Staff Judge Advocate level;

c. Associates Degree, preferably in a paralegal studies or criminal justice related program;

d. Proficient in Word, EXCEL, PowerPoint, SharePoint, Adobe Acrobat;

e. Highly organized and detail oriented; and,

f. At least a two (2) year service commitment.

9. Questions should be directed to the undersigned at [redacted] or fred.p.taylor[redacted] or to Mr. Jim Polley at [redacted] or james.d.polley[redacted]

FRED P. TAYLOR
Senior Attorney Advisor / Acting Staff Director
Trial Judiciary, Office of the Military Commissions

COST DATA-OMC REQUEST FOR ADDITIONAL CIVILIAN BILLETS

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

*Step 1 is used for planning purposes.

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

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