
UNITED STATES OF AMERICA

Government's Response

v.

To Dismiss
for Unlawful Influence

MOHAMMED JAWAD

3 June 2008

1. **Timeliness:** This response is filed within the timelines established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's orders.
2. **Relief Sought:** The Government respectfully submits that the Defense's motion to dismiss ("Def. Mot.") should be denied.
3. **Overview:** The Legal Advisor to the Convening Authority, a position the defense acknowledges is the creation of the Secretary of Defense and not the Military Commissions Act of 2006, 10 U.S.C. §949b (2006) (MCA) (Def. Mot. at 9), did not exercise unlawful influence over the trial counsel in this case, the former Chief Prosecutor, the interim Chief Prosecutor, or any other member of the Military Commission to which this matter has been referred. The allegations in the Defense motion are unsupported by the facts.

The facts demonstrate that the determination to swear charges against the accused resulted from a confluence of events unrelated to anything other than the evidence against the accused, the readiness of the case for charging, and the fact that no other cases had yet been cleared by the Office of the Director of National Intelligence (ODNI).

Finally, even if the factual assertions were true, viewed collectively and dispassionately, they fail to demonstrate that the Legal Advisor acted improperly in his dual and complementary roles as advisor to the Convening Authority and immediate

supervisor of the Chief Prosecutor. In any event, the Defense has adduced no facts suggesting that the accused has been prejudiced in any way. Accordingly, the Defense motion should be denied.

4. Burden of Proof: As the moving party, the Defense bears the burden of persuasion. See Rules for Military Commissions (R.M.C.) 905(c). Under military law,¹ the Defense has the initial burden of producing sufficient evidence to show facts which, if true, would constitute unlawful influence, and further some logical basis from which to conclude that the unlawful influence resulted in some cognizable unfairness to the proceedings. See *Green v. Widdecke*, 19 U.S.C.M.A. 576, 579, 42 C.M.R. 178, 181 (1970) (“Generalized, unsupported claims of ‘command control’ will not suffice to create a justiciable issue.”) See also *United States v. Johnston*, 39 M.J. 242, 244 (1994) “The threshold triggering issue ... should be more than a bare allegation or mere speculation.” See also *United States v. Loving*, 41 M.J. 213, 238 (CAAF 1994).

Once the Defense has met its burden of production, the prosecution (again, under military law) must rebut the allegation:

The Government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings...

United States v. Biagase, 50 M.J. 143, 151 (1999)

¹ Military law is expressly made not binding on Military Commissions, to the extent the UCMJ and its interpretation may be considered, they may not be considered binding. 10 U.S.C §948b(c). However, military law should be considered instructive on this issue, given the uniquely military nature of unlawful command influence.

5. **Facts:**

A. On 17 December 2002, Mohammed Jawad threw a Soviet-manufactured hand grenade into a vehicle in which two U.S. Special Forces sergeants and their Afghan interpreter were riding. The victims had been driving through the streets of Kabul on a humanitarian mission. Jawad was dressed as an Afghan civilian, and he was approximately 18 years old at the time.²

B. Before throwing the grenade through the rear window of the vehicle in which the victims were riding, Jawad permitted other Coalition soldiers (including Turks and Germans) to pass by so that he could target Americans. During his subsequent interviews by Afghan and Coalition forces, Jawad admitted that he threw the grenade and boasted that, if given the chance, he would do so again.

C. The two Special Forces soldiers -- one of whom almost bled to death -- have endured dozens of surgeries and continue to suffer the effects of their wounds. Their Afghan interpreter is now blind in his left eye, and underwent four surgeries at Walter Reed Army Medical Center. By contrast, photographs and medical examinations taken and conducted within hours after Jawad's apprehension establish that he suffered no physical injuries before or after his capture.

D. The Special Forces unit appointed its battalion chaplain as a "human rights observer" to ensure that US service members respected Jawad's rights at all times during his subsequent interview by US forces, during which Jawad again confessed to having thrown the grenade.

² Jawad has given conflicting accounts of his true age in December 2002—sometimes claiming to have been 19 years old, at other times, 17; recently, he has claimed to have been 16 years old at the time of the attack. A bone scan study later determined his age at the time of the attacks to have been approximately 18.

E. Jawad himself claimed to be affiliated with Hezbollah – e Islami Gulbuddin or “HIG,” a terrorist organization specially-designated as such by the US Department of State in February, 2003, presumably as a result of terrorist attacks carried out by its members in the Kabul area, of which Jawad’s may have been among the first.

F. With respect to this motion, Colonel Davis delivered the complaint referred to on page five of the Defense motion in to Judge Crawford’s office on a Friday, and on Monday she called to tell him that she had presented it to William J. Haynes, the DoD General Counsel, earlier that morning; she did not consider it a matter for the Inspector General, though Colonel Davis remained free to present it directly to the IG at any time. She also told Colonel Davis that she had directed that neither Brig Gen Hartmann nor Mr. Michael Chapman, staff director for the Office of Military Commissions (who also served as Acting Legal Advisor in the Legal Advisor’s absence) would serve as legal advisor on any pending cases until the matters raised in Colonel Davis’s complaint were resolved. She named Mr. Ron White, an attorney on her staff, to perform those functions in the meantime.

G. Many of the facts as asserted are inaccurate or misleading. While they will be refuted by testimony, some key errors merit specific explication here:

- Brig Hartmann used the term “sexy,” if at all, in response to its habitual use by Colonel Davis and others on the prosecution team.
- He never referred to individuals as having “blood on their hands.”
- He did tell prosecutors (though not in a “Prosecution (sic) war room”) that he had two roles, as legal advisor to the convening authority and as

supervisor (not “in charge of”) of the Chief Prosecutor, a legally accurate statement.

- He never – and will deny under oath – “attempted to direct the Chief Prosecutor to use evidence that he considered tainted and unreliable, or perhaps obtained as the result of torture or coercion.”

H. The asserted concerns about Brig Gen Hartmann’s management style are inapplicable to this case, even if the whole of the defense’s allegations were accepted as substantiated.

I. No factors other than the merits of the case were involved in the decision of when and with what to charge Mr. Jawad. In fact, Colonel Davis already had resigned by the time the prosecution charged Mr. Jawad. Testimony will establish conclusively that the interim or acting Chief Prosecutor made the decision to charge the accused based on the state of the development of the case and other factors to be presented at the hearing on this motion, including the approval for the swearing of charges by ODNI.

6. Law and Argument:

As noted above, the Defense must prove the nexus between the actions of the Legal Advisor and some legally cognizable harm to the accused.³ The position of Chief Prosecutor is limited in his or her ability to affect the process; he need not swear charges – and typically does not – and his judgments and recommendations are not final or conclusive.

Having failed to prove actual unlawful influence, the Defense has no basis for asserting apparent unlawful influence. The concept of apparent unlawful influence does

³*United States v. Reynolds*, 40 M.J. 98, 202 (C.M.A. 1994).

not exist in the MCA, the MMC, or any of the regulations promulgated by the Secretary of Defense. To the extent, as a matter of judicial construction of the Uniform Code of Military Justice, 10 U.S.C. § 801, et seq. (UCMJ), military courts have created or recognized such a concept, such decisions are expressly made not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the concerns upon which the doctrine and unique protections of unlawful command influence are based (primarily rank disparities, witness and juror intimidation), have diminished applicability to the context of military commissions being used to prosecute our nation's enemies. Whereas it may be appropriate to find apparent unlawful command influence even in the absence of prejudice to a member of our Armed Forces, such a broad and unrefined concept is out of place when it can be used or easily manipulated by those at war with the United States.⁴

There is no basis for dismissing the charges or disqualifying the Legal Advisor in this case

Even if the facts were as represented by the Defense, they reflect the Legal Advisor's complementary role, deeply rooted in military law, by which the Legal Advisor (Staff Judge Advocate) also supervises the prosecution effort.

The Secretary of Defense acted consistent with the MCA in fashioning the position of Legal Advisor, a lawful exercise of his authority as head of the Department of Defense, and consistent with the tradition and functions of the Staff Judge Advocate (SJA) in military practice.⁵ The MCA empowers the Secretary of Defense to promulgate

⁴ We note that even in the court-martial context, the burden for proving apparent unlawful command influence is high to guard against baseless allegations. *See, e.g., United States v. Lewis*, 63 M.J. 405, 415 (2006).

⁵ 10 U.S.C. §949(a).

procedures for military commissions “so far as [he] considers practicable...[that] apply the principles of law...in trial by general court-martial.” The role of the Staff Judge Advocate under the UCMJ is the precursor to and the equivalent of the Legal Advisor to the Convening Authority for the military commissions process. Just as the Manual for Courts-Martial requires the SJA to give independent legal advice on jurisdiction, sufficiency of the evidence and other factors⁶, RMC 406 requires the Legal Advisor to make similar recommendations to the Convening Authority.

There is nothing in Brig Gen Hartmann’s conduct, even as characterized by the Defense, that calls into question his ability to provide the “independent and informed appraisal of the charges” that the Discussion to RMC 406 suggests. His role as supervisor of the prosecution is complementary to, not in conflict with his role as the legal advisor to the Convening Authority; the requirement to bring justice is present in both circumstances. The military courts have long held that an SJA’s pretrial advice is primarily a prosecutorial codal tool. *United States v. Hardin*, 7 M.J. 399, 403 (CMA 1979) (quoted in *United States v. McCoy*, 2006 CCA LEXIS 85 (April 20, 2006) (unpublished opinion). In performing this pretrial advisory role, the SJA acts more like a prosecutor and less like a judge, for it is the Convening Authority who serves in the quasi-judicial capacity. See *United States v. Lynch*, 13 M.J. 394, 396 (C.M.A. 1982); *United States v. Smith*, 13 C.M.A. 553 (C.M.A. 1963). The SJA is not elevated “to a state of absolute impartiality required in the strict sense for a trial judge, reviewing authority or appellate court. *Hardin, supra*, at 403. To the extent that the Legal Advisor properly performed a prosecutorial function in rendering pretrial advice to the convening

⁶ See Rule for Courts-Martial 406(b)

authority, he did not act in any disqualifying or unlawful manner.

The Defense adverts to decisions or recommendations that Brig Gen Hartmann has made since assuming his role. Not every recommendation or decision that is contrary to the Defense's wishes translates to the Legal Advisor's abandonment of his role; moreover, the Defense would agree that the Legal Advisor has no supervisory role over its operations, though his commitment to justice must include fair consideration of Defense submissions, requests, and legal arguments. Furthermore, the Defense fails to cite a single case where the Legal Advisor improperly pressured a trial or defense counsel.

For a Legal Advisor (SJA) to be disqualified, he must so thoroughly abandon any pretense of impartiality that his ability properly to give advice to the Convening Authority is unalterably compromised. In this case, the Defense complains simply that the Legal Advisor's supervision of the prosecution effort has been exacting and intensive, not that it has been unethical or in any sense inconsistent with the supervisory functions historically exercised by an SJA, who also serves as the legal advisor to a commander or convening authority.

As evidence of the Legal Advisor's improper influence in this case, the defense can only point to the fact that this case was arguably charged earlier than would otherwise have occurred without any action by him. The defense argues that it was improper – if its facts were accurate - for the Legal Advisor to accelerate charging of this case from “approximately twentieth in the line-up of cases he [the Chief Prosecutor] intended to prosecute,” to one of the twelve cases charged thus far. Def. Mot. at 10. In a twist to the legal adage “justice delayed is justice denied,” the defense appears to being

arguing that the accused has been unfairly prejudiced by the expeditious movement in bringing his case simply to the charging stage – two months short of *five years* since his apprehension. Ignored in the defense’s allegation is the fact that all parties concerned saw the prosecutorial merit of this case and agreed that this case would, at some time in the near future, be sent to trial.

The defense concedes in its motion that all the alleged deficiencies raised (e.g., highlighting Mr. Jawad’s relative youth) are not requirements of the pretrial advice, but are discretionary matters that may be included. Defense Motion at 10; R.M.C. 406(b) Discussion. Under military law, failure to include such discretionary matters is not error. *See United States v. Corcoran*, 40 M.J. 478, 484 (C.M.A. 1994); R.C.M. 406(b) Discussion.

Additionally, the defense’s specific allegations of defective advice lack merit. The accused’s age at the time he committed the alleged offenses may well be an appropriate consideration at all stages of the process. Def. Mot.at 13. Nothing included in the pretrial advice regarding the accused’s age or personal background is alleged to be inaccurate or misleading, or likely to result in a different decision regarding referral. Defense’s assertion that the Legal Advisor ought to have commented on the potential public media reaction to this case calls to attention something that clearly is not a legal factor. Def. Mot.at 12. The defense fails to explain what is extraordinary about the fact that the accused is not specifically charged with terrorism, or associated with a specific terrorist organization, when he is in fact charged with offenses listed under the MCA. The pretrial advice correctly addresses the issues of personal and subject matter jurisdiction. In arguing that the pretrial advice fails to raise the “potential issue of

multiplicity or unreasonable multiplication of charges” the defense points out where the pretrial advice precisely addresses this point. Def. Mot at 12, footnote 9. Finally, the defense asserts that the Convening Authority may have been misled by the Legal Advisor’s recommendation to refer this case noncapital - in a case where capital punishment is not authorized,. The only way validate defense’s claim would be to presume that the Convening Authority, a career attorney and distinguished military jurist, was incapable of reading the statute she was charged with upholding.

The actions of the Legal Advisor on this case were properly authorized by law

The MCA provides that no person may attempt to coerce or, by *any unauthorized* means, influence the exercise of professional judgment by trial counsel or defense counsel. 10 U.S.C. §949b(a)(2)(c). Of course, implicit in this section of the statute is the recognition that there are those who may influence both trial and defense counsel by *authorized* means. All of Brig Gen Hartmann’s actions, as averred by the Defense, were authorized by and consistent with the MCA, the Manual for Military Commissions (MMC), and well established principles of military jurisprudence,.

The MCA specifically gives the Secretary of Defense the authority to draft *pretrial* procedures that apply the principles of law in trial by general courts-martial. See 10 U.S.C. §949a(a). Such pretrial procedures would include the Legal Advisor’s responsibilities for supervision over the Prosecution, as well as the Legal Advisor’s responsibilities to draft pretrial advice on the sufficiency of the sworn charges; both common responsibilities of Staff Judge Advocates.

Again, as noted above, the decisions of the military courts interpreting the UCMJ are not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the positions of

the SJA and the Legal Advisor, as they relate to the specter of unlawful command influence, differ in significant respects. For example, in typical military justice matters a court-martial convening authority's primary responsibility is for the good order and discipline of his subordinate troops; to assist him in these duties he has a "core staff" which is often composed of a Chief of Staff, functional staff officers, and, among others, a Staff Judge Advocate. In contrast, the Convening Authority for Military Commissions has only the limited authority to make determinations on certain matters regarding military commissions, and has no other military role. The Convening Authority possesses no "core staff" in the military sense of the term, and as such was not given a "Staff Judge Advocate." However, the Legal Advisor to the Convening Authority operates in a nearly identical manner to a Staff Judge Advocate on matters relating to justice.

The role of the Staff Judge Advocate under the UCMJ is similar to the Legal Advisor to the Convening Authority for the military commissions process. Assuming that the role of an SJA is the most closely analogous manner for evaluating the actions of the Legal Advisor in this military commissions, case the Manual for Courts-Martial requires the SJA to give independent legal advice on jurisdiction, sufficiency of the evidence and other factors⁷, RMC 406 requires the Legal Advisor to make similar recommendations to the Convening Authority. Any analysis of Brig Gen Hartmann's actions as Legal Advisor to the Convening Authority is best accomplished by evaluating whether an SJA to a General Court-Martial Convening Authority would have been authorized to take such action.

⁷ See Rule for Courts-Martial 406(b)

Even assuming, for purposes of this motion, that everything the defense counsel alleged against Brig Gen Hartmann is true, his actions were consistent with the role envisioned by the Secretary of Defense in the Manual for Military Commissions, and in accordance with generally accepted principles governing the role of a Staff Judge Advocate in the court-martial process. Contrary to the Defense claim, Brig Gen Hartmann did not become the de facto Chief Prosecutor in this case.

Finally, R.M.C. 406, as the defense correctly notes, requires the legal advisor to be responsibly personally for the pretrial advice (PTA) and that he *make an independent appraisal of the charges and evidence in order to render the advice.*” (Emphasis added.) There is no particular format for the PTA, and its required contents consist of five statements. R.M.C. 406(b)(1) – (5). Each of these required statements appears in the PTA.

In sum, the PTA complied with the requirements of R.M.C. 406, contained no inaccurate information, and the defense can point to no prejudice as a result of the PTA. The instant motion should be denied.

Distinctions between the instant case and the case of *United States v Hamdan*

The Defense repeats, without any citation, some of the “findings of fact” in a ruling issued by on 9 May 2008 by Judge Allred in *United States v Hamdan*. Notwithstanding the fact that such trial-level findings and rulings of law are not binding precedent on another commission, there are many distinctions in the alleged involvement of the Legal Advisor in the two cases that warrant denial of the defense motion in this case.

In the *Hamdan* case the Military Judge was specifically concerned about Brig Gen Hartmann's intention to enter into pretrial negotiations with the defense counsel. No such allegation has been made in the instant case. The ruling also makes clear that Judge Allred placed a certain emphasis on Brig Gen Hartmann's supposed direction that certain cases be tried; there are no facts to support this conclusion or finding in this case. Finally, Judge Allred was concerned that the Chief Prosecutor and the two prosecutors on the *Hamdan* case felt they were being "nano-managed" and one even requested an ethical opinion due to Brig Gen Hartmann's involvement *in that case*. No such allegations exist in the present case.

To summarize, the defense makes the grave claim that "the entire swearing of charges and referral process was infected by unlawful influence," but it supports the assertion only by casual supposition and sinister inference. The Legal Advisor's conduct complied with the law and was consistent with long-standing military practice; there was no unlawful interference and certainly no prejudice to the accused.

7. **Request for Oral Argument:** The Government requests oral argument and intends to present evidence in support of this response.

8. **Witnesses for the motion:**

- a. Brigadier General Thomas Hartmann, USAF
- b. Colonel Morris Davis, USAF
- c. LTC William B. Britt, USA

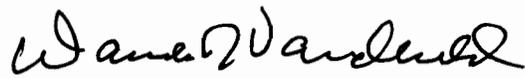
9. **Other Evidence:**

- a. Affidavit of the Honorable Susan J. Crawford, Convening Authority
- b. Other affidavits, as necessary.

9. **Conference:** Not applicable.

10. **Additional Information:** None.

Respectfully submitted,



DARREL J. VANDEVELD
LTC, JA, USAR
Lead Prosecutor

UNITED STATES OF AMERICA v. Mohammed Jawad	Supplement to D-004 Defense Motion to Dismiss for Unlawful Influence AMENDED July 16, 2008
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1. **Timeliness:** The filing is timely, in light of newly discovered evidence.
2. **Relief Sought:** Dismissal with prejudice of all charges and specifications.
3. **Overview:** On or about 1 November 2007, the Legal Advisor to the Convening Authority, Brigadier General Thomas Hartmann, directed his enlisted aide to prepare a master timeline chart setting forth in substantial detail his plans for the prosecution of commission cases over the next year. Later in November, Brig Gen Hartmann took the chart to Guantanamo and briefed the senior leadership of JTF-GTMO of his plans. He also used the chart to brief other senior leaders within the Department of Defense. The chart demonstrates that Brig Gen Hartmann was deeply involved in prosecutorial matters, to a much greater degree than he has previously admitted. The chart is inconsistent with his sworn testimony and other public statements he has made. The chart casts further doubt on the credibility of Brig Gen Hartmann and provides substantial additional evidence of the unlawful influence he exerted over the prosecution of military commissions, both generally and in Mohammad Jawad's case, and provides additional grounds for the termination with extreme prejudice of this case.

4. **Facts:**

- i. Brig Gen Hartmann testified at the 19 June hearing that he had developed a prosecution timeline.¹ The defense requested the chart directly from Brig Gen Hartmann but he did not provide it.

¹ Excerpt of 19 June Testimony:

Q [MAJ FRAKT]: It's not true that in November of last year, 2007, that you had a timeline that you were showing to other senior officers, with the names of the cases that you expected to be brought, the timing, the cases' schedule of what was to be prosecuted?

A [BG HARTMANN]: There was such a timeline, yes.

Q [MAJ FRAKT]: And who developed that timeline?

A [BG HARTMANN]: I developed that timeline.

- ii. The defense requested the timeline (chart) in discovery and filed a motion to compel production of the chart on 14 July. On 15 July, the prosecution provided a Word document prepared by an NCO (name withheld for privacy) assigned to Brig Gen Hartmann. This chart, Attachment 1, is entitled “3 OMC Case Timeline 1 Nov 07” indicating that it was prepared on or about 1 November, 2007, and is purported to be the timeline developed under Brig Gen Hartmann’s guidance and direction to which Brig Gen Hartmann referred in his testimony.
- iii. For much of November 2007, Lt Col Britt was still acting Chief Prosecutor until Col Lawrence Morris arrived and assumed the duties of Chief Prosecutor.
- iv. In November 2007, Brig Gen Hartmann privately briefed Brig Gen Crawford, Deputy JTF-GTMO Commander at Guantanamo, using Attachment 1, on the prosecution’s plans going forward.² After briefing Brig Gen Crawford, he also briefed CAPT McCarthy, JTF-GTMO SJA.³

5. Mixed Facts, Law and Argument

There are several specific entries on the chart which are directly relevant to the Defense Motion to Dismiss for Unlawful Influence D-004, and which have significant implications. For ease of reference, each specific entry will be discussed separately:

a. Entry: “2-7 Jan 08 referral and service of charges – Jawad”

Comment – This entry indicates that the decision to refer the Jawad case was a foregone conclusion and had already been made in Brig Gen Hartmann’s mind. This is consistent with the testimony of LTC Britt and Col Davis at the 19 June hearing that Brig Gen Hartmann pushed for Mr. Jawad’s case to be charged and that he was very enthusiastic about the case and believed it had significant jury appeal. A more appropriate entry, consistent with the role of the Legal Advisor, would have been: “Review referral notebook and defense submissions. Prepare pretrial advice for Convening Authority. Await Convening Authority referral decision.” Brig Gen Hartmann testified that the delay in referring the case from the time of swearing the charges until January was a result of a defense request and suggested that he was keeping an open mind about the

² According to the prosecution, “this is the only record from November 2007 kept by the NCO who prepared the charts for Brig Gen Hartmann. The NCO is not sure this is the exact chart used by Brig Gen Hartmann to brief the general/flag officers, as CAPT McCarthy testified.” E-mail from Trial Counsel, 15 July 2008.

³ Draft Deposition Transcript of CAPT McCarthy p. 27 and p. 32.

referral decision. The entry on the chart casts doubt on the accuracy of Brig Gen Hartmann's testimony. It is clear that Brig Gen Hartmann did not have an open mind about the Jawad case and was incapable of providing independent, neutral pretrial advice to the Convening Authority.

Excerpt of 19 June Testimony:

Q [COL MORRIS]: Do you know when the next case was sworn by the prosecutors after the Jawad swearing on the 9th of October?

A [BG HARTMANN]: I believe the next case was al Bahlul and that was sworn December 20th, 2007.

Q [COL MORRIS]: And your pretrial advice was not even submitted in this Jawad case for a few months, is that correct?

A [BG HARTMANN]: For another month.

Q [COL MORRIS]: I mean for a few months since the date of charging?

A [BG HARTMANN]: Correct.

Q [COL MORRIS]: Three or so months after charging.

A [BG HARTMANN]: Right.

Q [COL MORRIS]: Do you recall for what accounts for that length of time?

A [BG HARTMANN]: Yes, I don't recall it precisely, but I believed Colonel Sawyers send a memorandum asking us to delay the referral and also the parties determine that it would be appropriate to undertake some depositions in Afghanistan. And so, I thought it was appropriate to hold off on the referral until those depositions were completed, transcribed and available for review by me and by the Convening Authority; and that's what we did.

Comment: In light of the information on the chart, it appears that this testimony was misleading. Whatever Brig Gen Hartmann's reasons for delaying providing the pretrial advice to the Convening Authority, it is clear that he had made up his mind long before he actually signed the advice that he would be recommending that the case be referred to trial and he was confident it would be. As detailed in D-004 and developed more fully in Brig Gen Hartmann's testimony, his attitude toward the preparation of his first pretrial advice and his recommendation to refer charges against a child soldier which would potentially subject him to life in prison was cavalier, to say the least, as the following exchange from the 19 June hearing amply demonstrates:

Q [MAJ FRAKT]: And this pretrial advice, I think it concludes by saying that you recommend that the charges be referred noncapital, do you recall that, sir?

A [BG HARTMANN]: Yes I do.

Q [MAJ FRAKT]: Do you believe that that statement implies that it would've been an option to refer the charges as capital?

A [BG HARTMANN]: No, I do not. It was not an option to refer him as capital.

Q [MAJ FRAKT]: So you don't feel that that statement was misleading in any way?

A [BG HARTMANN]: No.

Q [MAJ FRAKT]: Did you know, General, that there was some question about whether Mohammed Jawad was a juvenile at the time that he was captured?

A [BG HARTMANN]: I knew his age.

Q [MAJ FRAKT]: What did you believe his age to be?

A [BG HARTMANN]: Well, the referral package indicated that his age was 16, 17 or 18.

Q [MAJ FRAKT]: So that would suggest some potential confusion about whether he was a minor are not?

A [BG HARTMANN]: It would suggest that his age was those ages.

Q [MAJ FRAKT]: Well, he couldn't be all three ages at once, right . . .

..General?

A [BG HARTMANN]: Right.

Q [MAJ FRAKT]: So?

A [BG HARTMANN]: He could be 16, 17, or 18.

Q [MAJ FRAKT]: Okay, so ...you believe that he was either 16, 17 or 18?

A [BG HARTMANN]: Yes.

Q [MAJ FRAKT]: And would it make a difference at all, if he was 16 or 18, in your pretrial advice?

A [BG HARTMANN]: In terms of determination of the issue of personal jurisdiction, no.

Q [MAJ FRAKT]: What about--so you don't buy the argument that Military Commissions don't have jurisdiction over minors or child soldiers?

A [BG HARTMANN]: Could you restate the question?

Q [MAJ FRAKT]: You do not buy or accept the argument that some have made that Military Commissions should not have jurisdiction over child soldiers or people who are minors at the time of their offenses?

A [BG HARTMANN]: I've looked at the statue and it says that you had jurisdiction--in personam jurisdiction over alien unlawful enemy combatants.

Q [MAJ FRAKT]: And so the absence of any mention of an age limitation, leads you to conclude that minors could be covered by that?

A [BG HARTMANN]: I haven't had to probe that particularly in this case because the age was 16, 17, or 18.

The absurdity of this testimony requires no further comment.⁴

⁴ In evaluating Brig Gen Hartmann's facility with written and spoken English and his apparent difficulty in comprehending simple questions (see also, Brig Gen Hartmann's feigned ignorance concerning the frequent flyer program, detailed in prior defense filings), it should be noted that, according to Brig Gen Hartman's testimony and his official Air Force biography, he graduated from the U.S. Air Force Academy as a Distinguished Graduate. He then received a scholarship to Stanford where he earned a Masters Degree in Modern European History, also with distinction, in just one year. He was later selected for the Air Force funded legal education program and attended George Washington University School of Law, a top tier law school, where he earned his J.D. at government expense, with high honors. Brig Gen Hartmann is also a

b. Entry: “20 Dec 07 – Charges Sworn and received by CA – Al Darbi.”

Comment: Brig Gen Hartmann’s testimony was factually inaccurate when he stated “I believe the next case was al Bahlul and that was sworn December 20th, 2007.” In fact, the next charges to be sworn were against Almed Mohammed Ahmed Haza al Darbi.⁵ The charges were sworn on 20 Dec 07, exactly as Brig Gen Hartmann had forecast on his timeline, even though a new Chief Prosecutor, Colonel Lawrence Morris, had arrived to assume control of the prosecution in the interim. While it is possible that Brig Gen Hartmann confused Ali Hamza Ahmad Suliman al Bahlul with Almed Mohammed Ahmed Haza al Darbi due to the similarity of their names, it must also be considered that Brig Gen Hartmann’s testimony was intentionally misleading. Perhaps more important than Brig Gen Hartmann’s intent in testifying inaccurately is the fact that Brig Gen Hartmann had foreknowledge, seven weeks in advance, of the exact day charges would be filed against the next detainee and who it would be. If Brig Gen Hartmann directed that charges be filed on Mr. al Darbi on a specific date, as the timeline suggests, then, according to his own testimony, he has exceeded his lawful role as the Legal Advisor.

Excerpt of 19 June Testimony:

A [BG HARTMANN]: . . . it would be wrong for me to direct someone to swear charges on a specific case, yes, I agree with that.

Q [MAJ FRAKT]: So you agree that under the M.C.A. and its implementing regulations that it is the chief prosecutor's decision which cases to charge, when to charge them, and what charges to swear?

A [BG HARTMANN]: In general, yes, I believe it is the chief prosecutor's responsibility to determine who to charge, and what you charge in conjunction with the actual prosecutor,⁶ because the actual prosecutor's the one that actually swears the charges.

c. Entry: “4-8 Feb 08 swearing of 9/11 charges; Joint trial of 6.” “4-8 Mar. referral & serv. of 9/11 charges.”

graduate of Squadron Officer’s School, Air Command and Staff College, Naval War College (with distinction), and Air War College.

⁵ The charges against Mr. al Bahlul were served 2 Feb 2008, consistent with Brig Gen Hartmann’s plan to swear new non-HVD cases in February.

⁶ This draft transcription appears to be inaccurate or incomplete here, but the general nature of Gen Hartmann’s response is clear.

Comment: Joint charges against six alleged 9/11 co-conspirators were sworn on 11 February 2008, 3 days after Brig Gen Hartmann's 1 November prediction. The charges were subsequently amended and resworn on 15 April 2008. Charges against 5 of the 6 were referred on 9 May 2008. Charges were dismissed against Mohamad al Qahtani by the Convening Authority against the advice of Brig Gen Hartmann.

d. Entry: "1-29 Feb – Swearing, referral and service of charges HVD II (East Africa)"

Comment: On 28 March 08. Charges were sworn against Ahmed Ghailani for the bombing of the Tanzanian embassy in East Africa

e. Entry: "3-30 Mar Swearing, referral and service of charges on HVD III (Cole)"

Comment: On June 30, charges were sworn against Abdal-Rahim Al-Nashiri for the attack on the USS Cole.

f. Entries in each month from January 2008 to Nov 2008, indicate the intent to swear "3 New Non-HVD cases" per month

Comment: Brig Gen Hartmann's plan for non-HVD cases appears to have been overly optimistic, as only nine additional New Non-HVD cases have been sworn in 2008:

1. Ali Al Bahlul, sworn 2/2/08, referred 2/26/08
2. Ibrahim Ahmed Mahmoud al Qosi, sworn 2/8/08, referred, 3/5/08
3. Mohammed Kamin, sworn 3/12/08, referred 4/04/08
4. Noor Mohammed, sworn 5/23/08
5. Jabran al Qahtani, sworn 5/28/08
6. Ghassan al Sharbi, sworn 5/28/08
7. Sufyian Barhoumi, sworn 5/28/08
8. Mohammad Hashim, sworn 5/30/08
9. Binyam Mohamed, sworn 5/28/08

g. There is a separate timeline on the chart for the Khadr case with the following entries: "8 Nov Khadr resumes for arraignment/jurisdiction." "7 Dec 07 – 5 to 7 law motions in Khadr" "11 Jan 08 – All remaining law motions in Khadr" 4 Feb 08 – Hearing re law motions in Khadr" "28 Feb 08 – Evidentiary Motions due." "1 Apr 08 –

Hearing re Evidentiary Motions” “15 Apr 08 – Hearing re Witness Production” “5 May 08 – Assembly and Voir Dire.”

Comment: A document dated 9 Nov 2007 entitled “Schedule for Trial” was provided by Colonel Peter E. Brownback III, the military judge in the Khadr case, to the parties. (Attachment 2). The Schedule for Trial ordered by the military judge is identical, in all respects, to the timeline laid out by Brig Gen Hartmann on his chart some 9 days before. This raises extremely serious questions. While the 8 Nov date to resume arraignment had been previously published, how did Brig Gen Hartmann know what the schedule would be for the rest of the trial before the order was published and the parties were informed? Indeed, how did he know that the case would survive the jurisdictional hearing? Did Brig Gen Hartmann have secret back-channel communications with the military judge? Did Brig Gen Hartmann exert influence over the military judge in some way? It is easy to come up with a sinister explanation for the congruence of the chart and the scheduling order. It is hard to come up with an innocent one.⁷

h. Excerpt of 19 June Testimony of Brig Gen Hartmann in U.S. v. Jawad:

Q [MAJ FRAKT]: . . .in that investigation has become to be known as the Tate Investigation . . . did they provide any admonition to you?

A [BG HARTMANN]: . . .the very basic one that one should always try to follow and that was not to get too involved, too deeply involved in prosecutorial matters.

Q [MAJ FRAKT]: Do you feel that you have complied with that guidance?

A [BG HARTMANN]: Yes.

Q [MAJ FRAKT]: You don't feel that you've been too deeply involved in prosecutorial matters?

A [BG HARTMANN]: I do not.

Comment: The Tate Investigation completed its report and Brig Gen Hartmann was provided a copy in early October 2007. The overwhelming evidence of Brig Gen Hartmann's deep involvement in prosecutorial matters, fully confirmed by the chart he

⁷ In this regard, it is important to note that the schedule ordered by Col Brownback differs substantially from the proposed trial schedule submitted by the prosecution two days before 1 Nov on 30 Oct. (Attachment 3). The official trial schedule, publicly released on the commissions website and dated 28 Nov 07, differs very slightly from the 9 Nov version in that one additional motion hearing date was added. (Attachment 4).

developed, contradicts his personal opinion that he followed the guidance of the Tate Investigation and did not become too deeply involved in prosecutorial matters.

i. In addition to his sworn testimony, Brig Gen Hartmann has made numerous public statements in his role as the primary Pentagon spokesperson for all matters relating to the military commissions. The content of the chart, coupled with the testimony presented by LTC Britt, Col Davis and CAPT McCarthy, suggests that not only has Brig Gen Hartmann been less than fully candid with the military commission, but that he has misled the press, the American public and, indeed, the entire world.

i. Selected excerpts from DoD News Briefing with Brig. Gen. Hartmann from the Pentagon, 11 Feb 2008,⁸ on the swearing of charges against the alleged 9/11 co-conspirators

QUESTION: Sir, can you talk about the steps more, but with a time frame? How soon would Judge Crawford come back with her decision? When might trial start?

HARTMANN: There's no specific statutory time specified for Judge Crawford to review the file. We will receive the file, I expect, later in the week. And we will work on it very quickly, as quickly as we can, with the entire staff focused on that. I can't give you a specific time frame.

When Judge Crawford completes her review, and should she decide to refer the case to trial, then 30 days following that the accused will be arranged -- within 30 days, the accused will be arraigned, and that means that they'll be read the charges in court and have the opportunity to enter a plea.

QUESTION: Can you tell us, was any of the information that was derived from aggressive interrogations of either KSM or any of the other five defendants used in referring these charges?

HARTMANN: I don't know the answer to that question. The prosecutors will make a determination about what evidence they are going to produce in the case in chief. I haven't seen the files yet, and that will identify to us what evidence is used.

QUESTION: . . . you used the word "jointly." Were you saying that all six are going to be tried together?

⁸ <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4142>

HARTMANN: Yes, all six are going to be tried together, or all six have been recommended for trial together.

The chief prosecutor has recommended that all six be tried jointly. That decision remains in the discretion of Judge Crawford as to whether she will refer them jointly. And then that can also be challenged. Even if she should refer them jointly, that can still be challenged.

Q Why did you decide to try this group together? And why are you doing it right now?

GEN. HARTMANN: The decision to try them together or the recommendation to try them together was made by the chief prosecutor, and he would have evaluated the commonality of fact, evidence, charging, the fairness and the administrative burdens of trying the cases separately and the impact on the victims, among many factors. I don't know specifically what factors he used. And we're trying them now because the prosecution has sworn the case and believes it's ready to proceed to trial.

GEN. HARTMANN: As to your first question, I have very little power to compel anyone to do anything. So I'm -- we are not in the position to compel any other government agency to produce information.

As to the general question about Judge Crawford's role, my point is that we will evaluate the evidence that comes to us and review it to determine if there's probable cause. I don't know the source of the information that's coming to us. I don't know what that information is. So once we see that information we will evaluate it and apply a legal standard to determine whether there's probable cause to proceed. And a variety of factors is used in making that evaluation.

Comment: Brig Gen Hartmann attempted to give the impression that he had no prior familiarity with the evidence against the 9/11 co-conspirators, that he had no idea of the timeline, that he had no involvement or prior knowledge of the decision to charge the 9/11 co-conspirators, that he had no role in the decision or recommendation to try the 9/11 co-conspirators jointly, that the decision to try the co-conspirators jointly was not final, and that the probable cause determination had not been made in his mind. None of these claims are consistent with the evidence presented in this case. Indeed, the chart indicates the plan that between "3 May - 29 Sep Motion Sessions and Trial on the Merits in 9/11 Joint Trial" would be completed. More than once, Brig Gen Hartmann slipped up and almost acknowledged the depth of his involvement before carefully correcting himself.

**ii. Selected Excerpts from DoD News Briefing with Brig. Gen
Hartmann From the Pentagon Mar 31, 2008 announcing charges against
Ahmed Ghailani for the bombing of the Tanzania Embassy.⁹**

Q When do you -- when will the charges be forwarded to Susan Crawford, and how long does she have before she is required to refer them back? Is there -- what's the time limit on that?

GEN. HARTMANN: Yes. They were forwarded to the office of the convening authority this morning. We've received them. I will complete a legal review once I receive a referral package. A referral package is all the documents that the prosecution will present to establish whether probable cause exists to proceed or not. Once I complete the legal review, I will present my legal review and the referral package to Judge Crawford. There's no specific timeline on that, but I'll move as expeditiously as I can.

Q Can you -- if the convening authority -- if he refers this to trial as a capital case and so on, how early would it -- what is the earliest point at which that trial might begin?

Before the end of this year?

GEN. HARTMANN: One can never predict when a trial would begin in any system. In our case, we have to go through a number of steps. Following the referral by the convening authority, then there are 30 days following that that are statutory, when the accused is arraigned, and that means the accused is brought into court, given the opportunity to get an explanation of the charges, his rights to counsel and to enter a plea. And then 90 days after that, under the statutory guidelines, was when we would assemble the court or bring in the jury.

Now, in reality, most of the time you'll have motions and discovery and things that go on that push that 90 days after the 30 days out. So it's hard to predict, but the process will move as quickly as it can. We will move as quickly as we can in the convening authority's office to get those statutory timelines started.

Comment: Once again, Brig Gen Hartmann gave the impression that no decisions had been made by him, that he had no prior familiarity with the evidence and that he was taking an open-minded review of the evidence. His statements that "one can never predict when a trial would begin in any system" and "there's no specific timeline" was particularly brazen, given that he himself had predicted on his chart not only that the

⁹ <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4183>

charges would be sworn and referred against Mr. Ghailani, but that by 31 Aug, the "Trial on the Merits HVD II Cases" would be complete.

**iii. Selected Excerpts from DoD News Briefing with Brig. Gen Hartmann
From the Pentagon June 30, 2008, announcing charges against Abdal-Rahim Al-Nashiri for his role in the bombing of the USS Cole.¹⁰**

GEN. HARTMANN: . . .Whatever evidence is forwarded to us by the prosecutors will be evaluated by Judge Crawford and by me -- my pretrial advice, and then to Judge Crawford in evaluation of the case. So we'll look at all the evidence that comes to us. I won't prejudge anything and I won't try to tell you what a particular piece of evidence is, but we will have the first opportunity to review the evidence that's going forward in the referral package.

Q I just want to follow -- a layperson who doesn't follow this closely but knows about the waterboarding is going to say, "How can they even refer charges? This thing is tainted from the get-go because of the waterboarding."

GEN. HARTMANN: Right, because you have to look at the evidence. We will look at the evidence -- all the evidence that is associated with the case. While there has been an admission that there was waterboarding, there may well be other evidence in the case. That's not the only -- necessarily the only form of evidence in the case.

So it's inappropriate for us to pre-judge at a press conference or any kind of a -- an indication of one piece of evidence or the other. All the evidence will come in and it will be evaluated by the defense, by the prosecution and by the judge. That's the beauty of the trial process. It allows you to study and expose these things in open court so that everybody gets an opportunity to see it, most particularly the accused and his defense counsel.

Q Yes, but if it's referred by Judge Crawford for trial, you're assuming that it will, just for --

GEN. HARTMANN: No, I'm not assuming. I'm saying that if Mrs. Crawford refers it, then it will be dealt with that way. We will evaluate the evidence before it gets there.

Q Can you give us an idea of the timeline here, how quickly will Judge Crawford be doing her work, how soon might we reasonably expect, if there is to be a referral, it would come?

¹⁰ <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4255>

GEN. HARTMANN: Well, Mrs. Crawford has to receive the referral package. We've gotten the sworn charges just today. So the prosecution will put together a referral package which has a number of pieces of evidence in it. And then once they've prepared that, Mrs. Crawford doesn't have any specific timeline, nor do I, in terms of completing my legal review or her referral decision. . . .

Comment: Brig Gen Hartmann's comment that it is inappropriate to pre-judge a case is absolutely true. His suggestion that he had not pre-judged the case is belied by his chart, which indicates that referral in the Cole case would take place and that the case would proceed to trial on the merits. Brig Gen Hartmann's claim that he didn't have any specific timeline was a blatant misrepresentation. Indeed, the defense has been informed by reliable sources that Brig Gen Hartmann has kept the timeline on the wall of his office and that it was seen there earlier this month.

CONCLUSION

A comparison of the chart with the dates of the VTCs, the dates of the swearing of charges in the HVD cases and the dates of Brig Gen Hartmann's press briefings establishes a clear pattern. Each time a new round of HVD cases was planned to be charged, closely adhering to Brig Gen Hartmann's master plan, he was aware of the anticipated date of service of charges well in advance, and knew enough of the details of the cases to provide a personal briefing to the senior leadership of JTF-GTMO and SOUTHCOM. Yet, in each press conference that he gave, he gave the impression that he had just received the charges that day and was just about to begin his review, with a presumption of innocence and an open mind.¹¹

¹¹ For example, at the 11 Feb 08 press briefing, Brig Gen Hartmann stated, "Today, the Convening Authority for Military Commissions received sworn charges against six individuals alleged to be responsible for the planning and execution of the attacks upon the United States of America, which occurred on September the 11th, 2001." "[A]s the legal advisor to the Convening Authority, I remind you that the sworn charges are only allegations, only allegations of violations under the Military Commission Act, and that the accused are and will remain innocent unless proven guilty beyond a reasonable doubt." Similar statements were made in all three press conferences.

In previous filings, the defense has suggested that the only way to preserve the legitimacy of the military commissions is to dismiss the charges against Mohammad Jawad. It has now become clear that it is impossible to restore the legitimacy of the military commissions. If indeed, they ever had any in the first place, the actions of Brig Gen Hartmann have damaged the credibility of the military commissions beyond all hope of repair. The appearance and the reality is of a completely distorted process, thoroughly permeated with the taint of unlawful influence and the stench of misleading testimony and propaganda. Brig Gen Hartmann's timeline proves conclusively that the promise of a fair, just and open process is a farce. But there is one entry on Brig Gen Hartmann's planned timeline that is worthy of careful consideration, and that is the following: "19 Jun Jawad trial completed." If justice is to be served, this is one prediction that should come true. The 19 June hearing, capped off by the incredible testimony of Brig Gen Hartmann, should be the final court appearance in the trial of Mohammad Jawad.

6. Request for Immediate Public Release: The defense requests immediate public release of this and all motions filed by the defense and the government responses thereto.

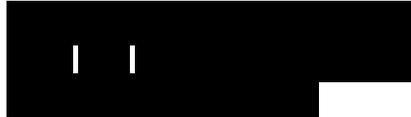
Respectfully Submitted,

//signed//

By: DAVID J. R. FRAKT, Major, USAFR

//signed//

And: KATHARINE DOXAKIS, LCDR, USN
Detailed Defense Counsel
Office of the Chief Defense Counsel



Attachments:

1. 1 Nov 2007 Timeline Developed by Brig Gen Hartmann
2. 9 Nov 2007 Schedule for Trial, U.S. v. Khadr
3. Prosecution Proposed Trial Schedule 30 Oct 07 U.S. v. Khadr
4. 28 Nov 2007 Schedule for Trial, U.S. v. Khadr

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>Mohammed Jawad</p>	<p>Prosecution Response to Supplement to D-004 Defense's Amended Motion to Dismiss for Unlawful Influence</p> <p>23 July 2008</p>
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1. **Timeliness:** The defense's latest supplement should not be authorized by the Military Commission Trial Judiciary (MCTJ) rules of court because it is not based new or newly discovered evidence, but rather on information that always has been available to Mr. Jawad. Anticipating that the military commission would like a reply nonetheless, it is provided in this document.

2. **Relief:** Denial of the underlying motion; summary dismissal of the instant "supplemental."

3. **Overview.** BGen Hartmann did keep the chart in question. Its purpose was to prompt, forecast, and track the logistical and other obligations that would be required to support charges as they were sworn. It was not meant as a timeline that would direct the prosecution of any case or cases, and in fact never was shared with or examined by the Chief Prosecutor. (Attachment 1) It does not show BGen Hartmann to have been "deeply involved in prosecutorial matters," but only that he was trying to align prosecutorial matters with all other facets of Office of Military Commissions operations. (Attachment 2) The chart, as with all of BGen Hartmann's actions, is consistent with his testimony. The implication that the chart casts "further doubt on [his] credibility" is as baseless as the charges of perjury casually lodged against BGen Hartmann by counsel in this case, and the charges of unethical conduct lodged by defense counsel against the prosecutors. There is and has been no unlawful influence.

4. **Facts.** Government replies track the defense's numbering scheme, in accordance with MCJT rule 3-2.

- i. Admit. In his testimony before the Commission, BGen Hartmann forthrightly acknowledged the chart. Deny that "he did not provide it (to the Commission)," as he had no obligation to do so, but it was provided to the defense.
- ii. Correct.
- iii. Incorrect. Colonel Morris arrived on 7 November 2007, having been appointed Chief Prosecutor on 28 October 2007.

5. “Mixed” Facts and Law Argument. (The following tracks the defense’s numbering scheme.)

- a. The entry regarding Jawad reflects a reasonable expectation that the case would be presented for referral sometime in that time window. As the record reflects, the case was long in development and Col Davis, the defense’s key witness, forecast on 3 October that Jawad would be sworn on 9 October. The defense claim that BGen Hartmann “made up his mind long before he actually signed the [pretrial] advice” is unsupported by the record; a fairer inference is that the almost four month period (9 October 2007 to 30 January 2008) between swearing and referral was due to the scrutinizing of the entire Jawad package before presentation to the Convening Authority.¹
- b. BGen Hartmann’s error in recalling the next case to have been sworn clearly was the good faith mistake of a witness – a mistake with which defense counsel could have confronted the witness during cross-examination at the time of the hearing on 19 June 2008. The defense is correct that *had* “BGen Hartmann directed that charges be filed on Mr. al Darbi on a specific date” – or any date – “he has (sic) exceeded his lawful role as the Legal Advisor.” But he never did so and there is no evidence of his having done so. Moreover, the issue before this court is the now-vanishing assertion that he did so with regard to *Jawad*, not *Darbi* or *Bahlul*.
- c. c-f. These entries show the inexactitude of the projections. The fact that cases were routinely sworn later than projected attests to the absence of influence, lawful or otherwise.
- d. (defense g) It should be clear from the record that the *Khadr* entries reflect actions after they occurred, not projections.
- e. (defense h) Inaccurate.
- f. (defense i). There is no contradiction, and of course BGen Hartmann has not spoken about prosecution matters before this military commission. The defense’s sweeping claim that “he (BGen Hartmann) has misled the press, the American public, and indeed, the entire world” is the kind of scurrilous hyperbole² the commission has come to expect from that has characterized the defense’s framing of the issues in this case, both in the pleadings and in in-court advocacy. The defense is expected vigorously and ethically to defend its client and challenge the government; its default position appears to be personal attack.
- g. (defense bold faced i). The defense intimations of BGen Hartmann’s deceptiveness assume he had something about which to be deceitful. It is lawful and appropriate that the Legal Advisor was aware of the plans involved in the charging process for the 9/11 and other detainees, notably the defense’s client; the Legal Advisor need not work in a bubble until charges are sworn, and his supervision of and consultation with the prosecution is lawful and appropriate – to

¹ In fact, a significant period of the time between the swearing of charges and referral is attributable to the Convening Authority’s ordering of depositions to be taken of witnesses in Afghanistan, and extraordinary exercise of caution before referral.

² See, e.g., Def. Mot. at p. 1, where the defense requests “dismissal with *extreme* prejudice” (emphasis added) – an apocalyptic phrase in the context of a case alleging attempted murder in violation of the law of war.

the extent it constitutes “influence” it is *lawful* influence. This same response applies to defense bold faced ii and iii.

6. Supplemental Argument - Prosecution. The defense tries to build a case of unlawful influence in two main ways: (a) challenging BGen Hartmann because of his discussions regarding Jawad before charging, and (b) challenging him because of his post-Jawad activities, which included supervising and monitoring the charging and referral process. The defense cites not a single case or any statute to support its theory, and in fact does not tie it to any traditional theory of unlawful influence.³ The supplemental submission is therefore without merit and should be denied:

A. The Legal Advisor is lawfully appointed to a lawfully constituted position. The Secretary of Defense has explicit statutory authority, under the Military Commissions Act, to create the position of Legal Advisor, as Congress empowered him to draft pretrial procedures that apply the principles of law in trial by general courts-martial. See 10 U.S.C. sec 949b (2006). A legal advisor is a key and indispensable official in the court-martial process, see generally Articles 6, 34, UCMJ; Rule for Military Commission (RMC) 406.

B. The Legal Advisor appropriately supervises the prosecution function while also providing independent advice to the Convening Authority. The functions of advising a convening authority while also supervising the prosecution are complementary and deeply rooted in statute, regulation, and military practice.

(1) The key functions of the Legal Advisor in the military commissions process are nearly identical to those of the staff judge advocate in military practice. See generally, Art. 6(b), UCMJ: “Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice...” Compare Art. 34, UCMJ (concerning pretrial advice) and RMC 406; compare also Art. 50, UCMJ (regarding post-trial advice to a convening authority) and RMC 1106.

(2) Military practice, as reflected in case law, recognizes that a staff judge advocate may simultaneously advise commanders and supervise prosecutors. In addition, there is no requirement for “neutrality,” a defense assertion supported without citation to such a term being used in case law, statute, or regulation. There is an expectation of impartiality, and case law recognizes that an SJA’s function, especially at the pretrial level, has a prosecutorial component that does not detract from his responsibility to give dispassionate advice to a Convening Authority who has a uniquely quasi-judicial function. See generally *United States v. Hardin*, 7 M.J. 399, 403 (C.M.A. 1979) (the SJA is not held “to a state of absolute impartiality required in the strict sense for a trial judge, reviewing authority or appellate court”).

³ The defense does not seek disqualification of BGen Hartmann, or any remedy lesser than the virtually unprecedented remedy of dismissal of the charges in toto, discussed infra at pp. 4-5.

(3) Military regulations confirm, codify, and reflect current practice by which the legal advisor/staff judge advocate both advises the convening authority. *See, e.g., Army Regulation 27-1, Judge Advocate Legal Services* (30 September 1996), which defines the role of the “supervisory judge advocate.” The regulation provides that the “supervisory JA [judge advocate] of a command is the *legal advisor* to the commander.” AR 27-1, para 5-2a (emphasis added). The regulation then delineates the considerable responsibilities of the legal advisor, including his responsibilities governing military justice: “The supervisory JA...provides commanders and convening authorities legal advice concerning military justice. ... [and] must be vigilant to recognize, reveal, and take steps to correct...command influence...[and] ensure that military justice is administered fairly. ...” AR 27-1 para 5-2c. This same official is expected to supervise prosecutors, as he is directed to “[p]rovide technical supervision of JAGC [Judge Advocate General’s Corps] officers...” AR 27-1, para 5-2a(2).

(4) The role of the legal advisor/SJA is further developed by the regulation’s description of the supervisory JA duties as “generally corresponding to those discharged by TJAG [The Judge Advocate General] with regard to HQDA [Headquarters, Department of the Army].” AR 27-1, para 5-2a. The relevant portions of those responsibilities include: serve as “legal advisor to the Chief of Staff, U.S. Army (CSA)”, para 2-1b; “[b]e the principal legal advisor to the SA [Secretary of the Army] and to the CSA concerning matters pertaining to military justice. ...and provide legal guidance and staff supervision of the Army’s system of military justice,” para 2-1d(1); “[m]anage the administration of military justice in the Army,” para 2-1d(9); “[m]anage professional legal training within the Army,” para 2-1t; and “[d]irect the members of the JAGC in the performance of their duties,” para 2-1v(2). Note, finally, that the supervisory SJA is specifically charged with “[r]esolving legal problems regarding...military commissions, provost courts, or other military tribunals.” AR 27-1, para 5-2a(1).

C. Many traditional unlawful influence concerns are inapplicable here. The core concerns of military jurisprudence regarding actual unlawful (command) influence primarily concern: (1) chilling the professional judgment and independence of intermediate commanders who must make independent recommendations regarding potential criminal cases; (2) improperly influencing panel members; (3) witness intimidation. The doctrine of apparent command influence is concerned with respect for and confidence in the military justice system among the rank and file and the general public. As the government has demonstrated in its earlier submissions, and at the hearing in this case, BGen Hartmann’s activities were both proper and authorized, and give rise to none of the traditional unlawful influence concerns.

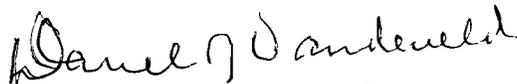
D. The defense remedy is unwarranted. Because there is no harm, there are no grounds for relief. The Defense has not met even a threshold showing of a nexus between the actions of the Legal Advisor in this case and any legally cognizable harm to the accused. *See United States v. Reynolds*, 40 M.J. 98, 202 (C.M.A. 1994).

(1). The defense seeks dismissal of charges for unlawful influence, a claim for which it offers no support. Even if the defense somehow managed to show unlawful

influence, the radical remedy of dismissal, rarely invoked in military courts, would not be warranted, as the defense has not addressed the traditional array of lesser remedies – re-swearing charges, advising witnesses of their freedom to testify/barring government cross of potentially intimidated witnesses, disqualifying panel members or ordering new members – perhaps because they cannot point to government conduct that has materially or prejudicially affected any party to the *Jawad* case.

(2). Neither is the disqualification of BGen Hartmann warranted. Again, if it is improper for the Legal Advisor to supervise the prosecution, then the relief requested by the defense should be granted. Because the Legal Advisor’s position is legally constituted, appropriately includes supervision of the prosecution, and there is not a whit of compelling or persuasive evidence regarding the processing of the charges against Jawad, this remedy also must be rejected.

7. **Public Release.** The government opposes public release, despite its willingness to have all of this material made available to the public, as it provides further inducement to use court pleadings as cloaks for press releases.


DARREL J. VANDEVELD
LTC, JA, USAR
Prosecutor

Attachments:

1. Declaration of COL Lawrence J. Morris (unsigned; a signed version will be submitted when COL Morris returns from Guantanamo Bay.
2. Declaration of BGen Thomas W. Hartmann dated 22 July 2008.

ATTACHMENT 1

UNITED STATES OF AMERICA v. Mohammed Jawad	Declaration of COL Lawrence Morris Re: Defense Supplemental to Motion to Dismiss D-004 23 July 2008
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I, Colonel Lawrence J. Morris, declare:

1. I am the Chief Prosecutor for the Office of Military Commission, and have detailed myself as Assistant Prosecutor in the case of *United States v. Jawad*.
2. I am aware that the Office of the Convening Authority maintained a timeline or chart purporting to forecast the progress of the cases sworn by my Office, because from time to time I would see it posted on a wall in BGen Thomas W. Hartmann's office on those occasions when I happened to visit the Office of Convening Authority.
3. I never examined the chart carefully, never consulted the chart in any capacity, and never employed the chart or timeline in order to determine the conduct of my Office, including the progress of any case, including *United States v. Jawad*.
4. I understood it to concern logistics matters, so while I appreciated the work being done in that regard, I never consulted it because it did not affect my decisions on when to swear charges in any case.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Lawrence J. Morris
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

ATTACHMENT 2

UNITED STATES OF AMERICA v. Mohammed Jawad	Declaration of BGen Thomas W. Hartmann Re: Defense Supplemental to Motion to Dismiss D-004 23 July 2008
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I, Brigadier General Thomas W. Hartmann, declare:

1. I am the Legal Advisor to the Convening Authority in the case of *United States v. Jawad*.
2. I testified at the 19 June 2008 hearing on Mr. Jawad's Motion to Dismiss on the grounds of undue influence (D-004). This declaration is submitted in connection with Mr. Jawad's most recent supplemental filing to that motion.
3. At my direction, the Office of Military Commissions – Convening Authority staff developed and maintained a Military Commissions Timeline. This chart listed existing cases and the potential pacing of future cases. The potential pacing of future cases was based either on information I had received from the Chief Prosecutor on prospective case charging or was based entirely on my estimates of the maximum number of cases that might be charged in a particular timeframe. No actual case names were placed on the chart, unless the prosecution advised me that a particular case would be charged in a particular timeframe. These timeframes were not fixed, but often changed.
4. I used the chart as a management tool to allow for the projection of logistical needs should cases proceed at a particular pace. My concern was that in the absence of such a planning tool, many systems, logistics, transportation, security, physical plant, clearance and personnel needs – which required lengthy planning -- could not be properly undertaken, thereby inhibiting the effective and fair operation of the Military Commissions process.
5. I also used the chart, which developed and became more comprehensive over time (in many instances not as expressed or anticipated in earlier versions of the chart), to brief senior leaders in order to permit these senior leaders to understand the complexity of the

process, the need for commitment to the process, and the importance of a long term planning view.

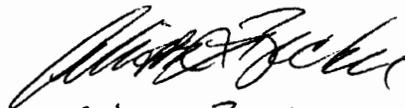
6. I did not seek to share the chart with the Chief Prosecutor, though I did ordinarily keep a copy of it on my office wall. I believe I shared the chart with a group of prosecution leaders shortly after the first chart was prepared in order to help them understand the myriad of planning factors involved in the Commissions process. In general, however, I did not make it a practice to discuss the chart with the Chief Prosecutor, and, to my knowledge, the Chief Prosecutor never consulted the chart or used it in planning the operations of his own office. The chart was not designed as a charging or planning tool for the Chief Prosecutor in preparing cases, but for me, in order to insure that the various logistical and support functions were being planned and carried out with enough lead time to support the legal process. In no sense did I employ the chart to direct the functions of the Office of the Chief Prosecutor.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.



Thomas W. Hartmann
Brigadier General, U.S. Air Force
Legal Advisor to the Convening Authority
Office of Military Commissions

Sworn and subscribed before me this 23rd day of July 2004.



Alison L. Becker
LTC, JA
USAR

*Authorized to administer oaths
under 10 USC 936*

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Reply to Prosecution Response to Supplement to D-004 Defense Motion to Dismiss for Unlawful Influence July 29, 2008
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1. **Timeliness:** The filing is timely. The Prosecution Response was filed 23 July 2008.

Reply to Paragraphs in Prosecution Response

“2. **Relief.**” Once again, the prosecution has sought a non-existent remedy, “summary dismissal” of the defense filing.

“3. **Overview.**” The prosecution has once again made the baseless claim that the defense “casually lodged” “charges of perjury” against Brig Gen Hartmann. No charges or even assertions of perjury have been made. The prosecution continues to distort and mischaracterize defense filings.

“4. **Facts.**”

iii. The government indicates that Col Morris “arrived” on 7 November 2007. It is unclear what “arrived” means in this context. Did he arrive in Washington D.C.? Did he begin in-processing, or did he actually start performing duties as the Chief Prosecutor? The defense believes that Lt Col Britt continued to fulfill the duties of the Chief Prosecutor until mid-November, but this minor difference does not affect the underlying basis of the defense motion.

iv. The prosecution completely ignored this crucial fact, failing to indicate whether they agreed or disagreed. The factual assertion by the defense must be taken as true.

“5. **Mixed Facts, Law and Argument**”

Prosecution d (defense g): The prosecution states that “It should be clear from the record that the *Khadr* entries reflect actions after they occurred, not projections.” The defense is unaware of what record the prosecution is referring to which would reflect this. The trial counsel indicated to defense counsel personally that there was no indication that the chart provided dated 1 Nov 2007 was ever updated after that point. The prosecution’s position makes no sense. If the chart were updated later to reflect actions after they

occurred, then all of the entries would have been correct. But in the preceding paragraph (prosecution c, referring defense c-f) the prosecution cites the “inexactitude of the projections” as evidence of the “absence of influence.” The prosecution appears to want to have it both ways – the entries which are slightly off are merely “projections” while the entries that are exactly correct are updates. Neither of these assertions are supported by the record.

Prosecution d. (defense h): The government states the defense paragraph is “inaccurate” but does not indicate in what respect it is inaccurate. The excerpt of the testimony is accurate. Apparently, the government disagrees with the defense interpretation of the evidence.

Prosecution f. (defense i): The prosecution states “there is no contradiction, and of course BGen Hartmann has not spoken about prosecution matters before this military commission.” It is unclear what the prosecution means by this statement. The prosecution complains that the defense has resorted to “personal attack.” The defense has pointedly avoided personal attack. The defense has simply identified the facts and drawn reasonable inferences therefrom. Ironically, in the same paragraph in which the prosecution asserts the “defense’s default position appears to be personal attack” the government characterizes the defense filing as “the kind of scurrilous hyperbole the commission has come to expect from (sic) that has characterized the defense’s framing of the issues in this case, both in the pleadings and in in-court advocacy.” A review of government filings will reveal that they are replete with personal attacks on defense counsel of this nature and worse. The defense has repeatedly noted the inappropriateness of commenting on the advocacy of opposing counsel, apparently to no avail.

Reply to 6. **“Supplemental Argument – Prosecution.”**

The gist of the government’s response is that Brig Gen Hartmann was simply performing the lawful function of supervising the Chief Prosecutor and acting as any General Court-Martial Convening Authority Staff Judge Advocate might. The record does not support these assertions. The prosecution has not addressed in any meaningful way any of the

inaccurate or misleading statements Brig Gen Hartmann made in his testimony or in his public statements.

In paragraph B, the government cites *U.S. v. Hardin* 7 M.J. 299 (CMA 1979) for the propositions that a Staff Judge Advocate need not be "neutral" or "absolutely impartial" and that the Legal Advisor's pretrial role "has a prosecutorial component." Setting aside the obvious fact that the Legal Advisor is not a Staff Judge Advocate and the statutory differences between the MCA and the UCMJ, more recent military caselaw challenges the proposition that Staff Judge Advocates need not provide neutral advice.

Perhaps inadvertently, *United States v. Hardin* began a lamentable process of degrading the Article 34 advice by designating it a "prosecutorial Codal tool." That process was completed in 1984, when the once-analytical Article 34 advice was eviscerated to a point where, at the option of the staff judge advocate, it might be nothing more than a conclusory form letter generated almost entirely by a computer (*see* R.C.M. 406(b)). Notwithstanding the redesignation and evisceration of the Article 34 advice, it is still possible to make a bad job of it, and the continuing validity of a judicial remedy has been reaffirmed in the very Manual for Courts-Martial, United States, 1984, that implemented the evisceration of the Article 34 advice. *See* R.C.M. 905(b)(1) and Discussion, and 906(b)(3).

If an Article 34 advice is merely a prosecutorial Codal tool, one may well ask why an accused has standing to obtain judicial review of it at all. Rule for Courts-Martial 406(c) requires that the Article 34 advice be provided to the accused, and the lead opinion in *Hardin* recognizes a continuing right to judicial review to test the Article 34 advice for legal competence, accuracy, and freedom from bias (whatever that means when applied to a prosecutorial document). . . . Whatever the theoretical basis, Rule for Courts-Martial 905(b)(1) and Discussion, and Rule for Courts-Martial 906(b)(3), appear to settle the matter of the availability of judicial review. Yet the existence of such a remedy strongly suggests that the characterization of the staff judge advocate's and the convening authority's functions in the referral process as prosecutorial, and the characterization of the Article 34 advice as a prosecutorial Codal tool, are not without their limitations, if not flaws.

Be that as it may, unlike *United States v. Hardin*, this case involves not the mere identity of who prepared the advice, but the very content of the advice itself, which was materially inaccurate in stating that there were no matters in mitigation, when, in fact, there were matters in mitigation.

U.S. v. Klawuhn, 33 M.J. 941, 944-5 (NMCMR 1991). The *Klawuhn* court went on to set aside the findings of guilty and sentence and ordered a "proper" pretrial advice if the case was to be referred to a new General Court-Martial. As in *Klawuhn*, the pretrial advice provided by the Legal Advisor in this case was inaccurate and left out key matters in mitigation, namely, Mr. Jawad's age, and the fact that he had been subjected to abusive treatment by U.S. authorities in his over 5 years of detention in U.S. custody. Thus, at a minimum, the charges must be dismissed and a new pretrial advice ordered by a new Legal Advisor.

A concurring opinion in *Klawuhn* provides sound advice for the Legal Advisor to the Convening Authority, whoever it may be, to follow in future cases:

A staff judge advocate advice should be professional, completed staff work that accurately and even-handedly tells the convening authority the important aspects of the case. This is more consistent with a quasi-judicial capacity which ought to characterize the role of the convening authority. This requires some thoughtful draftsmanship, not blind application of boilerplate. When matters not required to be included by law are included in the document, they must nonetheless be stated accurately.

Id. at 945.

Attachment 1: Declaration of COL Lawrence Morris

When COL Lawrence Morris detailed himself as assistant trial counsel, the defense did not object. At the time, the information available to the defense was that Brig Gen Hartmann's unlawful influence over the Chief Prosecutor was limited to Col Davis and LTC Britt. Based on BG Hartmann's chart and the facts presented in the supplemental filing to D-004, it has now become clear that the unlawful influence of Brig Gen Hartmann extends well into the tenure of COL Morris as Chief Prosecutor, and continued at least until the end of June 2008.

Since COL Morris has decided to make himself a witness in this case, and because Brig Gen Hartmann's unlawful influence over COL Morris (or stated another way, COL

Morris' prosecutorial independence from Brig Gen Hartmann) is now very much in issue, COL Morris clearly must be disqualified from performing any further role as assistant trial counsel and should also be barred from any further involvement in a supervisory role over this case. COL Morris' other actions, detailed in previous filings, provide further support for his disqualification.

While the defense has no basis to contest any of the specific factual assertions made by COL Morris in his sworn declaration, his declaration leaves several important questions unanswered. For example, if COL Morris took over as Chief Prosecutor on 7 Nov 2007 as the government indicated, and has exercised completely independent judgment on the selection and timing of charges to be sworn, without any reference to Brig Gen Hartmann's timeline, then how does COL Morris explain the remarkable congruence of Brig Gen Hartmann's chart with the actual timeline of events that he purportedly caused to occur as Chief Prosecutor? Was it merely a coincidence that charges were sworn against al Darbi on the exact day predicted by Brig Gen Hartmann weeks earlier? Was it just happenstance that the six 9-11 co-conspirators were charged just 3 days after Brig Gen Hartmann's predicted date? Was it just a fluke that the HVD cases have been charged in the exact order predicted by Brig Gen Hartmann? COL Morris states that he understood the chart to concern "logistics matters" and stated that he "never examined the chart carefully." Even a casual glance at the chart would reveal that only a small fraction of the entries could be construed as concerning "logistics matters." Indeed, the logistics matters were in a separate color along the bottom of the chart in yellow. The blue and red entries which make up the bulk of the chart all address the timing of pending cases. What kind of information did COL Morris (or others acting at COL Morris' direction) provide to Brig Gen Hartmann in advance of the swearing of charges to enable him to brief the General and Flag Officers at the VTCs, and to be prepared for his Pentagon Press Briefings and other media appearances? With the consent of the commission, it is the intent of the defense to call COL Morris as a witness at the next hearing to examine these and other matters (e.g. the e-mails received by COL Morris from CAPT McCarthy concerning the testimony of Brig Gen Hartmann at the June 19 hearing.)

Attachment 2: Declaration of Brig Gen Hartmann

Brig Gen Hartmann states that his chart reflects the “potential pacing” of existing and future cases and was merely a “planning tool” for logistical needs.¹ He also indicated that he used the chart to brief senior leaders “in order to permit these senior leaders to understand the complexity of the process, the need for commitment to the process, and the importance of a long-term planning view.” While the chart may indeed have been utilized by Brig Gen Hartmann in his lawful role facilitating logistics and for educating his fellow General Officers, it strains credulity that these were the only purposes of the chart. Indeed, the trial counsel has stated, in an interview with *The Nation*

The chart reflects the Office of Military Commissions' aspirational goals for moving the legal process forward.... If one were to compare the aspirational goals listed on that chart to reality, the evidence shows there was no influence on the timing of the prosecution of cases.

(Attachment 1) When the defense compares the “aspirational goals listed on the chart to reality” the defense find a remarkable similarity, indicating that Brig Gen Hartmann’s “aspirations,” like the “aspirations” of many a General Officer were taken as directive and carried out to the letter. Indeed, the government appears to have inadvertently admitted as much in their filing. In the Overview, the government refers to “the chart in question” and states that, “[i]ts purpose was to **prompt, forecast, and track the logistical and other obligations that would be required to support charges as they were sworn.**” (emphasis added). Logistical support is not needed to swear charges, nor is it needed to prepare pretrial advice. Logistical support is needed to try cases. Brig Gen Hartmann prompted the swearing of charges and then went about arranging the logistical support

¹ One statement in Brig Gen Hartmann’s declaration that is likely true is that the chart “developed and became more comprehensive over time.” However, Brig Gen Hartmann does not contradict the defense assertion that the 1 Nov 2007 chart was the chart used to brief senior leaders in November 2007. The defense has not been provided any later versions of the chart in order to evaluate Brig Gen Hartmann’s statement and requests that all versions of the chart used to brief senior leaders be provided, particularly if the charts reference Mr. Jawad’s case.

fully anticipating that every case sworn would be referred to trial, as he has recommended in each and every pretrial advice since. That is a textbook case of unlawful influence.

CONCLUSION

Nothing in the government response contradicts the defense assertions about the pattern of the VTCs, the dates of the swearing of charges in the HVD cases and the dates of Brig Gen Hartmann's press briefings. The government does not contradict that Brig Gen Hartmann was aware of the anticipated date of service of charges well in advance, and knew enough of the details of the cases to provide a personal briefing to the senior leadership of JTF-GTMO and SOUTHCOM. The government simply does not address the defense's detailed factual assertions that Brig Gen Hartmann gave a false impression to the press and public, other than to say that the uncontradicted assertions are "scurrilous hyperbole." The Declaration of COL Morris indicates that he was not directly influenced by Brig Gen Hartmann's chart. He does not say that he was not influenced by Brig Gen Hartmann himself. The uncontroverted evidence is that COL Morris, just as with Col Davis and LTC Britt before him, has been subjected to the unlawful exertion of influence by the Legal Advisor.

In *U.S. v. Hamdan*, in finding that Brig Gen Hartmann's actions in identifying himself too closely with the prosecution required him to be disqualified, the commission noted that one national magazine, *Harper's*, had called into question Brig Gen Hartmann's neutrality.

34. The Commission takes note of the 28 February 2008 article in *Harper's Magazine* entitled "The Great Guantanamo Puppet Theater" that alleges political influences over the trials and publicly challenges General Hartmann's ability to continue to act as the Legal Advisor to the convening Authority.

2

² Finding of fact from Ruling on DO26, *U.S. v. Hamdan*.

(h) Finally, the national attention focused on this dispute has seriously called into question the Legal Advisor's ability to continue to perform his duties in a neutral and objective manner. While the public's view of the matter is not controlling, the fact that a national magazine should have called the public's attention to General Hartmann's actions and suggested that he can no longer perform his duties is deeply disturbing.

3

Since that time, another prominent national magazine, The Nation, has challenged Brig Gen Hartmann's ability to continue to act as the Legal Advisor in two articles. (Attachments 1 and 2). Prominent military law experts were quoted in both articles questioning Brig Gen Hartmann's actions. According to the former Navy Judge Advocate General, RADM John D. Hutson, USN (ret.) and current Dean and President of Franklin Pierce Law Center, when the "legal advisor is meant to give independent and objective advice to the convening authority and then talks to the prosecutor about how to prosecute the case—that creates a conflict of interest. He has overstepped his bounds and possibly created unlawful command influence." (Atch 2) Eugene Fidell, President of the National Institute of Military Justice, and a professor of military law at Yale Law School and Washington College of Law stated that Brig Gen Hartmann has "eroded the independence of his own function and the independence of the Convening Authority." (Atch 1)

As CAPT Allred did in U.S. v. Hamdan, the military judge should take note of the growing public perception, based on facts established by the defense, that there are serious questions about "the Legal Advisor's ability to continue to perform his duties in a neutral and objective manner" and disqualify him from all further involvement with the military commissions. It is high time for the Legal Advisor to go, and the charges against Mr. Jawad to go with him.

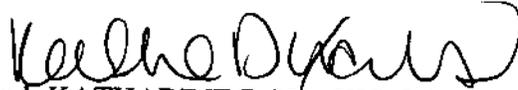
³ Analysis with respect to the motion to disqualify the Legal Advisor, Ruling on D026, U.S. v. Hamdan.

6. **Request for Immediate Public Release:** The defense requests immediate public release of this and all motions filed by the defense and the government responses thereto.

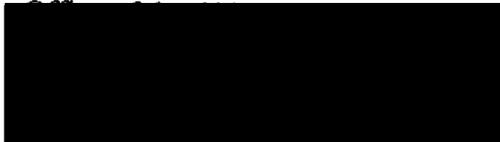
Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR



And: KATHARINE DOXAKIS, LCDR, USN
Detailed Defense Counsel



Attachments:

1. Ross Tuttle, "More Meddling at Gitmo" The Nation, July 17, 2008.
2. Ross Tuttle, "Gitmo in Disarray" The Nation, May 8, 2008

Attachment 1

THE Nation.

More Meddling at Gitmo

by ROSS TUTTLE

July 17, 2008

As the United States moves forward with the **first American military tribunal** in over fifty years, in the case against Osama bin Laden's driver Salim Hamdan, new evidence has emerged in another Guantánamo case--that of Mohammed Jawad--that the integrity of entire military commissions system has been corrupted.

According to a document filed in court by Jawad's attorney on July 15, Brig. General Thomas Hartmann, the highest-ranking officer and top lawyer overseeing Guantánamo's military tribunals, has misled the court, the press and the American public, and should be disqualified from the process. Major David Frakt, Jawad's defense counsel, brings to light new evidence that Hartmann has been deeply involved in prosecutorial matters--a role that contradicts his mandate to provide impartial legal advice to the office of the Convening Authority which runs the Commissions--raising serious doubts about the ability of the Commissions to administer justice.

The evidence is a timeline chart prepared by Hartmann that lays out plans for upcoming cases--including which cases would be charged, when they would be charged, when certain charges would be validated and sent to trial and, in some cases, how they would be tried. The problem is that the timeline was created in early November 2007, before many of those decisions should have been made. Those decisions are the purview of the Chief Prosecutor and the Convening Authority, who must arrive at them after lengthy consideration of the evidence and deliberation with advisors and other prosecutors. But, according to Frakt, the timeline suggests that those decisions were preordained by Hartmann.

"As legal advisor General Hartmann's duty has been to provide independent and impartial advice to the Convening Authority," says Frakt. (The Convening Authority is a quasi-neutral, quasi-judicial arbiter that oversees the commissions and makes crucial decisions about the allocation of resources, the use of expert witness and which charges are worthy of going to trial and which warrant clemency.) "But his role is made impossible when he is so deeply and partially involved in the strategic planning of prosecutorial efforts, as the chart suggests he is."

Neither the chart nor the document submitted to the court have yet been released to the public, but Frakt has detailed some of their contents to *The Nation*.

Reached for comment, Lt. Col. Darrel Vanderveld, lead prosecutor in the Jawad case, disputed Frakt's description of the chart's role in the Guantánamo cases. "The chart reflects the Office of Military Commissions' aspirational goals for moving the legal process forward.... If one were to

compare the aspirational goals listed on that chart to reality, the evidence shows there was no influence on the timing of the prosecution of cases," he said. (The office of military commissions refused to provide a copy of the chart to conduct a comparison.)

According to Frakt, the chart reveals that Hartmann was likely making the decisions about who to charge and when--behavior that contradicts testimony Hartmann had given on the subject just one month ago.

During a pretrial hearing in June on a motion to dismiss charges against Jawad based on unlawful influence, Hartmann said, "In general...I believe it is the Chief Prosecutor's responsibility to determine who to charge."

But Frakt says the timeline reveals that Hartmann "had foreknowledge, in one case, seven weeks in advance of the exact day charges would be filed against a detainee." This was the case of Ahmed al-Darbi, an alleged member of Al Qaeda, who was charged on December 20, 2007--exactly as forecast by the chart. But a new Chief Prosecutor, Col. Lawrence Morris, hadn't arrived to take control of the prosecutor's office until mid-November. According to Frakt, the chart suggests that this decision and many others concerning prosecutorial scheduling and strategy have been made by Hartmann.

In the case of Frakt's own client, Mohammed Jawad, Frakt believes the chart shows that the referral of charges to trial was a foregone conclusion.

The charges were referred to trial by the convening authority in January, 2008--a date set by Hartmann's timeline, says Frakt. Yet in his June testimony, Hartmann explained that the Convening Authority had waited until January before referring charges in order to review additional evidence. "But in fact, the chart makes it clear that he had already made up his mind that it was going to trial--long before he actually recommended the case be referred to trial, and he was confident it would be [referred]."

In the case of the alleged 9/11 co-conspirators, Frakt believes that Hartmann was not candid with the public about the decision to try defendants jointly. During a February 11 press conference to announce the charges, Hartmann said, "The decision to try them together or the recommendation to try them together was made by the chief prosecutor." But Frakt says that according to the language in the November chart, Hartmann had already outlined that it would be a joint trial--revealing an involvement in their charges that he'd heretofore attempted to obscure.

Hartmann had also been asked during this and other press conferences about a time frame for charges being referred and when trials would begin. Hartmann was uniformly noncommittal, saying "there is no specific timeline" and "one can never predict." Yet, according to Frakt, this belies the fact that Hartmann had indeed already made these predictions and was working with the prosecution and convening authority to assure they'd come to fruition.

Frakt's allegations aren't the first to claim Hartmann has inappropriately meddled in the affairs of the prosecution. **The accusations** first arose last year when then-chief prosecutor Col. Morris Davis complained Hartmann was violating the Rules of the Military Commissions, which state that "no person may attempt to coerce or by any unauthorized means influence the exercise of

professional judgment" by the prosecution.

Davis' complaint prompted an internal investigation, after which Hartmann was admonished not to align himself too closely with the prosecutorial function. Davis later resigned in part, he says, because of Hartmann's continued meddling.

And in May this year, a judge disqualified Hartmann from continuing to provide legal advice in the case of **Salim Hamdan**, because the judge said he had exerted improper influence over the prosecution. (The Hamdan case is scheduled to go to trial next week, in what will be the first trial of these military commissions.) Davis testified in that hearing on behalf of the defense.

"I don't know how you're going to do an independent and objective review of the charges when you've already got a date for the referral of charges set on the calendar," Davis said, upon hearing about this latest piece of evidence.

Davis believes that Hartmann's intent was clear from the beginning "he once told me, 'the way we validate this process is to get back into court, present evidence, and get convictions and good sentences.' "

But according to Frakt, Hartmann appeared to overstep his role in trying to make that happen.

"He went well beyond attempting to motivate and facilitate the military commissions effort," says Frakt, "he became actively involved in the prosecution strategy, and that wasn't his job."

Hartmann's stance has "eroded the independence of his own function and the independence of the Convening Authority," says Eugene Fidell, a professor of military law at Yale Law School and Washington College of Law. "This has been the problem from the beginning."

Fidell is uncertain if this latest revelation is fatal to the entire commissions, but says "the commissions are already under tremendous pressure and at a certain point, even a battleship can take only so many holes in its hull before it rides lower and lower until it eventually sinks."

"This development is enormous," says Frakt, who thinks it should spell the end of Hartmann's association with the military commissions. He also thinks this could spell the end of the commissions themselves. "They've taken a lot of body blows over the past couple months. This could be their knockout punch."

About Ross Tuttle

Ross Tuttle is a documentary filmmaker and freelance journalist based in Los Angeles. **more...**

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Attachment 2

THE Nation.

Gitmo in Disarray

By Ross Tuttle

This article appeared in the May 26, 2008 edition of *The Nation*.

May 8, 2008

Guantánamo Bay

When Salim Hamdan, Osama bin Laden's alleged driver, returned to court recently for yet another hearing in his long odyssey through the ad hoc US legal system for suspected terrorists, he had an unlikely ally--Col. Morris Davis, the former chief prosecutor who charged him with war crimes in May 2007. Davis was there to testify as a defense witness in a motion to dismiss those charges because of unlawful interference by Bush Administration appointees, including Brig. Gen. Thomas Hartmann, legal adviser to the office that oversees the military commissions process.

Since his resignation in October, Davis, once a staunch advocate of the commissions, has become an outspoken critic of the Pentagon's handling of the Guantánamo cases. Although he doesn't doubt Hamdan's guilt, he believes the current system will be unable to administer fair and open trials. The Pentagon has previously disputed Davis's account and on April 28 sought to discredit him in court. "Colonel Davis was ineffective [as chief prosecutor]," said current chief prosecutor Col. Lawrence Morris, adding that "clearly [Davis] didn't like or get along with General Hartmann."

However, despite attempts to dismiss Davis's claims as a personality conflict, documents obtained by *The Nation*, as well as testimony entered into the record at Hamdan's pretrial hearing, reveal that Davis's opinions were shared by other prosecutors in the military commissions system. In fact, the two lead prosecutors in the *Hamdan* case--Lt. Cmdr. Timothy Stone and Lt. Col. William Britt--had on previous occasions complained of political interference by Hartmann and of the general "state of disarray" in the prosecutor's office since his arrival. Along with a detailed complaint Davis submitted to the Pentagon's inspector general last August, these documents describe an acute level of dysfunction in the military commissions office, in which prosecutors repeatedly raised concerns about "ethical violations," the "suspect public reputation" of the process, "further embarrassment to the office

of the chief prosecutor" and the potential "disqualification of the legal advisor [Hartmann]."

In an August 2007 memorandum, Stone alerted then-chief prosecutor Davis of his intent to seek an opinion from the Navy JAG about "ethical concerns regarding the professed intentions of the Legal Advisor [Hartmann]." According to the memo, Hartmann had planned to meet Hamdan's civilian defense counsel in Cuba in September to negotiate a plea. "He told the prosecution team (LTC Britt and I) that we were not invited," the memo reads. Clearly frustrated, Stone wrote that Hartmann's knowledge of the *Hamdan* case was "totally insufficient" and that unless Hartmann was given additional information, "my client...the United States, will not be adequately represented." But if Stone were to provide Hartmann with the necessary case documents, he would have assisted Hartmann in "usurping the role" of the prosecutor and would thus "facilitate...the disqualification of the Legal Advisor," ultimately weakening Stone's case and causing "turmoil for the Commissions process."

Although Hartmann's backdoor negotiations never took place, Stone's ethical dilemma underscores the problem inherent in the job of the legal adviser. On the one hand, Hartmann is required to "independently and objectively provide cogent legal advice to the convening authority," says Susan Crawford, an appointee who by law is required to remain neutral. On the other hand, the legal adviser also supervises the prosecution, a directive Hartmann has seemingly interpreted to mean that he is the *de facto* chief prosecutor.

"When legal advisor is meant to give independent and objective advice to the convening authority and then talks to the prosecutor about how to prosecute the case--that creates a conflict of interest," says John Hutson, president of Franklin Pierce Law Center and the former Navy JAG. "He has overstepped his bounds and possibly created unlawful command influence."

A second document, an unpublished op-ed written by Stone in response to a September 2007 *Wall Street Journal* article, confirms that the "prosecution office has been in a state of disarray since the arrival of Brigadier General Hartmann." Stone's op-ed corroborates Davis's claim that Hartmann was fixated on prosecuting "sexy" cases that would politically benefit the Bush Administration. This claim is further bolstered by a statement from Britt, read in court by defense attorneys, that explains Hartmann's rationale for pursuing particular cases. According to Britt, Hartmann said, "The reason is, this case will seize the imagination of the American people and that case won't."

A third document, a memo Davis submitted to the Pentagon inspector general, recounts clashes with Hartmann over day-to-day functions of the prosecutor's office. According to Davis, at one meeting "Hartmann said: 'I wear two hats. In one I'm responsible for providing legal advice to the convening authority and in the other I'm responsible for the prosecution.'" Davis's memo says Hartmann wanted to

increase the rate at which cases were charged, over prosecutors' objections that many weren't ready, sometimes because evidence hadn't been declassified.

Davis's inspector general complaint was ignored because, as he was told, the matter had been "satisfactorily resolved" by a previous investigation, which ruled in favor of Hartmann. But it also warned the legal adviser to "diligently avoid aligning himself with the prosecutorial function." Current chief prosecutor Morris contends that Hartmann is not unlawfully influencing his office and that Britt's and Stone's comments merely "reflect an understandable and intense sense of ownership of a case." (Britt and Stone are prohibited by military gag order from speaking to the press; Hartmann declined to comment.)

According to Lt. Cmdr. Brian Mizer, the lead defense counsel for Hamdan, even if his motion to dismiss based on unlawful influence is denied, the issue will be raised in subsequent cases. "The government has somewhat of an argument" because Hamdan was charged before Hartmann arrived, Mizer concedes. "But that's like saying, 'Yeah, the house is on fire, but this room is OK.'" Indeed, despite Hartmann's push to accelerate the trials with a flurry of recent charges, the tribunals remain mired in other unresolved issues--concerns about the use of coerced testimony, counsel's access to clients, adequate resources and training for the defense, withheld evidence and undisclosed witnesses--that continue to plague their legitimacy.

Then there are the defendants. On the second day of the hearing, Salim Hamdan announced his decision to boycott his trial--as have now four others. "There is no justice in this court," said the 38-year-old Yemeni. "If you want to try me, you can by civil law or any law that is recognized."