

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Motion to Dismiss for Unlawful Influence May 20, 2008
--	--

1. Timeliness: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008 and within the specific deadline established for law motions by COL Brownback on 7 May 2008. The motion is filed pursuant to R.M.C. 905(b)(1), R.M.C. 907 and R.M.C. 104.

2. Relief Sought: Defendant Mohammed Jawad moves to dismiss all charges and specifications with prejudice.

3. Overview: The Military Commissions Act (MCA) prohibits attempted or actual coercion or unlawful influence of the exercise of professional judgment of trial counsel. 10 U.S.C. § 949b (2006) and R.M.C. 104(a)(2). The former Chief Prosecutor and his subordinates were subjected to actual and attempted unlawful influence by the Legal Advisor to the Convening Authority. Specifically, the Legal Advisor, the highest ranking military officer in the Office of Military Commissions, exercised unlawful influence in the selection and timing of cases to be pursued by the Office of the Chief Prosecutor, and associated himself too closely with the prosecutorial effort. The Legal Advisor unlawfully coerced or influenced the Office of the Chief Prosecutor to swear charges against Mr. Jawad in October 2007. After hand-selecting Mr. Jawad's case for immediate swearing of charges and personally overseeing the charging process, the Legal Advisor then provided legal advice to the Convening Authority recommending that the Charges and Specifications be referred to trial by military commission. Because the

Legal Advisor had so closely aligned himself with the prosecutorial effort in this case as to virtually become the Chief Prosecutor, he was unable to give impartial legal advice to the Convening Authority. His pretrial advice omitted numerous obvious and relevant legal issues and matters in extenuation and mitigation, depriving the Convening Authority of information that may have impacted her decision-making process, and included misleading information. Because the entire swearing of charges and referral process was infected by unlawful influence, the only appropriate remedy is dismissal.

4. Burden and Standard of Proof: Under U.S. military law, the defense bears the initial burden of raising the issue of unlawful command influence by a preponderance of the evidence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The defense meets this burden by showing facts, “which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Importantly, “disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.” *Stoneman*, 57 M.J. at 42. Even in the absence of actual command influence, the appearance of unlawful command influence may place an “intolerable strain on public perception of the military justice system.” *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). Dismissal may be an appropriate remedy to cure either actual unlawful influence or the appearance of unlawful influence. *See, e.g., United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), and *U.S. v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). This same remedy should be available for military commissions where Congress has afforded detainees even greater protections against unlawful influence than those that are found in the Uniform Code of Military Justice (UCMJ).

5. Facts:

i. On July 1, 2007, Brigadier General Thomas Hartmann became the Legal Advisor to the Convening Authority. At the time, the Chief Prosecutor was Colonel Morris Davis. Brig Gen Hartmann first met Col Davis on 2 July 2007, while Col Davis was about to undergo surgery, followed by a month's convalescent leave. During his absence Brig Gen Hartmann began visiting the Prosecutor's Office, asking counsel about their cases, and requiring detailed reports regarding the evidence, witnesses, and level of counsel preparation to try the cases. In Col Davis's opinion, Brig Gen Hartman management style was "nano-management" and arguably constituted "cruelty and maltreatment."

ii. During Col Davis' nearly month-long absence for convalescence, Lieutenant Colonel William B. Britt, Col Davis' Deputy, called him at home nearly daily to discuss office business. LTC Britt and Col Davis considered Brig Gen Hartmann's conduct to be very troubling and inappropriately meddlesome. During the same period of convalescence, Brig Gen Hartmann called Col Davis at home, questioning his leadership, his Deputy's integrity, the general quality of the prosecution shop's work, and giving him specific direction about needed improvements. He punctuated his demands with statements such as "Am I making myself clear, Colonel?" Col Davis was shaken, and offered to resign the next day. Brig Gen Hartmann backed off and assured Col Davis that there was no need for that.

iii. On 18 July Brig Gen Hartmann announced that *he* was going to select the next cases to go forward, which, in fact, he did. He wanted cases that would be "sexy" enough to capture the public interest, or cases in which an accused might have blood on his hands, rather than cases involving actors transporting documents, etc. In a meeting in the Prosecution war room on 19 July, Brig Gen Hartmann announced to all in attendance that he wore two hats: one as Legal Advisor to the Convening Authority, and one in charge of the prosecution.

iv. As a result of concerns about what was going on in his office, Col Davis returned to work after only 18 days of convalescent leave, a week earlier than he had intended.

v. On 15 Aug 2007, a meeting was held between Col Davis, Brig Gen Hartmann, and various assistants and representatives of other agencies. Anticipating a favorable decision from the Court of Military Commission review (CMCR) in the near future, Brig Gen Hartmann, directed that three cases be ready to refer the day that decision was issued.¹ Col Davis objected that three cases could not be ready by that date, and thought it improper that the Legal Advisor should be directing a particular number of cases to be referred on a date certain. Brig Gen Hartmann stopped the discussion by saying “I said we are going to have three cases ready on that day. Does everyone understand me?”

vi. On a number of occasions between July and September of 2007, Brig Gen Hartman accentuated his position of authority over Col Davis by explicit reference to the difference in rank, with phrases such as “Do you understand me, Colonel?” and “Am I making myself clear, Colonel?”

vii. The tensions between Col Davis and Brig Gen Hartmann continued to increase, with Brig Gen Hartmann becoming in Col Davis’ opinion, much too deeply involved in the operations of the Chief Prosecutor’s Office. In Aug of 2007, Brig Gen Hartmann expressed his disappointment to Col Davis with the speed at which the trials were moving.

viii. The Legal Advisor specifically singled out the case against Mohammed Jawad for prosecution. In the Legal Advisor’s opinion, the Jawad case, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter, was an example of a “sexy” case, a defendant with “blood on his hands” and a case that the “American people could understand.” In August and September 2007, the Legal Advisor, repeatedly referred to the Jawad case in his discussions with the Chief Prosecutor on the sequencing

¹ The decision was announced 24 September 2007; charges against Jawad were the next charges to be sworn.

of cases, referring to him as “that guy who threw the grenade.” The Chief Prosecutor indicated that he had other cases which were more fully developed and had had counsel assigned for longer² but the Legal Advisor did not think they were as interesting or had as much public appeal as Mr. Jawad because they were facilitator cases.

ix. The Chief Prosecutor did not have any immediate plans to swear charges against Mr. Jawad. Mr. Jawad was approximately twentieth on the list of cases that Col Davis intended to pursue.³ Col Davis did not believe the case was well enough developed at the time to swear charges immediately, and wanted to wait until more progress had been made in declassifying evidence. Col Davis also considered the age of Mr. Jawad to be a factor, although not a primary factor, in where he was in his queue of cases. Col Davis felt that it would be helpful to know the outcome in Khadr, before revisiting the issue of juvenile offenders. Col Davis wanted to focus on cases that he considered more serious. Col Davis expressed his views about the sequencing of cases to Brig Gen Hartmann. Brig Gen Hartmann challenged the Chief Prosecutor’s decision to take to trial first the cases he considered most serious. Brig Gen Hartmann also disagreed with Col Davis approach to declassifying evidence and felt that prosecutions should press on with classified evidence and let the military judges sort it out. Brig Gen Hartmann also 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, a clear effort to influence the professional judgment of the Chief Prosecutor.

x. In late August 2007, Col Davis delivered a formal complaint regarding the interference of Brig Gen Hartmann in his office to the Convening Authority. Colonel Davis’ complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA. In September 2007, Col Davis filed a complaint with the DoD Inspector General’s office.

² Trial counsel LTC Darrel Vandeveld was assigned to begin preparing the Jawad case in June 2007. He has indicated that he started from scratch on the case at that point. In contrast several other cases, such as the al Bahlul cases, had been in the works for years, and had been charged under previous incarnations of the military commissions.

³ Since charges were sworn against Jawad, charges have also been sworn against 11 other individuals, nine of which have been referred to military commissions, one dismissed, and one pending disposition.

xi. On October 3, 2007, Mr. England issued an appointing letter establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007. The letter indicated that Colonel Davis was to work for the Legal Advisor and that the Legal Advisor was to work for the DoD General Counsel. Col Davis was summoned on 4 October and given the memo. Unwilling to be placed in a chain of command under these individuals, Col Davis submitted his resignation later that day. He was advised the following day, Friday, 5 October that his resignation had been accepted. Monday, 8 October was Columbus Day, a federal holiday. The next duty day was Tuesday, 9 October. Charges against Mr. Jawad were sworn that day. The maximum authorized punishment for the charged offenses, if convicted, is life imprisonment.

xii. LTC Britt, as Deputy Chief Prosecutor, served as acting Chief Prosecutor until the new Chief Prosecutor was appointed on October 15, 2007.

xiii. On 21 Jan 2008, COL J. Michael Sawyers, detailed defense counsel for Mr. Jawad, sent a memorandum to the Legal Advisor asking him to consider certain “significant legal impediments to jurisdiction” and alleging a “defective preferral.”⁴ The memo asked the Legal Advisor to bring several legal issues to the attention of the Convening Authority for her consideration prior to referral of charges against Mr. Jawad. (Attachment 1) On 27 Jan 08, the Legal Advisor acknowledged the memo by e-mail to COL Sawyers (Attachment 2). COL Sawyers did not receive any acknowledgement from the Convening Authority.

xiv. The Legal Advisor prepared the pretrial advice (Attachment 3) to the Convening Authority as required by R.M.C. 406. The document was signed by him on 28 Jan 2008. The barebones pretrial advice did not include any reference to any potential legal issues in the case, other than a brief discussion of *in personam* jurisdiction. The pretrial advice

⁴ Although COL Sawyers used the more familiar term “preferral” from military practice rather than the term “Swearing of Charges” used in the R.M.C., his meaning was clear in context.

did not mention the issue of multiplicity or unreasonable multiplication of charges. The pretrial advice did not mention any extenuating or mitigating factors, such as the fact that Jawad's alleged crimes were committed when he was a juvenile, his cooperation with Afghan authorities, or that he was one of only two detainees taken into custody as a juvenile still being held at Guantanamo. The pretrial advice did not mention the fact that Mr. Jawad had no known terrorist affiliation, or that he was not a member of al Qaida or the Taliban. The pretrial advice did not mention that Jawad had already been in US custody for over five years, or that he was facing life imprisonment. The pretrial advice did not mention the nature or seriousness of the injuries suffered by the three victims of the grenade attack, whom Jawad had allegedly attempted to murder, or their current state of health.⁵ The pretrial advice recommended the case be referred noncapital, even though the death penalty was not an authorized punishment for the offenses charged. The pretrial advice did not mention the 21 Jan 08 Memorandum submitted to COL Sawyers or the legal arguments contained therein. COL Sawyers' memo was not listed as an attachment to the advice.

xv. The recommendation of the Legal Advisor was followed and Charges were referred, without comment, by the Convening Authority on 30 Jan 08.

xvi. From his appointment until March 2008, Brig Gen Hartmann made numerous public statements aligning himself with the prosecution, took credit for success in moving cases toward trial and indicated that he was the leader of the prosecutorial effort.

xvii. Brig Gen Hartmann's involvement in the details of prosecutorial decision making and management style led one prosecutor to resign, and another to seek ethical guidance from the NAVY JAG ethics office. Brig Gen Hartmann's objectivity has been called into

⁵ The defense believes that two of the three named victims suffered only minor injuries and have fully recovered, but has been unable to verify this because the government has not responded to the defense request to provide contact information for the victims.

question in a variety of national news publications, including Harper's Magazine, the Nation, and the New York Times.⁶ (Attachments 5-7)

6. Law and Argument:

THE MILITARY COMMISSIONS ACT PROHIBITS UNLAWFUL INFLUENCE OVER THE PROSECUTION

The Court of Appeals for the Armed Forces has emphasized the importance of ensuring that the convening authorities and legal advisors who carry out these important statutory responsibilities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004) (citing *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997); *United States v. Coulter*, 3 U.S.C.M.A. 657, 660 (C.M.A. 1954) ("However honest his intentions, an inherent conflict arises between a reviewer's duty to dispassionately advise the convening authority on the appropriateness of the sentence, and the prosecutor's innate desire to press for a substantial sentence as an accolade for his efforts in securing the conviction."). The Court has disqualified legal advisors from performing statutory duties when they have not remained "neutral" in fact or in appearance. *Taylor*, 60 M.J. at 194. "A Staff Judge Advocate is not a prosecutor and is usually in a position to give neutral advice." *United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997) (citing 10 U.S.C. § 806(c) (2006)).

The congressional prohibition against unlawful command influence found in the UCMJ was also codified in the MCA. But Congress did not simply transplant the prohibition against unlawful influence found in Article 37, UCMJ, into § 949b of the MCA. Article 37, UCMJ, prohibits persons subject to the Code from coercing or unlawfully influencing "the action of a court-martial or any other military tribunal or any member thereof..." 10 U.S.C. § 837 (2006). Section 949b of the MCA is broader in scope and prohibits *any person* from coercing or unlawfully influencing "the exercise of professional judgment

⁶ See, William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, NYTimes, May 11, 2008; Scott Horton, *The Great Guantánamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008. Ross Tuttle, *Unlawful Influence at Gitmo*, The Nation, March 28, 2008. (Attachments 5-7)

by trial counsel or defense counsel.” 10 U.S.C. § 949b (2006). Colonel Davis has testified in the Hamdan case that Senators John McCain and Lindsey Graham inserted these provisions into the MCA at his request to secure the independence of the Chief Prosecutor from interference external to his office.

The MCA made no mention of the Legal Advisor to the Convening Authority. The position of Legal Advisor to the Convening Authority was creation of the Secretary of Defense, as part of his statutory authority to create implementing regulations for the MCA. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (RTMC) 8-6. R.M.C. 103a(15) states that the Legal Advisor “provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the [UCMJ].” However, unlike in the military justice system, the MCA created an “Office of the Chief Prosecutor” 10 U.S.C. § 949b to make it clear that the Prosecution was an independent function with the power to exercise prosecutorial discretion. RTMC, paragraph 8-1, further emphasizes this point “The Chief Prosecutor shall supervise the overall prosecution efforts under the M.C.A., the M.M.C. and this regulation. The Chief Prosecutor shall further ensure proper management of personnel and resources.” These duties clearly encompass the selection and sequencing of cases for prosecution, and the assignment of prosecutors, paralegals and other office resources to such cases, functions which the Legal Advisor attempted to and/or actually has usurped.

THE LEGAL ADVISOR VIOLATED THE PROHIBITION ON UNLAWFULLY INFLUENCING THE PROSECUTION

By closely aligning himself with the prosecutorial effort, in public and in private, by usurping the function of the Chief Prosecutor, by substituting and imposing his prosecutorial judgment on the selection and sequencing of cases for prosecution, and by allowing impermissible factors, unrelated to the merits of the case, to intrude into the charging process, the Legal Advisor abandoned his objectivity and neutrality, overstepped his authority and exerted unlawful influence over the Office of the Chief Prosecutor, the military commissions generally, and the Jawad case specifically. The

Legal Advisor not only attempted to influence the professional judgment of the Chief Prosecutor, but coercively overrode it, a clear violation of 10 U.S.C. § 949b, thereby causing charges to be sworn against Mr. Jawad which would not otherwise have been sworn. Col Davis placed Mr. Jawad approximately twentieth in the line-up of cases he intended to prosecute. Despite Brig Gen Hartmann's unlawful efforts to prod the prosecution into filing cases at a more rapid clip, charges have been sworn against only eleven other detainees during his reign. Had Col Davis continued as Chief Prosecutor, it is likely even fewer cases would have been filed by this point in time. While it is impossible to know whether and what charges might have been filed against Mr. Jawad at some point in the future, it is indisputable that Mr. Jawad would not be facing trial by military commission now or in the immediate future were it not for the direct impermissible interference by the Legal Advisor.

After orchestrating the swearing of charges against Mr. Jawad, the Legal Advisor then compounded his unlawful actions by falsely assuming the mantle of the neutral objective Legal Advisor and purporting to provide independent pretrial advice to the Convening Authority.

THE LEGAL ADVISOR COULD NOT AND DID NOT PROVIDE OBJECTIVE INDEPENDENT PRETRIAL ADVICE TO THE CONVENING AUTHORITY

According to the Discussion to R.M.C. 406, "the legal advisor is personally responsible for the pretrial advice and must make an independent appraisal of the charges and evidence in order to render the advice." A legal advisor who has acted as a prosecutor is disqualified from preparing the advice. As Brig Gen Hartman had become the *de facto* Chief Prosecutor, he was legally prohibited from preparing the pretrial advice. The defective pretrial advice prepared by the Legal Advisor illustrates just why such a prohibition is in place.

According to the Discussion, although not required, "the pretrial advice should include, when appropriate, a brief summary of the evidence; and discussion of significant

aggravating, extenuating or mitigating factors.” While “the advice need not set forth the underlying analysis or rationale for its conclusion” it is customary for a legal advisor (or Staff Judge Advocate in the military justice context) to provide at least a minimal discussion of significant issues in the case. The extraordinary facts of this case mandated a more detailed discussion. The discussion to RMC 406 indicates that “information which is...so incomplete as to be misleading may result in a determination that the pretrial advice is defective.” This is a classic case of a defective pretrial advice – the virtual Chief Prosecutor providing partisan, misleading advice and intentionally providing a paucity of information to the Convening Authority to assure a swift referral of the charges.

The inclusion of at least some degree of detail and at least some discussion of important issues in a pretrial advice is particularly critical in light of the fact that there is no pretrial investigation under the M.C.A. When a case is recommended for referral to a General Court-Martial, a copy of the Article 32 Investigating Officer’s Report and recommendations are provided to the Convening Authority along with the SJA’s pretrial advice, thereby partially obviating the need for an extended discussion of the legal issues in the pretrial advice. Unfortunately, the M.C.A., at 10 U.S.C. § 948b(d)(C), specifically rendered inapplicable Article 32 of the Uniform Code of Military Justice, thereby ensuring that there would be no independent investigation or evaluation of the evidence by a neutral officer, as required before a case can be referred to a General Court-Martial. For military commissions, the only theoretically objective advice given to the Convening Authority is provided by the Legal Advisor.⁷ The lack of a pretrial investigation also deprives the defense of any formal opportunity to present information bearing on the propriety of referral for the consideration of the Convening Authority. While a defense counsel is free to try to bring information to the attention of the Convening Authority, as COL Sawyers did in this case, there is no guarantee that she will get it or consider it. Thus, it is incumbent upon the Legal Advisor to provide a more extended discussion of factors which the Convening Authority should consider, including matters in extenuation

⁷ The legal advice refers to a “referral notebook” prepared by the Office of the Chief Prosecutor, but it does not appear to have been presented to the Convening Authority. Even if it were, this partisan document is not a substitute for objective advice.

and mitigation. As indicated in the fact section above, this pretrial advice contained only the barest minimum of discussion, certainly an inadequate basis upon which to make life altering decisions for Mr. Jawad. One would expect that a more objective legal advisor, who had not personally hand-selected the case for prosecution, would have wished to apprise the Convening Authority of some important factors to be taken into consideration in her decision. For example, even if it not directly a legal factor, one might expect the Legal Advisor, as a professional courtesy, to warn the Convening Authority of the public relations firestorm that would likely result from referral of another case against a juvenile. One would have also expected the advice to mention the extraordinary fact that Mr. Jawad had no known affiliation with any terrorist organization, nor had he committed any terrorist acts, given the fact that the entire *raison d'être* of the Military Commissions Act, according to President Bush, is to prosecute terrorists.⁸ In this regard, the defense notes that Mr. Jawad is the only person among 15 individuals to have been charged before the military commissions who is *not* alleged to have been involved in terrorism. The pretrial advice also failed to mention the potential issue of multiplicity or unreasonable multiplication of charges in referring six separate specifications for a single act of throwing a hand grenade.⁹

The complete absence of any discussion of the significant mitigating factors present in Mr. Jawad's case is particularly appalling in light of the fact that the Legal Advisor was recommending charges that would potentially expose a juvenile offender to imprisonment for life. In fact, the only reference to potential punishment is misleading; the Legal Advisor recommends that the case "be referred noncapital," although the death penalty is

⁸ "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror." "The Military Commissions Act will also allow us to prosecute captured terrorists." "The bill I'm about to sign also provides a way to deliver justice to the terrorists we have captured." "When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS Cole, which killed 17 American sailors six years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more." Selected excerpts from President Bush's remarks at MCA signing ceremony, October 17, 2007. (Full text at Attachment 8).

⁹ The advice states that the second set of specifications for intentionally causing serious injury were charged "in the alternative" to the attempted murder specifications. The defense expects to file a motion to dismiss addressing multiplicity and unreasonable multiplication of charges that will demonstrate that this was a serious issue deserving of extended discussion.

not an authorized punishment for the charged offenses.¹⁰ This may have led the Convening Authority to falsely believe that she was being lenient by precluding the option of the death penalty.

Another egregious error is the failure to mention Mr. Jawad's juvenile status and age. This omission cannot be dismissed as a mere oversight. The United States recently submitted answers to questions presented by the U.N. Committee on the Rights of the Child. (Attachment 4). This report made several specific references to Mohammed Jawad, and specifically acknowledged that he was a minor at the time his alleged crimes were committed.

Mohammed Jawad, who is approximately 23 now, is being charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Mr. Khadr and Mr. Jawad are currently the only two individuals captured under the age of 18 that the U.S. Government has chosen to prosecute under the Military Commissions Act of 2006.
(Answer to 12c, p.15)

In response to the question "how Military Commissions take into account the rights of children" The U.S. assured the U.N. Committee that Mr. Jawad's age would be taken into account: "A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review – the latter two of which will review the findings and the sentence." (Answer to 12g, p. 21) The Legal Advisor appears to have defied official U.S. policy by failing to apprise the Convening Authority of Mr. Jawad's age. No facts concerning Mr. Jawad's background or upbringing were mentioned either.

In short, at the time the Legal Advisor prepared and submitted his pretrial advice, he had become a partisan advocate and was determined to move Mr. Jawad's case forward to trial as quickly as possible. He intentionally omitted pertinent information that might have given the Convening Authority pause before referring the case, including issues which the defense specifically requested be brought to her attention. Not surprisingly,

¹⁰ See MMC Part IV, Crimes and Elements, Chapter 4 (Attempts) paragraph c. "*Maximum punishment:* Any person. . .found guilty of an attempt. . . shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged."

given the dearth of information provided to her, the Convening Authority barely hesitated before accepting the Legal Advisor's recommendations in full just two days later.

**DISMISSAL IS AN AUTHORIZED AND APPROPRIATE REMEDY FOR
EGREGIOUS CASES ON UNLAWFUL INFLUENCE SUCH AS HAS
OCCURRED IN THIS CASE**

While the MCA prohibits unlawful influence, it does not specify the appropriate remedy for a violation of this provision. As the Commission has noted, since there is no established body of case law on 10 U.S.C. § 949b (2006) and R.M.C. 104(a)(2), the Commission may properly look to military law for guidance. 10 U.S.C. § 949a directs that procedures for military commissions "shall apply the principles of law and rules of evidence in trial by general court-martial" to the extent practicable. The defense notes that R.M.C. 907 does not specifically list unlawful influence as a ground for dismissal nor does R.M.C. 104 identify the proper remedy for a violation of the prohibition of unlawful influence. These provisions are based on and nearly identical to Rules for Courts-Martial 104 and 907, which also do not specify dismissal as a remedy for unlawful command influence. However, the Court of Appeals for the Armed Forces has left no room for doubt that dismissal with prejudice is an appropriate remedy for serious instances of unlawful command influence. In two recent cases, the highest military court has ordered dismissal of all charges and specifications with prejudice to remedy unlawful command influence in courts-martial. According to CAAF, "[D]ismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *U.S. v. Gore*, 60 M.J. 178, 187 (CAAF 2004) citing, *U.S. v. Green*, 4 M.J. 203, 204 (C.M.A. 1978), and *U.S. v. Gray*, 22 C.M.A. 443, 445, 47 C.M.R. 484, 486 (1973).

The Court further elaborated:

[D]ismissal of charges is permissible when necessary to avoid prejudice against the accused. . .from the egregious error in this case, we conclude the military judge acted within his discretion to dismiss with prejudice the

charges against Appellant. . . . We agree with the military judge when he said that, "the mandate of [Biagase]¹¹ could not be more clear. Undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated." *Id.*

In *U.S. v. Lewis*, 63 M.J. 405 (CAAF 2006) the actions of the Staff Judge Advocate, the legal advisor to the convening authority, were found to amount to unlawful influence and found to be sufficiently egregious to warrant dismissal of all charges and specifications with prejudice. In *Lewis*, the SJA orchestrated an improper but successful effort to have the detailed military judge recuse herself. The improperly recused military judge was replaced by a well-qualified and neutral military judge who took significant measures in an attempt to ameliorate the prior unlawful command influence, and otherwise conducted a fair trial. The new military judge "directed that the SJA be disqualified, that the SJA be barred from sitting in the courtroom, and that there be a new convening authority for post-trial actions." *Id.* at 415. These steps were not deemed sufficient by CAAF to remove doubts about the impact of unlawful command influence.

According to CAAF:

Our review of the command influence in this case is not limited to actual unlawful influence and its effect on this trial. Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with "eliminating even the appearance of unlawful command influence at courts-martial." *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). "[O]nce unlawful command influence is raised, 'we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.'" *Stoneman*, 57 M.J. at 42 (quoting *Rosser*, 6 M.J. at 271). This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *Simpson*, 58 M.J. at 374 (quoting *Stoneman*, 57 M.J. at 42-43). Thus, "disposition of an issue of unlawful command influence falls short if it fails to take into consideration . . . the appearance of unlawful command influence at courts-martial." *Id.*

Whether the conduct of the Government in this case created an appearance of

¹¹ *U.S. v. Biagase*, 50 M.J. 143 (CAAF 1999).

unlawful command influence is determined objectively. *Stoneman*, 57 M.J. at 42. "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Id.* at 42-43 (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). . . .

We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. Applying this test to the instant case, we believe that a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government's conduct. . . .

To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the Government must convince us that the disinterested public would now believe [the accused] received a trial free from the effects of unlawful command influence. *U.S. v. Lewis*, 63 M.J. at 415.

Concluding that the government had failed to make such a showing, the Court dismissed all charges and specifications with prejudice. The Legal Advisor's well-chronicled unlawful actions in this case go far beyond the isolated improper act of the SJA in *Lewis*, and are far more damaging to both the reality and perception of fairness.

Mr. Jawad has clearly been prejudiced by the actions of the Legal Advisor. It is clear that charges against Mr. Jawad would not have been sworn last October nor at any time soon thereafter were it not for the direct personal unlawful intervention of the Legal Advisor. Most likely, charges would not have been filed until the issues in the Khadr case had been fully resolved, which has yet to occur. Indeed, it is possible that charges would never have been sworn against Mr. Jawad had the Legal Advisor not insinuated himself into the case selection process. Even if charges had eventually been sworn against Mr. Jawad, a more independent and unbiased pretrial advice providing highly pertinent information to the Convening Authority might have resulted in far fewer, if any, charges being referred to trial by military commission.

CONCLUSION

Brig Gen Hartmann is both the highest ranking officer and the senior military lawyer involved in the military commissions system. Because Brig Gen Hartman is a lawyer and an officer of the court, with a special ethical duty to ensure the fairness of the process, his actions must be given the highest level of scrutiny. Brig Gen Hartmann's actions strike at the very core of the attempt to provide due process and impartial justice to the detainees at Guantanamo, a task already deemed to be impossible by many observers.¹² As the President of the ABA has stated in a letter to President Bush, "the military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice. . . . Under the current system, we believe that detainees will not receive due process or fair trials."¹³ Given the widespread public skepticism concerning the fairness of military commissions, even before the Legal Advisor's actions became publicly known, it would not be possible at this point to convince the disinterested public that Mr. Jawad can receive a trial free from the effects of unlawful influence. Any objective observer would harbor significant doubts about the fairness of any future proceedings against Mr. Jawad. The actions of the Legal Advisor have irremediably and irretrievably tainted the process.

¹² See, e.g., Statement of Anthony D. Romero, Executive Director, ACLU, available at <http://www.aclu.org/safefree/detention/34773res20080403.html> ("The military commissions set up by the Bush administration for the men imprisoned at Guantánamo Bay – including those it suspects were involved in the September 11 attacks – are not true American justice. . . . The prison at Guantánamo Bay, and the military commission proceedings set to occur there, were set up to evade the American justice system and the rule of law. The proceedings, as proposed under the Military Commissions Act and run by the Department of Defense, are nothing like the trials guaranteed by our Constitution or the long-established military commissions promulgated by the Uniform Code of Military Justice – the finest system of military justice in the world.") Similar statements condemning the military commission system have been issue by Human Rights Watch, Human Rights First, Amnesty International, The National Association of Criminal Defense Lawyers, and Martin Scheinin, Special Rapporteur to the United Nation Human Rights Council, among others. Law Review articles and editorials critical of the military commissions process are legion.

¹³ Letter from the ABA President to President Bush dated February 27, 2008, (Attachment 9).

The defense recognizes that dismissal with prejudice is a drastic remedy, but when a case is so thoroughly permeated by the taint of unlawful influence, it is the only appropriate remedy.

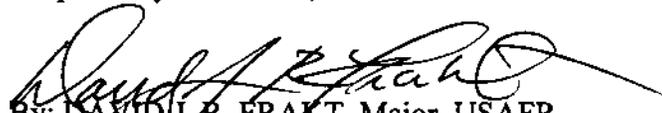
7. Request for Oral Argument: The Defense requests oral argument at the next scheduled motion hearing to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. Request for Witnesses: The Defense intends to call Colonel Morris Davis, and Lieutenant Colonel William Britt. However, if the government agrees to stipulate to all the facts in this motion, live witnesses may be unnecessary.

9. Conference with Opposing Counsel: The Defense has conferred with the Prosecution, which opposes this motion.

10. Request for public release: The defense requests permission to publicly release the government's response to this pleading and the court's ruling as soon as possible.

Respectfully Submitted,


By: DAVID R. FRAKT, Major, USAFR
Office of the Chief Defense Counsel



Attachments:

1. Memorandum from COL Sawyers to Brig Gen Hartmann dated 21 Jan 08
2. E-Mail from Brig Gen Hartmann to COL Sawyers dated 27 Jan 08
3. Pretrial Advice dated 28 Jan 08
4. Supplemental US Report to the U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, submitted for 22 May 2008 session of the Committee.¹⁴
5. Harper's article William Glaberson, Judge's Guantánamo Ruling Bodes Ill for System, NY Times.
6. Scott Horton, The Great Guantanamo Puppet Theatre, Harper's Magazine.
7. Ross Tuttle, Unlawful Influence at Gitmo, The Nation
8. President Bush's Remarks on Signing Military Commissions Act of 2006
9. ABA Letter to President Bush

¹⁴ Further information available at <http://www2.ohchr.org/english/bodies/crc/crcs48.htm>

Attachment 1



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

21 January 2008

MEMORANDUM THRU Legal Advisor, Office of Military Commissions (ATTN: BG Hartman),

FOR Convening Authority (Honorable Susan Crawford), Office of Military Commission

SUBJECT: Referral of Charges Against Mohammad Jawad

1. I represent Mohammad Jawad in regards to the charges preferred against him on 4 October 2007 pursuant to the Military Commissions Act. The prosecution informs me that you will, in the very near future, consider referring these charges to trial by Military Commission. Based upon several recently issued judicial opinions by a Commission trial judge, as well as the decision by the Court of Military Commission Review (CMCR) in the case of *U.S. v. Khadr*, CMRC 07-01, 2007, there are significant legal concerns that the United States lacks *in personam* jurisdiction over Mr. Jawad. Specifically, and as will be outlined below, Mr. Jawad asserts that he is a person protected by the Article 4 of the third Geneva Convention concerning the Treatment of Prisoners of War (GCIII)^{1 2} and Additional Protocol I (AP1), Article 45(1).³ Accordingly, until such time as the United States provides Mr. Jawad with an Article 5 Tribunal outlined in GCIII and AP1, Article 45, he is presumed to be a prisoner of war (PW). A PW is presumptively a lawful combatant. Such presumptions preclude the Commission from trying Mr. Jawad, pursuant to Article 102 of GCIII.

2. As you are aware, Mr. Jawad's Combat Status Review Tribunal (CSRT) found him to be an enemy combatant. The CSRT is silent as to whether Mr. Jawad is a lawful or unlawful enemy combatant. The CSRT's determination confers PW status on Mr. Jawad. However, and obviously, this finding does not create *in personam* jurisdiction over Mr. Jawad, in accordance with the holding in *Khadr*, in a trial before a military commission. However, at the current time, the *Khadr* findings are irrelevant based upon the current posture of Mr. Jawad's case. The referral against Mr. Jawad is itself defective because of his PW status, making a proper referral at this time impossible.⁴

¹ Mr. Jawad's position is premised upon the belief that at the time of his capture the United States was engaged in an International Armed conflict. Should you want a more complete outline of the facts that shows the capture occurred during an international armed conflict, the undersigned is prepared to create such a document. I am also willing to meet with you personally at any time in order to discuss the matter further. Please inform the undersigned if you assert Mr. Jawad's capture occurred during an armed conflict not of an international nature.

² Mr. Jawad reserves the right to seek judicial determination at a later date concerning the nature of the armed conflict in which the United States was engaged at the time of his capture, if necessary.

³ The requirements of Additional Protocol I, Article 45 is binding on the United States as customary international law. See *Khadr*, Footnote 38.

⁴ The CSRT is not an appropriate substitute for an Article 5 Tribunal. See Military Judge Alfred's recent opinion in *U.S. v. Hamdan*, attached.



3. Since Mr. Jawad is a PW, he may not be criminally prosecuted until his status as a PW changes. The only way a status change can be effectuated is by providing Mr. Jawad with an Article 5 tribunal that meets the requirements of GCIII, Article 5 and API, Article 45(1) and applicable Department of Defense regulations.
4. Relying upon Captain Allred's decision in Hamdan, Mr. Jawad asserts that the MCA provision §948(g) that prohibits an "unlawful enemy combatant" from invoking the Geneva Convention is inapplicable to him because he has yet to be determined to be an "unlawful" enemy combatant. Therefore he enjoys all the right afforded him by GCIII and API.
5. Finally, unlike the parties in Hamdan, Mr. Jawad does not concede that a Commission's Military Judge may sit as an Article 5 Tribunal because a Commission's Military Judge has no authority, at this time, to make decisions on a person who is presumed to be a lawful combatant. Moreover, a single person may not sit as an initial Article 5 tribunal according the applicable DoD standard. Instead, Mr. Jawad demands that if the government conducts an Article 5 Tribunal concerning his status as a PW, that such proceeding conform itself to the parameters of GWIII, API, and applicable DoD regulations.
6. Mr. Jawad requests that you consider these significant legal impediments to jurisdiction prior to any decision you make concerning referring this case to trial.
7. Thank you for you time, on behalf of Mr. Jawad. I stand ready to discuss the issues raised in this memorandum at your convenience.

Very Truly Yours,

J. MICHAEL SAWYERS
COL, JA
Office of Military Commissions,
Office of the Chief Defense Counsel

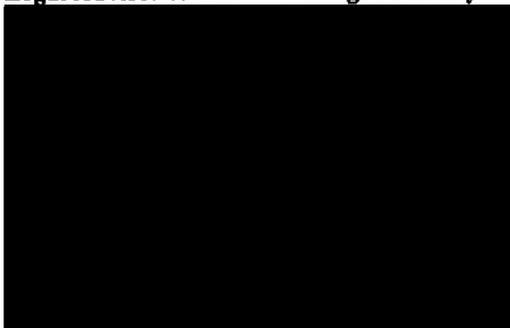
Attachment 2

From: Hartmann, Thomas, BG, DoD OGC
Sent: Sunday, January 27, 2008 5:24 PM
To: Sawyers, James, COL, DoD OGC; Crawford, Susan, Hon, DoD OGC
Cc: Hartmann, Thomas, BG, DoD OGC
Subject: RE: Mohammad Jawad

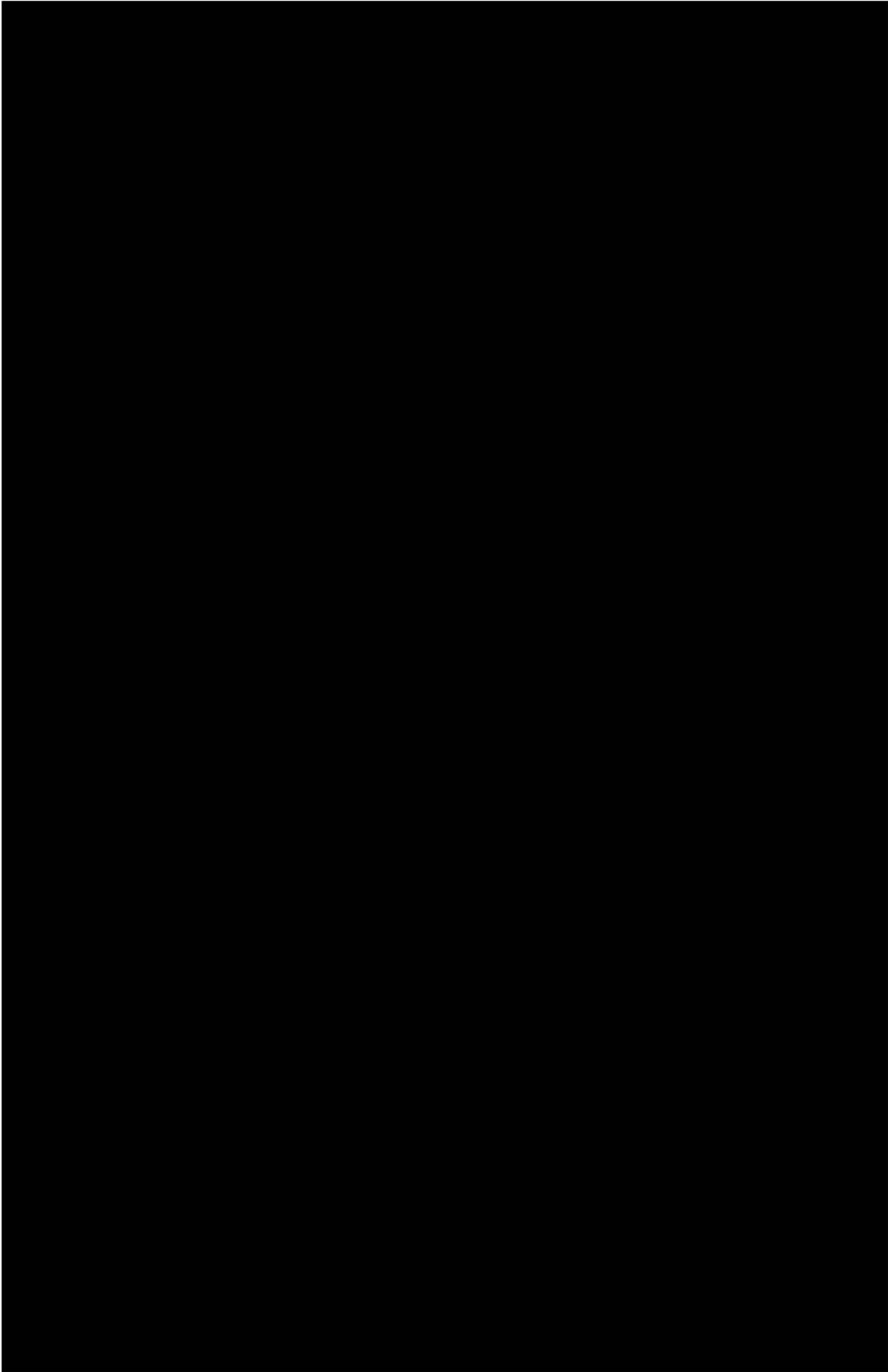
Mike: Thanks for the memo. I have reviewed in connection with the referral process.

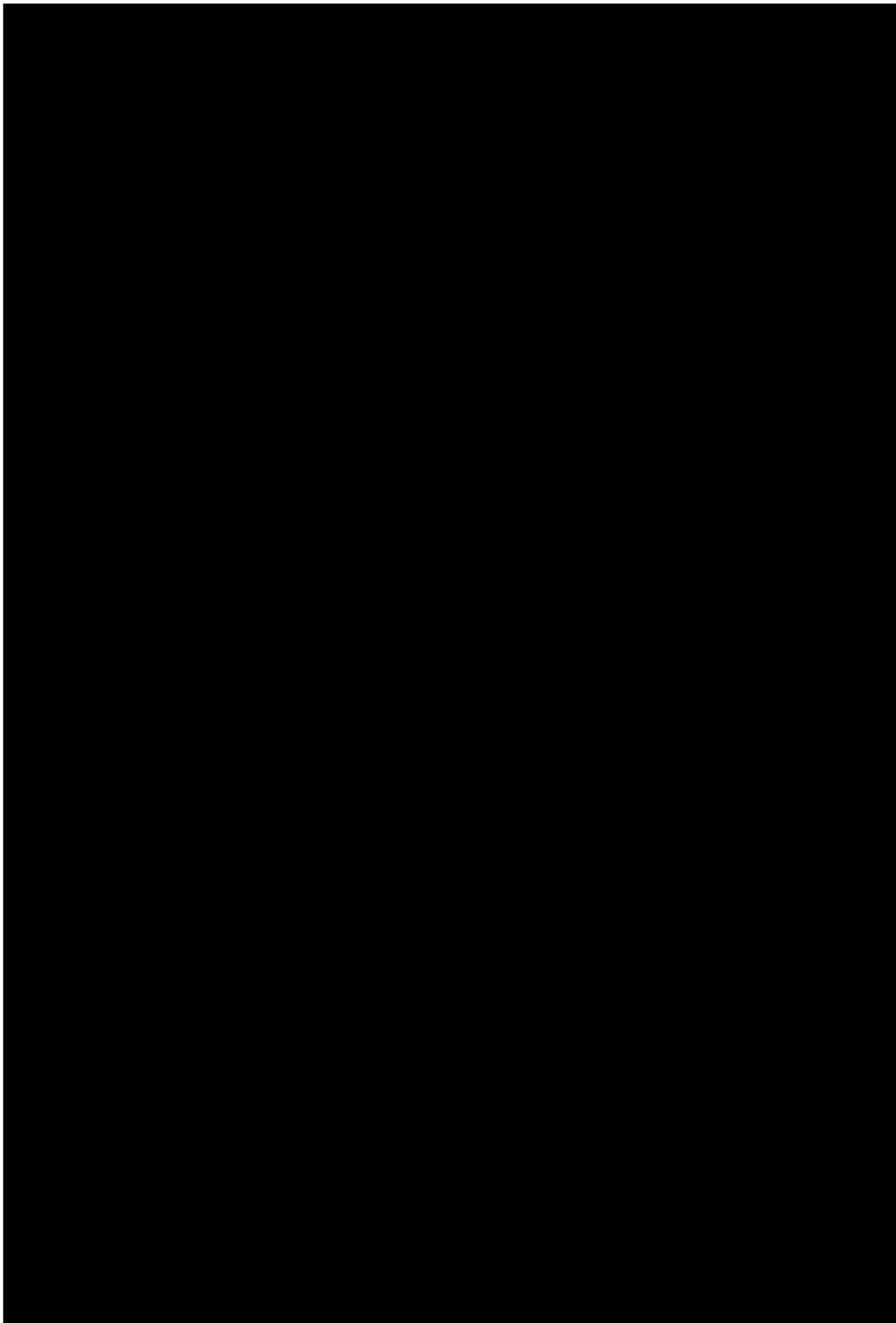
TWH

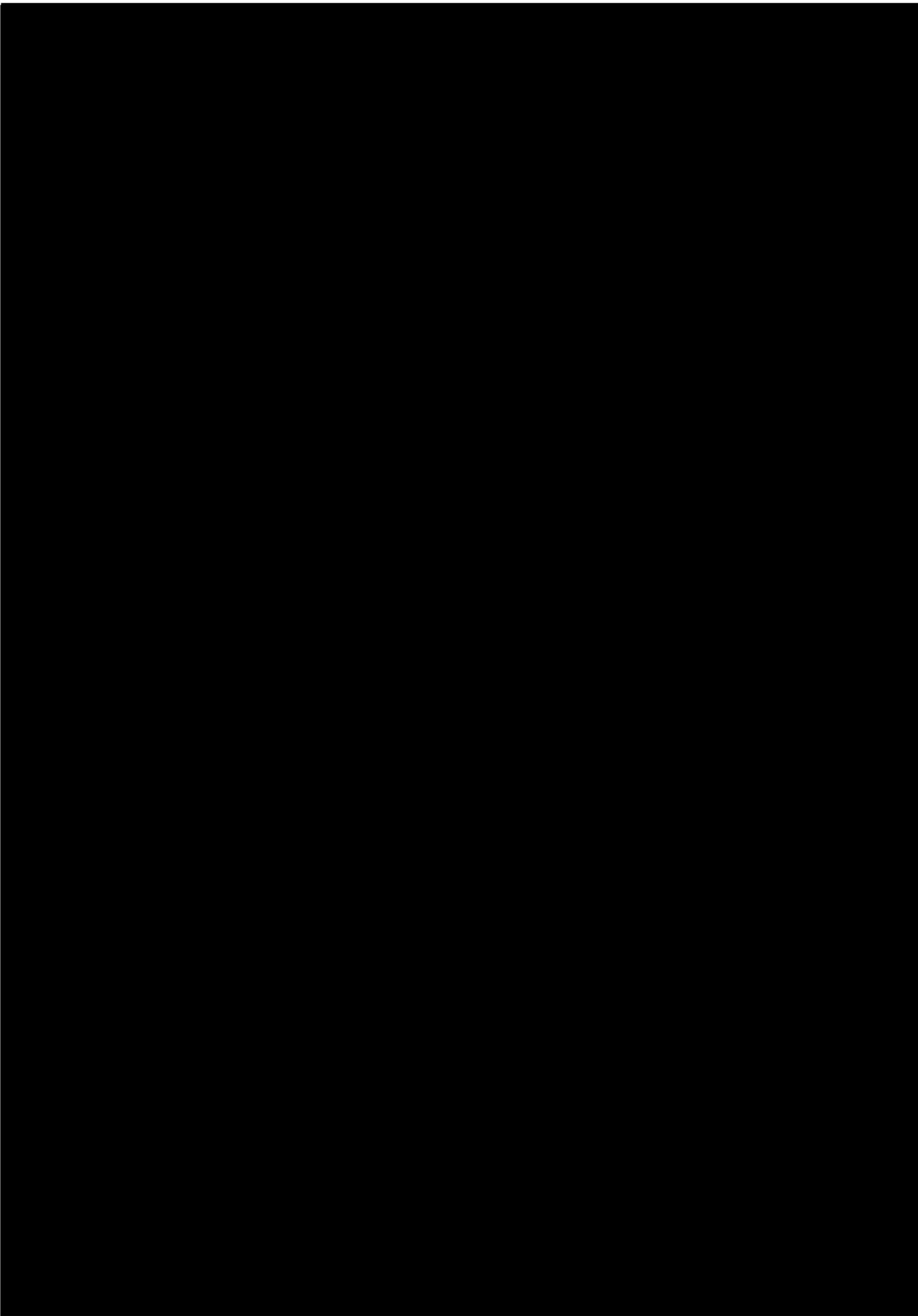
Thomas W. Hartmann
Brigadier General, United States Air Force
Legal Advisor to the Convening Authority

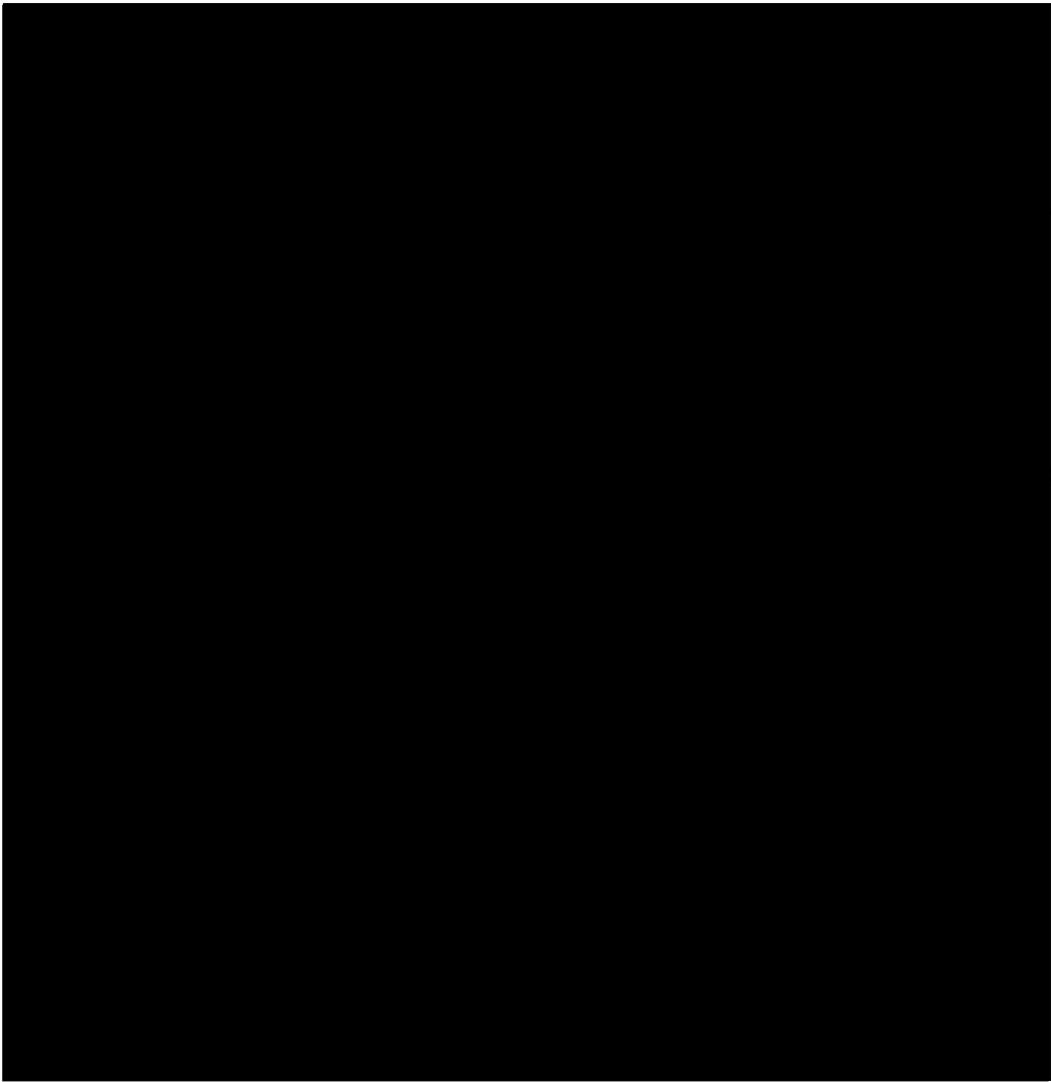


Attachment 3









ted

Attachment 4

**OPTIONAL PROTOCOL ON THE INVOLVEMENT
OF CHILDREN IN ARMED CONFLICT**

**List of issues to be taken up in connection with the consideration
of the initial report of the United States of America
(CRC/C/OPAC/USA/1)**

- 1. Please provide information on the exact national provisions relating to the crime of forced or compulsory recruitment under 18 years of the Optional Protocol on the Involvement of Children in Armed Conflict.**

Answer: As stated in the U.S. report to the Committee, U.S. law does not permit the United States to compel the recruitment into military service of any person under the age of 18. The U.S. report also noted that the U.S. selective service, which provided for involuntary induction is inactive (50 U.S.C. App. §§ 451 et seq.). Forced recruitment by non-governmental armed groups could violate any number of state and federal laws, particularly those dealing with abduction.

- 2. Furthermore, please provide detailed information as to whether the USA assumes extraterritorial jurisdiction over the war crime of conscripting or enlisting children under the age of 15 into the armed forces or using them to participate actively in hostilities. Also in relation to extraterritorial jurisdiction, please indicate whether USA courts have jurisdiction in case of forced recruitment or involvement in hostilities of a person under 18 if committed outside USA, by or against a US citizen. Please provide copies of jurisprudence, if applicable.**

Answer: The U.S. war crimes statute (18 U.S.C. § 2441) establishes extraterritorial jurisdiction over various war crimes if the perpetrator or the victim of the crime is a U.S. national or a member of the U.S. Armed Forces. The war crimes statute incorporates or refers to specific provisions of the 1949 Geneva Conventions, the Hague Convention IV of 1907, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (when the U.S. is a party to that Protocol). It does not, however, incorporate or refer to the Optional Protocol to the Convention

on the Rights of the Child on the Involvement of Children in Armed Conflict, and does not specifically criminalize the conscription or enlistment of children under the age of 15 into the armed forces or the use of such children to participate in hostilities (nor does the Optional Protocol contain such a requirement). Similarly, the war crimes statute does not specifically address the forced recruitment or involvement in hostilities of a person under 18 outside the United States. Depending upon the circumstances, however, the manner in which children are recruited, used, or treated in hostilities could constitute prohibited conduct under the statute. A copy of the war crimes statute is included in Annex 1.

3. Please inform the Committee of any relevant developments regarding the draft Child Soldiers Prevention Act of 2007 and the draft Child Soldier Accountability Act of 2007.

Answer: The Child Soldiers Accountability Act of 2007 (S. 2135) passed the Senate on December 19, 2007. The bill is now pending in the House Judiciary Committee. The Child Soldier Prevention Act of 2007 (H.R. 2620, H.R. 3028, and S. 1175) has been introduced in both houses of Congress but has not as yet seen further congressional action.

4. Please clarify whether, in a state of emergency or armed conflict, persons under 18 years of age could be required to take direct part in hostilities.

Answer: Article 1 of the Protocol provides that “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.” In the view of the United States, Article 1 applies in cases of a state of emergency or armed conflict.

- 5. Please inform the Committee whether persons under the age of 18 have been deployed to areas of armed conflict, notably to Iraq and Afghanistan, since the entry into force of the Protocol in 2002. If so, please also detail the safeguards undertaken in order to ensure that they do or did not take part directly in hostilities.**

Answer: The Department of Defense (DoD) has deployed more than 1.7 million service members in support of Operations Enduring Freedom and Iraqi Freedom (OIF/OEF). There have been no reports of service members under 18 being directly engaged in hostilities. In addition, we have had no reports of any service members under the age of 18 being deployed to Iraq or Afghanistan.

It is the policy of all of the military departments to ensure that service members under the age of 18 do not take direct part in hostilities, should they be deployed to areas of armed conflict. In addition, the military departments' policy and procedures restrict the assignment of service members to units deployed overseas or scheduled to deploy operationally before the service member's eighteenth birthday. While the policies are designed to keep juveniles from participating directly in hostilities, 17-year-olds have been deployed in past years to areas the Defense Department categorizes for "hazardous duty pay" or "imminent danger pay." The data indicates that 17-year-old service members have been deployed to these areas "in support of" OEF/OIF, but this does not mean they were deployed to Iraq or Afghanistan.

The following summarizes the policies each Service employs to ensure that no one under the age of 18 engages directly in hostilities. Also summarized below are the results of DoD inquiries regarding whether persons under the age of 18 have been deployed in support of OEF/OIF in fiscal year 2008 (FY08). Inquiries revealed that three persons under the age of 18 were deployed to Kuwait, although as noted above there are no indications that they engaged in hostilities or were sent into Iraq or Afghanistan.

- Navy guidance is that no Sailor under the age of 18 will be assigned to an operational unit. If, however, a Sailor is inadvertently assigned to an operational unit that is deployed, the Commander's responsibility is to ensure that the service member is not directly involved in causing harm to the enemy. Steps are taken to ensure Sailors under the age of 18 are

not sent to deployable units; for instance, a Sailor's record is "flagged" and the proposed assignment is reviewed by the Deputy Division Director, generally the first commissioned officer in that Sailor's chain of command. As of January 31, 2008 reports indicate that there was one Sailor under the age of 18 deployed in support of OIF/OEF (Kuwait) in FY08. This individual was 39 days short of his 18th birthday when deployed to Kuwait on November 5, 2007, and was still deployed at the time of the inquiry. Although the Sailor was far from direct hostilities, the Department of the Navy has stated that the Sailor, who turned 18 on December 14, 2007, was deployed "...contrary to the requirements of the Military Personnel Manual. Those requirements have been re-emphasized to all personnel involved in the distribution of enlisted Sailors."

- Marine Corps policy restricts the deployment of Marines under the age of 18. Marines under the age of 18 will not be assigned to a unit scheduled to operationally deploy prior to the Marine's 18th birthday. Further, commanding generals and commanding officers will not operationally deploy a Marine under 18 years of age. On April 6, 2007, Marine records were updated with the duty limitation remark of code "P" for all Marines less than 18 years of age for ease of identification in assignment and deployment processing. As of January 31, 2008, there were no Marines under the age of 18 deployed in support of OIF/OEF in FY08.
- The Air Force identifies Airmen under the age of 18 with an Assignment and Deployment Availability code in the Military Personnel Data System (MilPDS) denoting that they are ineligible for assignment, temporarily or permanently, to a hostile fire or imminent danger area. Further, the Air Force deployment system will not allow orders to be generated for such individuals, keying on the above-mentioned Availability code. As of January 31, 2008, there were no Airmen under the age of 18 deployed in support of OIF/OEF in FY08.
- The Army's policy is articulated in personnel, mobilization, and readiness regulations that provide procedural guidance to prevent the assignment of soldiers under the age of 18 outside the continental United States. As an additional precaution, the Army promulgated messages in June 2004 and August 2006 reminding commanders of the policy "not to assign or deploy Soldiers, less than 18 years of age outside the continental United States..." As of January 31, 2008, there were two

Soldiers under the age of 18 who were deployed to Kuwait in support of OIF/OEF in FY08. However, the information available indicates that the two Soldiers were returned to the United States within 2-3 days of arriving in Kuwait.

- It is Coast Guard practice not to assign recent, non-rate basic training graduates directly to conflict areas or to any of the Coast Guard cutters serving in those regions. No Coast Guard members under the age of 18 have been deployed in support of OIF/OEF.

6. Please provide the Committee with disaggregated data (by sex and ethnicity) on the number of voluntary recruits under the age of 18 for the years 2004, 2005, 2006 and 2007.

Answer: Annex 2 provides the requested data, which includes the number of individuals who were under the age of 18 at the time they voluntarily enlisted in the Armed Forces of the United States, broken out by active and reserve components, gender, and ethnicity for fiscal years 2004 to 2007.

The data shows that, of those that joined the armed services at age 17 across the four-year period, approximately 76 percent were male and 24 percent were female. With respect to ethnicity, approximately 64 percent of those that acceded were "white," 12 percent were "Hispanic," 11 percent were "African American," and approximately 13 percent were "American Indian/Alaskan," "Asian or Pacific Islander," or "Other." The Annex shows a total of 94,005 recruits of 17-year-olds. This represents 7.6 percent of the accessions to all Services from 2004 to 2007.

7. Please provide further information on the methods used by military recruiters and which safeguards are available to prevent misconduct, coercive measures or deception. Please also inform the Committee of the number of cases of misconduct among recruiters have been reported, the number of investigations into such cases and the sanctions applied since the entry into force of the Protocol.

Answer: The Department of Defense (DoD) policy is to not recruit any individual into the armed forces who is under the age of 17, and recruitment of youth that are age 17 requires the consent of a parent or guardian.

Recruiters are trained to abide by strict standards of conduct and are informed of the roles and responsibilities of recruiters, which prohibit the use of coercive measures or deception. In addition, recruiters are expected to remain professional at all times and should prevent any appearance of recruiter impropriety in the recruiting process. Policy prohibits recruiters from having personal or intimate relationships with potential applicants; they are prohibited from falsifying enlistment documents, concealing or intentionally omitting disqualifying information, encouraging applicants to conceal or omit disqualifying information; and they are prohibited from making false promises or coercing applicants. Recruiters who violate these basic standards are subject to punishment under the Uniformed Code of Military Justice. Military recruiters are subject to frequent and periodic reviews of their conduct, which they are required to pass.

In 2006, the Office of the Under Secretary of Defense for Personnel and Readiness published a directive-type memorandum that requires semi-annual reporting (January and July) of “recruiter irregularities” – defined as “those willful and unwillful acts of omission and improprieties that are perpetrated by a recruiter or alleged to be perpetrated by a recruiter to facilitate the recruiting process for an applicant.” The report is used for internal monitoring and provided upon request.

The report for 2006 is included as Annex 3. The reports lag because of the time needed to resolve each case. In January 2008, DoD received data for 2007 cases, of which more than 400 are still considered “on-going.” These are cases of improprieties involving the entire population of recruits from 17 to 42 years of age, and each allegation of recruiter impropriety is reviewed thoroughly. Local Commanders, in consultation with legal counsel and inspector general personnel, evaluate the details of each claim. Based on the facts resulting from the investigation, the Services may act administratively to resolve the issue or they may ask law enforcement investigators to take the case. If a determination is made that the recruiter knowingly violated established policy, he or she is subject to punishment under the Uniform Code of Military Justice. Each case is reported regardless of final disposition, and the next report, scheduled for release in July 2008, should provide a more complete assessment of the 2006-2007 cases.

As the report illustrates, substantiated claims of recruiter irregularities are extremely few, relative to the total number of recruits. It is also important to note that the monitoring system has a much broader focus than child

recruitment, and that irregularities involving the recruitment of children are rare. In 2006, for instance, the number of confirmed and redressed instances of misconduct perpetrated on individuals under the age of 18 was fewer than 30, or less than 0.08 percent of U.S. Military accessions.

- 8. Please provide information regarding the training on the provisions of the Optional Protocol provided for soldiers serving in military operations abroad, notably in Iraq and Afghanistan. Please also inform the Committee whether military codes of conduct and rules of engagement take into account the Optional Protocol.**

Answer: The United States Initial Report and these responses describe at length the measures undertaken by the United States to implement its obligations under the Protocol, including steps taken to ensure that persons under the age of 18 do not take a direct part in hostilities and are not compulsorily recruited into the U.S. Armed Forces. We refer you to the answer to Question 5 for additional information. As individual units do not recruit soldiers and as control measures are in place to ensure that persons under the age of 18 are not in a position to engage in hostilities, it is unclear what the purpose would be of individualized training with respect to the Protocol.

- 9. Please explain how the State party ensures that private military and security companies contracted by the Department of Defense and the Department of State are informed of the provisions of the Protocol and the obligations contained therein. Please inform the Committee what sanctions can be applied to private contractors for acts contrary to the Protocol and whether there are examples of such cases.**

Answer: Private security companies contracted by the Departments of State and Defense to protect U.S. Government personnel or others in areas of ongoing combat operations are not part of the U.S. armed forces and are not authorized to engage or participate in offensive combat operations. Nonetheless, at a minimum these armed contractor personnel must be at least 21 years old, and properly vetted, a fact that is verified by the Departments as part of a mandatory resume review and certification process. Such private security companies are also required by their contract to

comply with all applicable law and government regulations. In addition, private companies contracted by the Department of State to provide local guards for diplomatic or consular persons or property in non-combat environments are required to obtain all licenses and permits (both company and individual) required under the laws of the host government to operate as a security company providing guard services. All contractors are required to meet any minimum age, experience, appropriate background check, and training requirements established by the host government prior to performing work under a Department of State or Defense contract.

10. Please inform the Committee of the training and dissemination of the Protocol among relevant professional groups working at the national level with children who may have been recruited or used in hostilities, including teachers, migration authorities, police, lawyers, judges, medical professionals, social workers and journalists.

Answer: As outlined in the Initial Report of the United States, the primary means of disseminating the principles and provisions of the Optional Protocol to domestic groups, including to law enforcement and the judiciary, is through U.S. domestic law and policy which is largely co-extensive with U.S. obligations under the Protocol. As appropriate, the United States explicitly incorporates the principles and provisions of the Optional Protocol into its internal training programs and policy guidance documents. For instance, the U.S. Citizenship and Immigration Service (USCIS) includes information on the Optional Protocol and a link to the Protocol in its lesson plan on “Guidelines for Children’s Asylum Claims,” which is part of the Asylum Officer Basic Training Course. The text of the Optional Protocol is also posted on the U.S. Department of State website (under “Democracy, Human Rights and Labor”).

Further, as the Committee is aware, the United States has an extremely active civil society. Although the United States government does not monitor the training and dissemination of the Protocol by civil society groups, there are many organizations and institutions of civil society that are vigorously engaged on issues relevant to the Optional Protocol.

11. Please provide disaggregated data (including by sex, age and country of origin) covering the years 2005, 2006 and 2007 on the number of asylum-seeking and refugee children coming to the USA from areas where children may have been recruited or used in hostilities. Please inform the Committee how refugee and asylum claims from children who have been recruited or used in situations of armed conflict are considered.

Answer: Annexes 4-7 provide the data requested by the Committee. Statistics are provided for those countries identified in the UN Secretary General's Report on "Children and Armed Conflict" as having armed forces or groups that recruit or use children in situations of armed conflict. UN Doc. No. A/62/609, S/2007/757 (Dec. 21, 2007); see Annexes I and II. Those 13 countries are: Afghanistan, Burma (Myanmar), Burundi, Central African Republic, Chad, Colombia, Congo (Democratic Republic of), Nepal, Philippines, Somalia, Sri Lanka, Sudan, and Uganda.

The data provided in Annexes 4-6 include the number of children (under the age of 18) who applied for asylum with the U.S. Citizenship and Immigration Services (USCIS) in the United States or were processed overseas by USCIS or the Department of State for possible admission into the United States as a refugee. These numbers reflect children who applied for asylum or refugee status in their own right; that is, they do not include the numbers of children who applied for such status as dependents on their parents' applications. In the years in question, USCIS interviewed 190 child refugee resettlement applicants and 80 child asylum applicants from the 13 identified countries.

Numbers of child asylum seekers from the above countries are those who applied affirmatively with USCIS and do not include the numbers of children from these countries who applied for asylum as a defense to removal while in removal proceedings. Annex 7 provides the relevant data on children filing asylum claims in defensive removal proceedings. In the years in question, the Department of Justice's Executive Office for Immigration Review (EOIR), the agency with responsibility for the adjudication of asylum claims filed by children as a defense to removal while in defensive removal proceedings, encountered a total of 14 cases from three of the countries examined (Colombia, Congo and Somalia). This number also includes two children who turned 18 years of age after the start of removal proceedings. This number does not include cases that were

referred by USCIS from the affirmatively filed asylum cases and placed in removal proceedings.

Consideration of refugee and asylum claims from children
who have been recruited or used in situations of armed conflict

It is conceivable that children who have been recruited or used in situations of armed conflict may be eligible for asylum or refugee protection based on this shared past experience. At least one court has held that where an applicant for asylum can establish that his or her status as a former child soldier is the characteristic for which he or she has been or will be subjected to forms of persecution other than the recruitment itself, a refugee or asylum applicant may be eligible based on the applicant's membership in a particular social group. *See Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (holding that class of former child soldiers who have escaped fits within the statutory definition of a particular social group). But to qualify as a "particular social group" for purposes of the U.S. asylum and refugee laws, the alleged group must, inter alia, "have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them." *Matter of A-T-*, 24 I. & N. Dec. 296, 303 (BIA 2007) (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-75 (BIA 2007), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam), and *Matter of C-A-*, 23 I. & N. Dec. 951, 959-61 (BIA 2006)), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006)). An applicant's status as a child, on the other hand, is not sufficient, on its own, to establish a particular social group, as children are a large and diverse group and such a group does not tend to meet the particularity requirement of a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005); *Lukwago*, 329 F.3d at 171-72.

Different considerations come into play when the persecution being considered in an asylum or refugee claim is the forced recruitment itself. Where individuals are targeted for forced recruitment because they are viewed as desirable combatants, there is generally not a nexus between the forced recruitment and a protected characteristic. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). If, however, a child was subject to forced recruitment on account of another protected characteristic (such as race, religion, nationality, or political opinion), that child might be eligible for refugee or asylum status, presuming there are no bars to eligibility.

Children, like adults, who have been recruited or used in situations of armed conflict, may be inadmissible to the United States for reasons related to national security and terrorism-related activities. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B). Because most armed resistance organizations would meet the definition of a “terrorist organization” under the INA, a child’s association with, or activities on behalf of, these organizations may impact that child’s eligibility for asylum or refugee protection. Recruitment of children by a state, on the other hand, would not likely raise the terrorism-related grounds of inadmissibility.

The INA provides the Secretary of Homeland Security and the Secretary of State with the discretionary authority to determine that certain terrorism-related grounds of inadmissibility will not apply to specific cases. INA § 212(d)(3)(B)(i). A process for exempting the material support ground of inadmissibility has been in place since 2006, when the Secretary of State exercised her exemption authority for refugee resettlement applicants who had provided material support to eight particular organizations. To date, the Secretary of Homeland Security has exercised his exemption authority for individuals who provided material support to any of the following groups: 1) Karen National Union/Karen National Liberation Army (KNU/KNLA); 2) Chin National Front/Chin National Army (CNF/CNA); 3) Chin National League for Democracy (CNLD); 4) Kayan New Land Party (KNLP); 5) Arakan Liberation Party (ALP); 6) Tibetan Mustangs; 7) Cuban Alzados; 8) Karenni National Progressive Party (KNPP); 9) ethnic Hmong individuals and groups; and 10) the Front Unifié de Lutte des Races Opprimées (Montagnards).

The Secretary of Homeland Security also exercised his exemption authority with respect to material support provided under duress to undesignated terrorist organizations and certain organizations designated by the U.S. Department of State as terrorist organizations, where the totality of the circumstances warrants the favorable exercise of discretion. At this time, the exemption authority for material support provided under duress to designated organizations has been authorized for material support provided under duress to the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army of Colombia (ELN), and the United Self-Defense Forces of Colombia (AUC). Additional designated and undesignated groups have been identified, and are being reviewed in an inter-agency process for future exercises of the exemption authority.

Under the Consolidated Appropriations Act, 2008 (CAA), signed on December 26, 2007, the ten undesignated groups listed above no longer qualify as terrorist organizations for acts or events that occurred before the date of enactment. As a result, many activities or associations with these groups, including receipt of military-type training from one of these groups, no longer constitute a bar to asylum or refugee status. However, former combatants on behalf of these named groups do not qualify for an automatic exemption under the CAA. The CAA also provides the Secretary of Homeland Security and the Secretary of State with the authority to exempt almost all of the national security-related grounds of inadmissibility under the INA. However, the CAA prohibits exemptions for members or representatives of designated terrorist organizations; those who, on behalf of a designated terrorist organization, "voluntarily and knowingly" engaged in terrorist activity; endorsed or espoused terrorist activity or persuaded others to do so; or who "voluntarily and knowingly" received military-type training. The U.S. Government is currently examining whether to issue additional exemptions based on the CAA's changes in law.

Additionally, where an applicant for asylum or refugee status, whether a child or an adult, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, that applicant is barred from a grant of asylum or refugee status, although they remain eligible for protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Cases involving children who have been recruited or used in situations of armed conflict may require evaluating whether the persecutor bar is applicable.

12. Please inform the Committee of;

- (a) **the number of children detained at Guantanamo Bay and at other US administered detention facilities abroad since 2002;**

Answer: Since 2002, the United States has held approximately 2,500 individuals under the age of 18 at the time of their capture. Juvenile combatants have been detained at Guantanamo Bay, in Iraq, and in Afghanistan.

The United States does not currently detain any juveniles at Guantanamo Bay. In the entirety of its existence, the Guantanamo Bay detention facility has held no more than eight juveniles, their ages ranging from 13 to 17 at the time of their capture. It remains uncertain the exact age of these individuals, as most of them did not know their date of birth or even the year they were born. Department of Defense medical personnel assessed that three of the juveniles were under the age of 16, but could not determine their exact age. All three juveniles under the age of 16 held at Guantanamo were transferred back to Afghanistan in January 2004. Three other juveniles were transferred back to their home countries in 2004, 2005, and 2006, respectively.

Since 2002, the United States has held approximately 90 juveniles in Afghanistan. As of April 2008, there are approximately 10 juveniles being held at the Bagram Theater Internment Facility as unlawful enemy combatants.

Since 2003, the United States has held approximately 2,400 juveniles in Iraq. The juveniles that the United States has detained have been captured engaging in anti-coalition activity, such as planting Improvised Explosive Devices, operating as look-outs for insurgents, or actively engaging in fighting against U.S. and Coalition forces. As of April 2008, the United States held approximately 500 juveniles in Iraq.

(b) the length of time they have been deprived of liberty;

Answer: The U.S. Department of Defense detains enemy combatants who engaged in armed conflict against U.S. and Coalition forces or provided material support to others who are fighting against U.S. and Coalition forces. U.S. forces have captured juveniles, whom we believed were actively participating in such hostilities. Although age is not a determining factor in whether or not we detain an individual under the law of armed conflict, we go to great lengths to attend to the special needs of juveniles while they are in detention.

The United States has a number of policies in place that attempt to limit the length of time a juvenile is held in detention. The average stay of a juvenile in detention is under 12 months. Although this is not true for every case, we do our best to ensure that the overwhelming majority of juveniles in detention are released within the 12-month timeframe.

In Iraq, a great majority of juvenile detainees are released within six months, and most are currently held for no more than 12 months. A very small percentage of the juveniles detained in Iraq have been held for longer than a year, as they were assessed to be of a high enough threat level to warrant further detention. There also have been a handful of instances where a juvenile has been captured more than once and returned to detention after being determined once again to be a security threat.

In Afghanistan, the Department of Defense detains unlawful enemy combatants as defined in the Department's Directive 2310.01E, The Department of Defense Detainee Program. The United States may, under the law of armed conflict, detain unlawful enemy combatants for the duration of the conflict, regardless of their age at the time of capture. Nevertheless, the United States has instituted robust processes to review the necessity for continued detention and release those whose threat can be otherwise mitigated. In Afghanistan, a detainee's unlawful enemy combatant status is assessed immediately upon capture, reviewed again within 75 days of entry into the Theater Internment Facility, and is re-assessed every six months. Detainees are given the opportunity to provide input into this status determination.

The United States does not currently detain any juveniles at Guantanamo Bay. Of the eight juveniles who were detained at Guantanamo Bay, only two remain, who are now 21 and approximately 23 years old, respectively, and are facing trial by military commission. The three juveniles detained in Guantanamo, who were under the age of 16, were transferred back to Afghanistan by 2004. The Department of Defense worked with UNICEF to have these juveniles accepted into UNICEF's rehabilitation program for child soldiers in Afghanistan. One of the juveniles returned to the fight and was recaptured on the battlefield in Afghanistan engaging in anti-coalition activity. The other three juveniles were transferred back to their home countries in 2004, 2005, and 2006, respectively.

(c) the charges raised against them;

Answer: As the committee is aware, the United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. The law of armed conflict allows parties to the conflict to capture and detain enemy combatants without charging them for crimes. The U.S. Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), affirmed that the detention of enemy combatants is a fundamental and accepted occurrence in war, and concluded that the United States is therefore authorized to hold detainees for the duration of the conflict. This is consistent with the Geneva Conventions. The principal rationale for detention during wartime is to prevent combatants from returning to the battlefield to re-engage in hostilities.

In certain cases, the U.S. Government or the host nation may choose to prosecute a detainee for crimes. Both detainees who were picked up as juveniles and who remain at Guantanamo Bay have been charged for prosecution by military commission. Omar Khadr is currently 21 years old and is facing trial by military commission on the following charges: murder in violation of the law of armed conflict, attempted murder in violation of the law of armed conflict, conspiracy, providing material support to terrorism, and spying. Mohammed Jawad, who is approximately 23 now, is being charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Mr. Khadr and Mr. Jawad are currently the only two individuals captured under the age of 18 that the U.S. Government has chosen to prosecute under the Military Commissions Act of 2006.

(d) the legal assistance available to them;

Answer: Under the law of armed conflict, the purpose of detention is to prevent a combatant from returning to the battlefield, and, therefore, a detainee would generally not be provided legal assistance. Nevertheless, there are numerous processes that the United States conducts to ensure that a detainee is being properly held as a threat to security, including some processes that include attorneys, administrative hearings, and the ability for a detainee to represent himself. All detainees, regardless of age, are advised of the reason for their detention and undergo periodic reviews.

The initial determination of a detainee's status is made by forces at the point of capture. It is not always clear at the point of capture whether the individual is under the age of 18. Because many of our enemies do not wear uniforms, or other identifying insignia, it is often difficult for our forces engaged in combat to ascertain who the enemy is and whether those captured do indeed pose a threat. Detainees are moved away from the active battlefield as quickly as practicable, as required under Department of Defense Directive 2310.01E, and are reviewed by the brigade and division unit levels before being transferred to a Theater Internment Facility (TIF). Following their transfer to a TIF, the Combatant Commander, or his designee, makes a determination as to the detainee's status and assesses whether there is a need to continue detaining the individual. If the command is reasonably sure the individual is a juvenile, generally based on an assessment done by military medical personnel, he is separated from the adult detainee population, and special protections and programs will be afforded him.

In Afghanistan, the determination of a detainee's status must be made within 90 days of capture. The detaining Combatant Commander produces a written assessment regarding the detainee's status based on a review of all the available and relevant information. In Afghanistan, a detainee's unlawful enemy combatant status is assessed immediately upon capture, reviewed again within 75 days of entry into the TIF, and is re-assessed every six months. Detainees are given the opportunity to provide input into this status determination. The Commander may also review the status of any detainee under his control at any time based on any new information that becomes available.

In Iraq, detainees are being held by U.S. forces as imperative threats to security with the authorization of the U.N. Security Council and at the request of the sovereign Iraqi government. Review of a detainee's status occurs at several different levels. The first level of review is called the Detention Review Authority and is completed by the detaining unit commander and the unit's Staff Judge Advocate to assess whether the individual is an imperative security threat. Approximately 50 percent of those initially detained in Iraq are determined not to be an imperative security threat, and these individuals are released at the unit location. Those assessed to be a threat are transferred to the TIF.

At the TIF, the detaining command Magistrate Cell, consisting of judge advocates, conducts a thorough review of each individual's case. Based on this review, the Magistrate Cell either recommends the detainee be expeditiously released or retained as an imperative security threat. Additionally, the Cell recommends either that the detainee be referred to the Central Criminal Court of Iraq (CCCI) if there are grounds for criminal prosecution, or that the detainee's case be referred to the Combined Review and Release Board (CRRB) if he is a security internee. The CRRB process is consistent with a review under Article 78 of Geneva Convention IV. The CCCI or CRRB, as appropriate, forms the third review in this system.

Through each of the reviews conducted at the TIF, the detainee is notified in writing and provided the opportunity to present information for consideration. Additionally, a detainee is authorized access to an attorney and, if referred to the CCCI, will be provided a government defense attorney if he does not have private counsel.

All detainees at Guantanamo Bay are allowed to seek legal representation, and are provided review of their enemy combatant status in the U.S. federal courts. Those detainees who are being prosecuted by military commission have additional counsel rights.

In the case of Omar Khadr, a military Judge Advocate has been assigned as his defense counsel. In addition, Mr. Khadr has two Canadian civilian attorneys, who operate as consultants on his defense team. The United States Government remains in dialogue with the Canadian Government, as Mr. Khadr is a Canadian citizen. Representatives from the Canadian Government have visited Mr. Khadr and continue to do so on a regular basis. In the case of Mohammed Jawad, a military Judge Advocate has been assigned as his defense counsel. Private, civilian counsel would also be allowed as consultants to Mr. Jawad, if any were to request to represent him.

(e) the physical and psychological recovery measures available to them;

Answer: The Department of Defense recognizes the special needs of young detainees and the often difficult or unfortunate circumstances surrounding their situation. We have procedures in place to evaluate detainees medically, determine their ages, and provide for detention facilities and treatment appropriate for their ages. Every effort is made to provide them a secure

environment, separate from the older detainee population, as well as to attend to the special physical and psychological care they may need.

All detainees in DoD custody, wherever they are held, have access to medical professionals who assess their physical and psychological needs. The juvenile detainees are also attended to by medical professionals, who recognize that because of their age, they require special care.

One of the juvenile detainees at Guantanamo was diagnosed and treated for Post Traumatic Stress Disorder. In addition, those who were assessed to be under the age of 16 were provided education courses in their own language, including instruction in math and English, were allowed to watch age-appropriate movies, and had access to a small field on which to play. Each one was allowed time for regular prayer and for study.

In Iraq, a Juvenile Education Center was opened on August 12, 2007. The Iraqi Government's Ministry of Education (MoE) and the Multi-National Forces-Iraq (MNF-I) have worked together to incorporate Iraqi standards for a curriculum to provide basic educational instruction for all juvenile detainees up to age 17.

On February 12, 2008, the MoE and Task Force 134, MNF-I's detention command task force, signed a Memorandum of Understanding that provides a plan for upcoming improvements to the educational programs offered to juvenile detainees while in detention. In January 2008, each student underwent a written assessment of their educational abilities, allowing the task force to ensure each juvenile is placed in the classroom that best serves his needs. All juvenile detainees are offered attendance in basic educational programs in grades 1-6, with a core curriculum of six subjects: Arabic reading, writing, and language skills; math instruction from simple addition through algebraic equations; history and social studies beginning with those of Iraq and then the world; earth science and biology; civics instruction in the structure of the Iraqi government and basic citizenship; and, instruction in English numbers, letters, and phrases. The program is designed so that the juveniles can continue their education after their release, and efforts are being made to incorporate the MoE standards and curriculum.

The education center features classrooms, a library, a medical treatment facility, and four soccer and athletic fields. Juveniles are afforded the chance to exercise, to paint, and to participate in activities appropriate for

persons of their age. They are transported to and from the education facility daily from Camp Cropper, and plans are underway to build a permanent housing unit at the juvenile education center to facilitate their education and physical activities more effectively. Teachers were chosen from Baghdad and surrounding provinces and may live at the school while they are teaching.

The aim is to contribute positively to the future of Iraq by offering hope for personal growth through education and by working to empower the juvenile detainees through proper counseling and guidance. The juvenile education center offers an education and life skills that will be beneficial upon their eventual release and reconciliation into society. The hope of the United States is that these educational opportunities will spark a desire inside the youth of Iraq to continue their education and allow them to become the building blocks upon which they can rebuild their country.

In Afghanistan, juveniles have access to the Mental Health Unit (MHU) at the Theater Internment Facility (TIF). The MHU is staffed by a psychiatrist, a social worker, and a psychological technician. The MHU offers detainees, including juveniles, the opportunity to participate daily in group therapy sessions with a psychiatrist. Since the program's inception, 45 detainees have participated in these therapy sessions, although no juveniles have requested to participate, or required the care provided.

In January 2008, DoD instituted a program that enables detainees at the TIF to visit with family members via video teleconference (VTC). The program operates on a weekly basis. Since its inception, over half of the detainees held at the TIF have participated, many of them multiple times. DoD is currently developing security enhancements that should enable family visits at the TIF sometime in the next few months.

In the last several months, the guard force at the TIF has noted an improvement in morale and a sharp decrease in the number of disciplinary problems among detainees. These developments coincided with the creation of the MHU and implementation of the family visit VTC program.

Space constraints at the TIF have limited the ability to offer detainees educational, religious, and vocational programs in the past, but plans are underway to establish such programs in the future. As in Iraq, the aim of these programs is to offer all detainees an opportunity for personal growth

that will be beneficial upon their eventual release and reintegration into society.

Similarly, space constraints at the TIF have limited the frequency, duration, and space available for detainee recreation, but plans are underway to remedy the situation.

(f) the current status of their legal situation;

Answer: The United States is in a state of armed conflict with Al Qaida, the Taliban, and their supporters. Under the law of armed conflict, countries may lawfully detain enemy combatants until the cessation of active hostilities. The principal rationale for the detention of enemy combatants during wartime is to prevent them from returning to the battlefield to re-engage in hostilities.

In Iraq, all detainees, regardless of age, are held by U.S. forces as imperative threats to security at the request of the sovereign Iraqi government and pursuant to a UN Security Council Resolution. As of April 2008, U.S. forces held approximately 500 juveniles under this framework.

In Afghanistan, detainees are held under the law of armed conflict to prevent them from re-engaging in hostilities against our forces. As of April 2008, U.S. forces held approximately 10 juveniles under this legal framework. U.S. forces have not referred any juveniles to the Government of Afghanistan to face charges.

At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006. Mr. Khadr is being charged with murder in violation of the law of armed conflict, attempted murder in violation of the law of armed conflict, conspiracy, providing material support to terrorism, and spying. His case continues to move toward trial and motions continue to be heard by the military judge. Mr. Jawad is being charged with attempted murder in violation of the law of armed conflict and intentionally causing serious bodily injury. His case continues to move forward and pre-trial hearings have begun before a military judge.

(g) how Military Commissions take into account the rights of children;

Answer: The Military Commissions Act of 2006 establishes Military Commission procedures for trying alien, unlawful enemy combatants in a manner that fully complies with Common Article 3 of the Geneva Conventions. The legislation incorporates numerous due process safeguards for defendants, including: an extensive appeals process, including the right to appeal final Military Commission convictions to the U.S. federal courts (which includes the right to seek review in the United States Supreme Court); the right to be present throughout the trials; the presumption of innocence; the right to represent oneself; the right to cross-examine prosecution witnesses; the prohibition on double jeopardy; an absolute bar on admission of statements obtained through torture, or through cruel, inhuman or degrading treatment in violation of the Detainee Treatment Act of 2005; a prohibition against compelled self-incrimination; and access to counsel.

The trials will ensure that the unlawful combatants who are suspected of war crimes are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people. These trials will be fair and be conducted with the utmost respect for judicial rights and procedural safeguards, and will be open to the media.

It is not unprecedented for juveniles to face the possibility of a war crimes trial. In fact, the Geneva Conventions and their Protocols contemplate the prosecution of those under the age of 18 for violations of the laws of armed conflict. Article 6(4) of Additional Protocol II prohibits the application of the death penalty to those under 18 at the time the offense was committed, thereby suggesting that prosecutions not resulting in the imposition of death are not prohibited. This is also true of the International Tribunals from Rwanda, the Former Yugoslavia and Sierra Leone. A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review – the latter two of which will review the findings and the sentence.

In the event that a Military Commission must call a child (defined as being 16 or younger) as a witness, there are special protections within the Manual for Military Commissions. For instance, the Rule for Military Commission (RMC) 804c permits an accused to absent himself voluntarily in the event a

military judge allows the child witness to testify remotely. RMC 914A permits the use of remote live testimony of a child, unless the accused absents himself under 804c. In addition, the Military Commission Rules of Evidence (MCRE) have provisions that deal with children. For example, MCRE 104 identifies children as people the military judge might have to make special provisions for by utilizing protective testimonial procedures. MCRE 611d gives a military judge the authority to permit remote live testimony when a child (as above, defined as being 16 or younger) cannot testify in court because of fear, likelihood of suffering mental trauma as a result of providing testimony in court, mental infirmity, or because of the behavior of the accused (e.g., acts of intimidation). There is no spousal privilege when an accused commits a crime against the spouse or the child of either the spouse or the accused. See MCRE 504c2A.

(h) **remedies available should they not be found guilty of any offense.**

Answer: The purpose of the detention of enemy combatants during wartime is not for prosecution; rather, the principal rationale for such detention is to prevent them from returning to the battlefield to re-engage in hostilities. The overwhelming majority of juveniles held by the United States will not face any charges. Each detained juvenile will have his individual circumstances reviewed at least every six months to determine whether the detainee continues to pose a threat.

In Iraq, if it is determined that a detainee can be successfully reintegrated into society and will no longer pose a threat to coalition forces or to innocent civilians, the detainee will be released.

In Afghanistan, detainees who still pose a limited threat that can be mitigated with conditions less restrictive than continued detention are transferred to the Government of Afghanistan for participation in the Takhim e-Solik (Peace Through Strength, or PTS) reconciliation program. This program provides for the release of Afghan detainees to their tribal leaders with assurances that they will not return to the fight. The tribal leaders assume responsibility for the former detainees upon their transfer. So far, no juveniles have participated in the PTS program; however, it remains one option available for the Afghans to help reintegrate juveniles into their society.

As previously noted, the United States has chosen to prosecute two individuals who are accused of committing war crimes when they were less than 18 years of age. In all instances, prosecution by Military Commission is not tied to the threat a detained enemy combatant poses on the battlefield. An individual who is not successfully prosecuted by Military Commission may still warrant detention under the law of armed conflict in order to mitigate the threat posed by the detainee.

13. Please inform the Committee whether national legislation prohibits the sale of arms when the final destination is a country where children are known to be, or may potentially be, recruited or used in hostilities.

Answer: Section 699C of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 provides that Foreign Military Financing (“FMF”) appropriated in that Act may not be provided to the government of a country identified in the U.S. Department of State Country Reports on Human Rights Practices as having government armed forces or government supported armed groups that recruit or use child soldiers. FMF is funding that is granted to a foreign government for the purchase of defense articles and services. The Secretary of State may overcome this restriction by certifying to the Congressional Appropriations committees that the government of such country has implemented effective steps to demobilize children from its armed forces and/or supported armed groups, and prohibit future recruitment and use of child soldiers. In addition, it is within the discretion of the Secretary of State to waive application of this provision after determining and reporting to the Congressional Appropriations Committees that such a waiver is important to the national interest of the United States.

Section 699G of the same act prohibits provision of FMF, the granting of defense export licenses, or the sale of military equipment or technology to Sri Lanka unless the Secretary of State certifies, among other things, that the Government of Sri Lanka is bringing to justice members of the Sri Lankan military who have been complicit in the recruitment of child soldiers. This restriction does not apply to the sale of equipment for maritime and air surveillance or for communications.

Also, Section 110 of the Trafficking Victims Protection Act (TVPA) of 2000 restricts nonhumanitarian and nontrade-related foreign assistance to a country that is on Tier 3 of the State Department's annual Trafficking in Persons Report if that country fails to make significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking in persons as outlined in the TVPA. The President may waive the restriction in full or in part. Child soldiering is considered to be a unique and severe manifestation of trafficking in persons that involves the unlawful recruitment of children through force, fraud or coercion to be exploited for their labor or to be abused as sex slaves in conflict areas.

In addition, the United States integrates human rights considerations, including the use of child soldiers, as part of the standard review for countries of concern prior to the granting of arms export licenses or deciding to sell defense articles or defense services.

List of Annexes

1. U.S. War Crimes Statute (18 U.S.C. § 2441)
2. Accessions of Individuals Below Age 18 to U.S. Armed Services (2004-2007)
3. Military Recruiting and Recruiter Irregularities (2006)
4. U.S. Asylum Seekers from Conflict-Affected Countries: Individuals under 18 Who Filed as Principal Applicants (2005-2007)
5. Unaccompanied Minors who were Principal Applicants for Refugee Status (2005-2007)
6. DHS Interviews of Unaccompanied Minors who were Principal Applicants for Refugee Status (Statistical Profile for Selected Nationalities, 2007)
7. Defensive Asylum Applications Filed by Juveniles in their Own Right (2005-2007)

Attachment 5

May 11, 2008

NEWS ANALYSIS

Judge's Guantánamo Ruling Bodes Ill for System

By WILLIAM GLABERSON

A decision by a military judge on Friday to disqualify a top Pentagon official from any further role in a Guantánamo war crimes case was a major new challenge to the Bush administration's legal approach to the war on terrorism.

The ruling, in the case against Salim Hamdan, a detainee who was a driver for Osama bin Laden, transformed what had been something of a Pentagon soap opera over how to prosecute detainees into a formal ruling that gave new force to critics' accusations of improper political influence over this country's first use of military commissions since World War II.

At issue is the role of a Pentagon office called the "convening authority," which oversees the military prosecutors and has extensive power over the defense lawyers and judges in the cases against Guantánamo detainees. One role of that office is to be a neutral arbiter, deciding such matters as allocation of resources for both the defense and prosecution and which charges brought by prosecutors should go to trial.

But military defense lawyers and other critics have said officials running that office have overstepped the bounds of impartiality by pushing prosecutors to charge more detainees and to use evidence obtained under coercive interrogations.

Lawyers said the ruling set the stage for new challenges that could slow even the administration's highest priority Guantánamo prosecution, against six detainees for the 2001 terrorist attacks. One of the six is Khalid Shaikh Mohammed, the self-professed planner of the attacks that killed nearly 3,000 people.

"The military judge has said that, at the very least, there are grave appearance problems with this system," said Michael J. Berrigan, the deputy chief defense counsel for the Guantánamo cases.

The judge, a Navy captain, provided the critics with pages of new material to underscore their attacks on the system. He said he accepted accusations by a former Guantánamo chief

prosecutor, Col. Morris D. Davis, that a military official with broad powers over the tribunal system, Brig. Gen. Thomas W. Hartmann, had exerted improper influence over the prosecutors.

“Telling the chief prosecutor (and other prosecutors),” the decision said, “that certain types of cases would be tried and that others would not be tried, because of political factors such as whether they would capture the imagination of the American people, be sexy, or involve blood on the hands of the accused, suggests that factors other than those pertaining to the merits of the case were at play.”

In the past, General Hartmann had denied that he had political motives in pressing for progress in what has been a problem-plagued war crimes system.

But the decision sided with Colonel Davis, who has become a harsh critic of the system he once helped run. His most contentious claim has been that General Hartmann pressed him to use evidence that he had rejected because it had been obtained through interrogation techniques critics view as torture, like the simulated drowning known as waterboarding.

The judge, Capt. Keith J. Allred, noted that prosecutors have an ethical obligation to present only evidence they consider reliable. At a hearing in Guantánamo on April 28, Colonel Davis testified that before General Hartmann was appointed last summer, prosecutors had been building cases without using evidence derived through waterboarding because Colonel Davis considered it unreliable. He testified that General Hartmann overruled that approach.

Judge Allred wrote that directing the use of “evidence that the chief prosecutor considered tainted and unreliable, or perhaps obtained as a result of torture or coercion, was clearly an effort to influence the professional judgment of the chief prosecutor.”

General Hartmann did not comment on Friday's ruling, which, as is common at Guantánamo, was not publicly released immediately. But in Congressional testimony after his dispute with Colonel Davis became public last fall, General Hartmann said military judges should decide whether evidence backing prosecution cases was permissible.

Under the Military Commissions Act, evidence derived through torture is inadmissible, but prosecutors can build cases with evidence obtained through coercion.

Critics of the military commission system seized on Judge Allred's ruling as the latest in a long line of challenges that have frustrated the Bush administration in its efforts since 2001 to begin war crimes prosecutions.

"The military commission process is hitting a brick wall from within the military and outside the military," said Anthony D. Romero, the executive director of the American Civil Liberties Union, which has been a vocal critic of the system.

The ruling only affected Mr. Hamdan's case, in which defense lawyers had claimed there had been unlawful influence over the prosecutors. But the case would not necessarily be delayed. It is scheduled to go to trial this month.

The judge directed the Pentagon to appoint a replacement for General Hartmann in dealing with the Hamdan case. General Hartmann is the legal adviser to Susan J. Crawford, a Pentagon official with the title of Convening Authority, who has broad powers over the entire war crimes system, including the power to approve charges, reduce sentences and make plea bargains.

General Hartmann has described Ms. Crawford as "an independent, quasi-judicial figure" who administers the Pentagon's Office of Military Commissions, which runs the war crimes system at Guantánamo.

It was that independence Judge Allred found that General Hartmann compromised by becoming so deeply involved in the prosecution that he was making decisions about what cases were to be prosecuted and how. Judge Allred called it a Pentagon official's "nanomanagement of the prosecutors' office."

Copyright 2008 The New York Times Company

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)

Attachment 6

The Great Guantánamo Puppet Theater

By Scott Horton

Last week the Department of Defense launched a major media offensive. It announced that trials of six "high-value detainees" linked to the attacks on 9/11 would be charged in proceedings before the Guantánamo military commissions this spring. Specific accusations concerning the roles played by each of the six in the tragedy of 9/11 were all over the media. For the most part, the media has only lightly embroidered the Pentagon's script. The *Washington Post* told us about the "clean team" that the Pentagon had sent in, top-notch no-nonsense prosecutors to do the job. PBS's NewsHour gave an extended segment over to the Pentagon's key spokesman on the issue, Brigadier General Thomas Hartmann, to set out the case for the proceedings.

Curiously, this ran side-by-side with a series of public presentations by leading figures of the Administration—Attorney General Mukasey, Steven Bradbury (acting head of Justice's Office of Legal Counsel), Director of National Intelligence Michael McConnell and even President Bush himself—shoring up the Administration's barely comprehensible position on waterboarding and other coercive interrogation techniques. The overlap was not

<http://www.harpers.org/archive/2008/02/hbc-90002460>

5/20/2008

coincidental, because the two projects were closely intertwined. The Administration took the position that it doesn't presently authorize waterboarding, but now acknowledges that it did in the past and reserves that it might again in the future. It argues that there's nothing wrong with waterboarding, and that any waterboarding done in the past was done lawfully. Why not just say that waterboarding is "torture"? There's one immediate reason: doing so would exclude a mass of evidence that appears to be available for the pending prosecutions.

But while the American mainstream media presented the story with the main spotlight on the Pentagon and its announcements and some trivial sideshows in which bickering lawyers raised quibbles about vexatious technicalities like the hearsay rule, access to exculpatory evidence and the ever-present torture, overseas the Guantánamo proceedings got a different treatment. Outside of the United States, "Guantánamo" is a by-word for torture, authoritarian abuse and injustice. And the fact that the U.S. had elected to put these six detainees on trial before a military commission in Guantánamo drew a predictable review. "There will not be six persons on trial, but seven," editorialized the predictably pro-American German newspaper *Die Zeit*. The seventh, of course, is the Bush Administration and its hopelessly corrupted concept of justice.

The American media seems by-and-large not to understand the "justice" angle of the military commissions debate. They instantly want to run into the weeds with extended discussions of evidentiary issues, and they miss the glaring question that hangs over the entire affair. And now a week into the process, the proposed trials have taken a strange twist. Will the American media at last recognize that the real questions about this process go to the fundamental *independence* of the courts? Dramatic disclosures in an article published yesterday in *The Nation* require them to take a close look at it. So far, they don't seem to be willing to do so. Here's the core of Ross Tuttle's dramatic piece:

According to Col. Morris Davis, former chief prosecutor for Guantánamo's military commissions, the process has been manipulated by Administration appointees in an attempt to foreclose the possibility of acquittal. Colonel Davis's criticism of the commissions has been escalating since he resigned this past October, telling the Washington Post that he had been pressured by politically appointed senior defense officials to pursue cases deemed "sexy" and of "high-interest" (such as the 9/11 cases now being pursued) in the run-up to the 2008 elections. Davis, once a staunch defender of the commissions process, elaborated on his reasons in a December 10, 2007, Los Angeles Times op-ed. "I concluded that full, fair and open trials were not possible under the current system," he wrote. "I felt that the system had become deeply politicized and that I could no longer do my job effectively."

Then, in an interview with The Nation in February after the six Guantánamo detainees were charged, Davis offered the most damning evidence of the military commissions' bias—a revelation that speaks to fundamental flaws in the Bush Administration's conduct of statecraft: its contempt for the rule of law and its pursuit of political objectives above all else. When asked if he thought the men at Guantánamo could receive a fair trial, Davis provided the following account of an August 2005 meeting he had with Pentagon general counsel William Haynes—the man who now oversees the tribunal process for the Defense Department. "[Haynes] said these trials will be the Nuremberg of our time," recalled Davis, referring to the Nazi tribunals in 1945, considered the model of procedural rights in the prosecution of war crimes. In response, Davis said he noted that at Nuremberg there had been some acquittals, something that had lent great credibility to the proceedings.

"I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process," Davis continued. "At which point, [Haynes's] eyes got wide and he said, 'Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have

acquittals, we've got to have convictions."

Davis submitted his resignation on October 4, 2007, just hours after he was informed that Haynes had been put above him in the commissions' chain of command. "Everyone has opinions," Davis says. "But when he was put above me, his opinions became orders."

Colonel Davis is not just any JAG officer. He was an up-and-comer widely viewed in his peer group as someone in line for a star, and ultimately perhaps, to be the Air Force's Judge Advocate General. He is also no whining civil libertarian, but rather a no-nonsense conservative, whose prior scraps with civilians in the Pentagon came over the restraints they put on his ability to charge forward and prosecute cases.

In particular, Davis and other Guantánamo prosecutors were crest-fallen over the handling of the case of David Hicks. An Australian sheepskinner turned Middle East adventurer, Hicks was labeled one of the "worst of the worst" and was charged with being a weapons-toting terrorist. Just as his trial got under way, and Davis confidently delivered a searing opening promising to make Hicks out as a bloodthirsty figure who had betrayed his homeland and turned to a path of "Islamic" violence, the public learned that a plea-bargain had been reached. Curiously however, all this transpired without involving the prosecutors. You might well wonder how that was possible. And indeed, that is the very nub of the current accusations over the rigging of the commissions, because the handling of the Hicks case quite dramatically supports Colonel Davis's charges. Over the next several weeks, the details of the Hicks plea bargain—which led very quickly to a minimal sentence for Hicks, his transfer to Australia, and his release—trickled out. Apparently the Hicks case turned on one single issue: politics. Indeed, electoral politics.

Australian Prime Minister John Howard was facing a difficult election campaign. The imprisonment of David Hicks was figuring as a terrible issue for him and his Liberal Party. Public opinion has swung against his government, as people, led by the legal community, questioned how an Australian citizen could be abandoned to the perils of Guantánamo—when the U.K. and other nations had fetched their nationals home. Vice President Dick Cheney visited Howard, discussed the Hicks case, and returned home. Within a short period, a Cheney protégée, particularly close to Cheney's chief of staff David Addington, Susan J. Crawford, was installed as the convening authority for the Military Commissions, and Ms. Crawford's legal advisor quickly negotiated a plea bargain with Hicks's attorneys. Later it was learned that Jim Haynes, known for his tight connections with the Vice President's office, had played a key role as intermediary in the affair.

The Australian public welcomed the release of David Hicks, but the manipulation of his case produced a significant scandal. It was, as several Australian papers charged, the impermissible manipulation of legal proceedings through a political process and for political reasons—which many speculated is about all the Guantánamo process had been from the outset. John Howard and his Liberal Party were humiliated at the polls, and in an astonishing embarrassment, voters in Howard's own constituency decided to retire him from political life. But American media reacted to the entire affair with a collective yawn.

So the first high profile military commissions case ran its full course. And it turned on nothing *except* politics. Not a good sign for the future.

But as foreign media were regularly observing, there was something extremely fishy about these "military"

commissions. In fact one of the major insights critics offered up was that they *were not really "military" at all*. They had the appearance of being "military," because the courtroom scene on which all the cameras focused were filled with men and women in uniform. But as the Hicks case showed, the military actors were all like so many marionettes. Behind the scenes, the puppet masters were pulling the strings. And the puppet masters were suspiciously partisan political figures. Two were points of focus. The first is Susan J. Crawford, who served as convening authority. In the military justice system the convening authority is a uniformed military commander whose command responsibility covers the territory or subject matter of the legal proceedings. He is the "convening authority" because the military justice process is seen as an extension of his command authority. Under the doctrine of *Yamashita*, military commanders have a specific responsibility to implement the laws of armed conflict, and they may in fact bear liability if they fail in this duty.

But unlike her predecessor, Major General John D. Altenburg, Susan J. Crawford is a convening authority who has never worn a uniform nor held a military command. She is a civilian. Indeed, her principal qualification for the position appears to be her political proximity to Vice President Cheney, and specifically to his legal policy guru, David Addington. In fact at an event held last year to mark Crawford's retirement as a military appeals judge, she went out of her way to note the presence of and thank just one person, her friend David Addington.

Given this tight relationship, it then emerges as no surprise that Crawford and her office are so receptive to the concerns of Vice President Cheney's office and so prepared to allow another Addington crony, Jim Haynes, to dictate the terms of the proceedings.

But, unseemly as this situation was already, it actually got much worse following the Hicks case. Apparently judging the military commissions process as a matter of tight personal concern, Jim Haynes decided he needed to have tighter and more direct control over them. He then proposed a change in the command structure for the participants. They were to be subordinated directly to his command.

Haynes crafted and secured Deputy Secretary of Defense Gordon England's signature on two documents. The first, which can be examined [here](#), directs that Brigadier General Thomas Hartmann, Legal Advisor to the convening authority and the person who effectively manages her office, reports to Paul Ney, **DOD Deputy General Counsel (Legal Counsel)**, who, of course, in turn, reports to Jim Haynes.

The second memorandum, which can be examined [here](#) directs that Colonel Morris Davis, the Chief Prosecutor, reports to Brigadier General Hartmann, who reports to Ney, who reports to Haynes. This memorandum was particularly necessary as an after-the-fact adjustment to cover Haynes's manipulation of the Hicks case, establishing a chain-of-command justification for his intervention to direct the plea bargain resolution of the case.

Same relationship exists for the Chief Defense Counsel, who reports to Paul Koffsky, **DOD Deputy General Counsel (Personnel & Health Policy)** who, like Ney, reports to Haynes.

The cumulative effect of these changes masterminded by Haynes is plain enough: the already very obvious threads attached to the commission participants were replaced with some crude hemp rope. It was obvious to all observers who was calling the shots. And it was plainly illegal and unethical. Professional rules require the defense counsel, prosecutor, and judges to exercise independent professional judgment. Moreover, the Military Commissions Act of 2006 guarantees the professional independence of these actors in the process. The command structure crafted by Haynes was plainly designed to achieve the political subordination of the JAGs,

defying the MCA's guarantee of independence.

Davis resigned because he felt the commissions system was rigged. He also filed a formal complaint over the improper role played by the convening authority's legal advisor in the Hicks case. That complaint is in the process of investigation by the Department of Defense. [Here](#) is a memorandum posted to the Department of Defense's website concerning the still pending investigation and the issues raised. Note that while Davis was not in a position to premise the complaint on Haynes's involvement, that is the 800 pound gorilla in the room. But Davis was not the only, nor even the first prosecutor to resign. Three others—Maj. Robert Preston, Capt. John Carr and Capt. Carrie Wolf—asked to be relieved of duties after saying they were concerned that the process was rigged. One said he had been assured he didn't need to worry about building a proper case; convictions were assured.

Of course, the number of *defense* counsel claiming that the system is stacked against them is legion. I surveyed the views of the defense lawyers, and the serious mistreatment they frequently faced at the hands of the Rumsfeld Pentagon, in this [article](#).

Even the chief judge at Guantánamo, Colonel Ralph Kohlmann is plainly troubled by the military commissions arrangement. He wrote in a paper published in 2002 that "even a good military tribunal is a bad idea." Col. Kohlmann argued that the "apparent lack of independence" of military judges would present "credibility problems." Col. Kohlmann wrote these words *before* the obvious political manipulation of the Hicks case and *before* Haynes's jiggered the command structure to place himself in control of the entire process. The "apparent lack of independence" of which he wrote has ballooned into a nightmarish reality.

Brigadier General Hartmann is a focal figure in all of this. His "independent judgment" has been dramatically displayed in his testimony before a Senate Committee. He was asked a few questions about waterboarding and torture, and the answers he gave were strictly those of his puppet master. A number of senators, from both parties, expressed their disgust with his stooge-like behavior. Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Hartmann was quick to invoke the model of the Nuremberg trials, calling these proceedings a "modern Nuremberg." In fact, the Nuremberg process is worthy of emulation and had the Bush Administration turned to its grand design, or even some of the other model international tribunals, most of the embarrassment that now surrounds the Gitmo moral swamp would have been avoided. Robert H. Jackson, arguably America's greatest attorney general, was responsible for structuring those proceedings. He made clear throughout that he was guided by two concerns. The first was to do justice. And the second was to be damned sure that the public recognized that justice was being done. He accomplished both goals, and the result was a landmark international law and a point of pride for America.

But the military commissions crafted by the Bush Administration are an embarrassing stain compared to

Nuremberg. One of the main reasons is that they have been crafted by political hacks out on a partisan agenda, and the experts who could have done a credible job—first among them the military lawyers in the JAG corps—have been ignored or overruled at each turn. The ability of defense counsel to conduct a meaningful defense has been impeded, with gains coming grudgingly only after the Supreme Court overturned the first, colossally incompetent structure in *Rasul*. Most menacingly, the specter of torture hovers over the current military commissions proceedings, with the acknowledgement that many of the defendants were subjected to techniques which the entire world (excluding only the Bush Administration) considers to be torture.

Even most critics concede the professionalism and integrity of the military lawyers who are assigned to the military commissions system as judges, prosecutors and defense counsel. Their professionalism and integrity are not an issue, or more precisely, protecting their professionalism and integrity from political predators *is* the issue. Critical attention focuses today just where it did at the outset: on the political hacks who have shamelessly attempted to manipulate the system, and whose misconduct is bringing shame and opprobrium upon the United States. Colonel Davis's description of his conversation with Haynes comes as a surprise to no one who has been tracking this issue. To the contrary, it is a bit of the well-understood reality of the situation bubbling to the surface.

Attachment 7

THE Nation.

Unlawful Influence at Gitmo

by ROSS TUTTLE

March 28, 2008

On March 27 Lieut. Cmdr. Brian Mizer, defense attorney in the office of military commissions, filed a motion to dismiss charges against his client Salim Hamdan, the alleged chauffeur of Osama bin Laden, who has been detained at Guantánamo since 2002. In his motion, Mizer alleges unlawful interference in the affairs of the defense and prosecution by political appointees within the Pentagon and by the office of Susan Crawford, the convening authority.

Hamdan has been at the center of several pivotal developments within the military commissions process--most notably as named plaintiff in the Supreme Court case (*Hamdan v. Rumsfeld*) that upended the previous incarnation of the tribunals. His case is slated to be tried this summer, one of the first under the new system developed by the Military Commissions Act of 2006. But this latest motion could result in yet another stinging setback for an administration desperate for victories in a maligned process that has seen only one case resolved in six years.

Central to Mizer's claim is a piece of evidence suggesting that Crawford's legal adviser, Brig. Gen. Thomas Hartmann, is so ensconced in the prosecution that he has become the de facto chief prosecutor--a highly improper role according to observers, participants and the Military Commissions Act itself.

"The convening authority is supposed to be this quasi-neutral, quasi-judicial functionary who chooses the jury that hears Hamdan's case and others," says Mizer. "So if that person has become a partisan, you essentially have the prosecutor picking the jury, and that's simply unfair."

In addition to selecting the jury, the convening authority (Crawford) must also review the charges, refer them to trial, approve allocations for expert witnesses and serve as the first stop in the appeals process--roles that all require neutrality. By extension, the convening authority's adviser (Hartmann) must also be impartial.

Mizer's motion draws heavily on familiar claims made by the former chief prosecutor, Col. Morris Davis, who resigned last October, complaining of the use of coerced testimony and political pressure to try "sexy" cases in the run-up to the 2008 elections. Davis had singled out Crawford, Hartmann and former Pentagon general counsel William Haynes, who has since resigned, for interfering in the process or applying political pressure. Davis, who has also submitted his resignation to the Air Force, has agreed to testify as a witness for the defense at Hamdan's April pretrial hearing.

Mizer's motion also introduces new evidence to corroborate Davis's account--chiefly an e-mail that deputy chief defense counsel Mike Berrigan inadvertently recieved on January 29. The e-mail was titled "9-11 Draft Charges-25 Jan," and it came with an attachment of the draft charges against the six high-value detainees alleged to have participated in the 9/11 plot. That a defense attorney received these charges in draft form two weeks before charges were announced was unusual enough, but the source of the message was even more surprising. It had come from Wendy Kelly, chief of staff in the office of the convening authority.

"What that e-mail shows is who's drafting the charges," says Mizer. "It's not the prosecutor, which is intended to be an independent office according to Congress. It's the convening authority."

Two weeks later, when Hartmann announced the charges, he opened his remarks by stating, "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."

"It's an outright fraud," says Mizer. "The convening authority is supposed to receive the charges from the prosecutor and make an independent assessment on whether or not this goes forward. General Hartmann didn't just receive those charges; they'd been circulating in his office a full two weeks before he held that press conference."

After Berrigan received the e-mail with the draft charges, he notified the sender, asking whether she had meant to send it to him. The convening authority's office then asked for the immediate return of the charges. But when Berrigan refused, recognizing that the e-mail could be evidence of unlawful influence, Hartmann sent what Mizer called an implicitly threatening letter to chief defense counsel Steven David.

"He [Hartmann] said something like, 'I went to the ethics advice committee in the Navy, Marine Corps and Army, and they said you had no ethical basis to hold this document,'" recounted Mizer. "It's this implicit threat that what you've done is outside of the scope of ethical conduct of an attorney and you need to turn this over. And then he [Hartmann] said, 'I don't know what state you're licensed in, but I'm sure it's unethical there too.'"

To Mizer, this also qualified as unlawful influence--in that it was an attempt to "coerce" defense counsel.

According to scholars, unlawful command influence has frequently been called the mortal enemy of military justice. One way to protect against it is to mandate an independent defense and prosecution. Indeed, when two of the Military Commissions Act's authors, John McCain and Lindsey Graham, asked Davis what he would need in order to do his job as chief prosecutor, Davis said unequivocally: independence.

As a result, the authors included in the act relevant language that Davis himself wrote. Section 949b(2)c states, "No person may attempt to coerce or, by any unauthorized means, influence the exercise of professional judgment by trial [prosecution] counsel or defense counsel."

It is this rule that Hartmann appears to be flouting; at times, he seems to be celebrating his

prosecutorial participation. During a February 22 NPR interview he boasted, "Colonel Davis was part of the process for two years. In that period he was able to get two cases sworn and charged. In the period of time since he's left, just four months, we've charged ten new cases."

"He's not even concealing the fact.... He's making open comparisons to his role and that of the chief prosecutor," says Mizer.

According to legal experts, therein lies the problem. Hartmann likely feels no compunction to conceal his role of "supervising the prosecution" because his appointing orders, signed in October 2007 by Deputy Defense Secretary Gordon England, authorize him to do so. Despite language in that document requesting that he maintain the ability to "objectively and independently provide cogent legal advice" to the convening authority, the order leaves room for selective interpretation--and to some, the dual orders are actually irreconcilable.

"This arrangement is rife with conflicts of interest," says Eugene Fidell, who teaches military law at Yale Law School and Washington College of Law. According to Fidell, the Military Commissions Act stresses the "exercise of professional judgment," but such neutrality would be eviscerated if England "can insert the legal adviser as a substantive supervisor to the...chief prosecutor."

"It makes for an un-impartial convening authority and an un-independent prosecutor," says Fidell. "I rather doubt that's what Congress had in mind."

To Fidell, the problems are structural, and the revelations in Mizer's motion bear that out. "The convening authority performs a quasi-judicial function," he says. "And the convening authority and legal adviser are apparently reviewing charges before they're filed? That's not how judges work."

The prosecution has until April 11 to respond to the motion, though it has already signaled opposition. If Mizer is unsuccessful at getting a dismissal, he will then seek to have Crawford and Hartmann disqualified from further participation in the *Hamdan* case.

"I think he [Hartmann] has a misconception of what the role of legal adviser is in the military commissions process--someone that's supposed to neutrally evaluate the evidence and decide if someone is supposed to go face trial in front of military commission," says Mizer. "Our motion is that he's become the de facto chief prosecutor and that he has to be recused."

About Ross Tuttle

Ross Tuttle is a documentary filmmaker and freelance journalist based in Los Angeles. [more...](#)

Copyright © 2008 The Nation

Attachment 8



THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH



CLICK HERE TO PRINT

For Immediate Release
Office of the Press Secretary
October 17, 2006

President Bush Signs Military Commissions Act of 2006

The East Room

- [Fact Sheet: The Military Commissions Act of 2006](#)
- [In Focus: National Security](#)
- [Get the Story](#)



VIDEO Multimedia

President's Remarks

[view](#)

9:35 A.M. EDT

THE PRESIDENT: Welcome to the White House on an historic day. It is a rare occasion when a President can sign a bill he knows will save American lives. I have that privilege this morning.

The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives like Khalid Sheikh Mohammed, the man believed to be the mastermind of the September the 11th, 2001 attacks on our country. This program has been one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country. And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come. The Military Commissions Act will also allow us to prosecute captured terrorists for war crimes through a full and fair trial.

Last month, on the fifth anniversary of 9/11, I stood with Americans who lost family members in New York and Washington and Pennsylvania. I listened to their stories of loved ones they still miss. I told them America would never forget their loss. Today I can tell them something else: With the bill I'm about to sign, the men our intelligence officials believe orchestrated the murder of nearly 3,000 innocent people will face justice.

I want to thank the Vice President for joining me today. Mr. Vice President, appreciate you. Secretary Don Rumsfeld, I appreciate your service to our country. I want to thank Attorney General Al Gonzales; General Mike Hayden, Director of the Central Intelligence Agency; General Pete Pace, Chairman of the Joint Chiefs of Staff.

I appreciate very much Senator John Warner, Chairman of the Senate Armed Services Committee, and Congressman Duncan Hunter, Chairman of the House Armed Services Committee, for joining us today. I want to thank both of these men for their leadership. I appreciate Senator Lindsey Graham, from South Carolina, joining us; Congressman Jim Sensenbrenner, Chairman of the House Judiciary Committee; Congressman Steve Buyer, of Indiana; Congressman Chris Cannon, of Utah. Thank you all for coming.

The bill I sign today helps secure this country, and it sends a clear message: This nation is patient and decent and fair, and we will never back down from the threats to our freedom.

One of the terrorists believed to have planned the 9/11 attacks said he hoped the attacks would be the beginning of the end of America. He didn't get his wish. We are as determined today as we were on the morning of September the 12th, 2001. We'll meet our obligation to protect our people, and no matter how long it takes, justice will be done.

When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to



continue? This bill meets that test. It allows for the clarity our intelligence professionals need to continue questioning terrorists and saving lives. This bill provides legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs.

This bill spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law. And this bill complies with both the spirit and the letter of our international obligations. As I've said before, the United States does not torture. It's against our laws and it's against our values.

By allowing the CIA program to go forward, this bill is preserving a tool that has saved American lives. The CIA program helped us gain vital intelligence from Khalid Sheikh Mohammed and Ramzi Binalshibh, two of the men believed to have helped plan and facilitate the 9/11 attacks. The CIA program helped break up a cell of 17 southeastern Asian terrorist operatives who were being groomed for attacks inside the United States. The CIA program helped us uncover key operatives in al Qaeda's biological weapons program, including a cell developing anthrax to be used in terrorist attacks.

The CIA program helped us identify terrorists who were sent to case targets inside the United States, including financial buildings in major cities on the East Coast. And the CIA program helped us stop the planned strike on U.S. Marines in Djibouti, a planned attack on the U.S. consulate in Karachi, and a plot to hijack airplanes and fly them into Heathrow Airport and Canary Wharf in London.

Altogether, information from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaeda member or associate detained by the United States and its allies since this program began. Put simply, this program has been one of the most vital tools in our war against the terrorists. It's been invaluable both to America and our allies. Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By allowing our intelligence professionals to continue this vital program, this bill will save American lives. And I look forward to signing it into law.

The bill I'm about to sign also provides a way to deliver justice to the terrorists we have captured. In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. These commissions were similar to those used for trying enemy combatants in the Revolutionary War and the Civil War and World War II. Yet the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress.

And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs. These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.

When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS Cole, which killed 17 American sailors six years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more. With our actions, we will send a clear message to those who kill Americans: We will find you and we will bring you to justice.

Over the past few months the debate over this bill has been heated, and the questions raised can seem complex. Yet, with the distance of history, the questions will be narrowed and few: Did this generation of Americans take the threat seriously, and did we do what it takes to defeat that threat? Every member of Congress who voted for this bill has helped our nation rise to the task that history has given us. Some voted to support this bill even when the majority of their party voted the other way. I thank the legislators who brought this bill to my desk for their conviction, for their vision, and for their resolve.

There is nothing we can do to bring back the men and women lost on September 11th, 2001. Yet we'll always honor their memory and we will never forget the way they were taken from us. This nation will call evil by its

name. We will answer brutal murder with patient justice. Those who kill the innocent will be held to account.

With this bill, America reaffirms our determination to win the war on terror. The passage of time will not dull our memory or sap our nerve. We will fight this war with confidence and with clear purpose. We will protect our country and our people. We will work with our friends and allies across the world to defend our way of life. We will leave behind a freer, safer and more peaceful world for those who follow us.

And now, in memory of the victims of September the 11th, it is my honor to sign the Military Commissions Act of 2006 into law. (Applause.)

(The bill is signed.)

END 9:47 A.M. EDT

Return to this article at:

<http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>

 [CLICK HERE TO PRINT](#)

Attachment 9

William H. Neukom
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

February 27, 2008

The President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

I write to restate the strong concerns of the American Bar Association (ABA) that the military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice.

There can be no argument that detainees who plotted terrorist attacks against our country and killed thousands of innocent Americans should be brought to justice and be held fully accountable for their horrific crimes. At the same time, no matter how outrageous the conduct, we must insure that these detainees receive fair trials that meet the highest standards of due process and justice for which this nation long has been respected throughout the world. We believe that the established principles of due process must be followed, and the ABA is prepared to assist.

Since 2002, the ABA has urged that military tribunals be governed by the Uniform Code of Military Justice, provide the rights afforded in courts-martial proceedings, including the right to habeas corpus review, and comply with our international treaty obligations. These obligations include representation by counsel of choice, respect for the attorney-client privilege, adequate time and facilities to prepare the defense, the ability to examine all evidence and confront witnesses, and an independent and impartial tribunal. Longstanding ABA policy calls for zealous and effective assistance of counsel in any case, including military commission trials.

Under the current system, we believe that detainees will not receive due process or fair trials. Detainees cannot challenge their detention by habeas corpus, and the standards for

admissibility of evidence could allow for convictions based on rank hearsay. Similarly, statements secured through coercion could be introduced against a defendant. Indeed, the Legal Advisor to the Convening Authority recently declined to reject the use of evidence acquired through waterboarding. Further, detainees' access to their counsel is limited, and the access of a detainee's counsel to fundamental information pertaining to the defense of that detainee is restricted.

Our concerns about lack of due process and access to counsel have been heightened by the recent announcement that prosecutors are seeking the death penalty for six detainees charged with offenses related to the September 11, 2001 terrorist attacks. While the fundamental protections discussed above are important in any prosecution, the extreme nature of the sanction and the extraordinary complexity and demands of capital cases require a significantly greater degree of skill and experience on the part of defense counsel than in non-capital cases.

In recognition of the unique demands upon counsel in death penalty cases, the ABA promulgated Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the "Guidelines") in 1989. These Guidelines have become the preeminent nationally recognized standards on this subject, have been adopted by numerous jurisdictions, and are widely relied upon by the bench and bar in setting forth the minimal requirements for defense counsel in capital cases.

The Guidelines call for defense teams -- consisting of at least two qualified attorneys, one investigator, and one mitigation specialist -- with sufficient experience and training to provide high quality legal representation to those who face execution if convicted. These principles are so important that, since 1997, the ABA has urged a moratorium on executions in death penalty jurisdictions until procedures consistent with the Guidelines can be implemented to ensure that capital cases are administered fairly, accurately and impartially. The Guidelines were revised in 2003 to apply specifically to military commission proceedings.

Before the commencement of any death penalty prosecution, we urge that adequate resources be provided to the defense in compliance with the Guidelines. We are concerned that there still exists a significant imbalance between the resources allocated to the prosecution, including assistance from experienced Department of Justice prosecutors, and those provided to the Office of the Chief Defense Counsel. Under such circumstances, we do not believe military commission trials can or will provide the level of fairness that is consistent with our values and essential to our credibility in the rest of the world.

To this end, the ABA is prepared to help ensure adherence to the Guidelines in these capital cases. We also stand ready to consult on how we might engage the most able legal minds to ensure that these cases comport with the rule of law, so precious to our democracy. By these means, we can further assure the American people and the free world that those who seek to abrogate the rule of law are held accountable for their crimes.

Sincerely,



William H. Neukom

cc: The Honorable Susan J. Crawford
Convening Authority, Office of Military Commissions

The Honorable Fred F. Fielding
Counsel to the President

The Honorable Robert M. Gates
Secretary of Defense

The Honorable William J. Haynes II
General Counsel, U.S. Department of Defense

The Honorable Michael B. Mukasey
Attorney General of the United States

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Reply to Government Response to D-004 Motion to Dismiss for Unlawful Influence June 13, 2008
--	--

1. Timeliness: This reply is timely. The military judge established a deadline to file this reply of 13 June 2008.

2. Reply to Prosecution Facts:

5.A. First sentence. These facts have been alleged, but not proven. The second and third sentences are irrelevant to this motion.

B. Irrelevant.

C. Irrelevant.

D. Irrelevant.

E. Irrelevant.

F. The defense has no information upon which to evaluate these claims. No source or citation has been offered.

G. This paragraph appears to respond to some specific factual assertions made by the defense in filing D-004 and indicates that the factual assertions will be refuted by testimony. As has become the government's routine practice in response to motions filed by the defense, the government refuses to follow the Military Commission Trial Judiciary Rules of Court (Change 2, 2 Nov 2007), Rule 3, Motions Practice Rule 6(b)(2) which directs the government to follow the format in Form 3-2 for responses. This rule requires the government to list:

4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that

the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.

As usual, the government did not respond paragraph by paragraph to the defense motion, admitting or denying the factual assertions made by the defense. Rather, the government provided additional irrelevant facts using a different numbering system. The Chief Judge of the Military Commissions Trial Judiciary, Col Kohlmann, issued a letter dated 2 November 2007, which is attached to the court rules and includes the following language:

3. Action:

- a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.
- b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.

The defense respectfully requests that the government be ordered to comply with this rule and be appropriately sanctioned for its routine and flagrant disregard of commission rules.

H. Brig Gen Hartmann's management style is relevant to the extent that his actions were perceived as unlawful influence by those whom he was managing.

I. The defense believes that there was much more to the timing and the decision to swear charges against Mr. Jawad than the "merits of the case" and will attempt to establish this through testimony at the hearing. The defense agrees that the clearance received by the Office of the Director of National Intelligence on 26 September 2007 played a role in the decision to swear charges by the interim Chief Prosecutor. However, the defense notes

that the former Chief Prosecutor did not approve the swearing of charges, despite the ODNI approval.

3. Reply to Specific Legal Arguments advanced by the Government in Paragraph 6:

Law and Argument: The prosecution claims that 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.” The defense agrees that the Chief Prosecutor doesn’t typically personally swear charges, however, the Chief Prosecutor is hardly limited in his “ability to affect the process.” The position of Chief Prosecutor was created by Congress in the Military Commissions Act. 10 U.S.C. § 948k(a) and (d)(1). R.M.C. 503(c) states “there shall be a Chief Prosecutor appointed by the Secretary of Defense or his or her designee.” There are a number of references to the duties and responsibilities of the Chief Prosecutor in the Manual for Military Commissions. For example, R.M.C. 501 states that “Military trial and defense counsel shall be detailed to military commissions by the Chief Prosecutor and Chief Defense Counsel, respectively.” The Chief Prosecutor may also detail himself to serve as counsel. R.M.C. 501(c). This power to detail counsel ensures that the Chief Prosecutor has total control over the prosecutorial process.

The Regulation for Trial by Military Commission (RTMC) also makes clear that the Chief Prosecutor controls the prosecution process. For example, Rule 3.1 states:

3.1 Although charges under the M.C.A. may be sworn by anyone subject to the Code (U.C.M.J.), charges will normally be sworn by an appropriate official in the office of the Chief Prosecutor of the Office of Military Commissions (OMCP). If charges are sworn by someone other than an OMCP official, **the charges should be forwarded as soon as possible to the Chief Prosecutor for further processing and action.**

As further evidence that all charges must go through the Chief Prosecutor. RTMC 3.3 states in pertinent part:

Trial counsel will forward charges with the accompanying materials or other evidence supporting the charges **through the Chief Prosecutor** to the legal advisor to the convening authority then to the convening authority. . .

RTMC 8-1. states, “**The Chief Prosecutor shall supervise the overall prosecution efforts under the M.C.A., the M.M.C. and this Regulation.** The Chief Prosecutor shall further ensure proper management of personnel and resources.” Finally, RTMC 8.2 and 8.6 indicate that the Chief Prosecutor supervises all trial counsel. Given all the authority granted to the Chief Prosecutor by statute and regulation, the defense believes it would come as a great shock to the Chief Prosecutor that he is limited in his ability to affect the process.

The government argues that the defense can not show actual prejudice, or that, at best, the defense can only show that the case was charged earlier than it otherwise would have been. The defense disputes that the swearing of charges in this case was inevitable. The defense will prove at the hearing that, due to the pressure to rush this case to trial caused by the Legal Advisor, the government did not have time to adequately develop the evidence in the case. Importantly, none of the prosecutors had obtained or reviewed the detention records of Mr. Jawad. Therefore, no one at OMC-P was aware that Mr. Jawad had attempted to commit suicide or that he had been subjected the extremely abusive conduct known as the frequent flyer program, referenced in the D-008 Motion to Dismiss (torture of detainee), which the government has previously conceded occurred.¹ The defense intends to introduce testimony that neither the Chief Prosecutor Col Davis nor his interim replacement LTC Britt would have forwarded charges against a detainee that they believed had been tortured.

The rush to swear charges against Jawad also precluded the government from applying any meaningful legal analysis to the viability of the charges. The government asserts that “the pretrial advice correctly addresses the issues of personal and subject matter jurisdiction.” However, neither the prosecution nor the Legal Advisor raised the issue of

¹ The government conceded this fact in a now withdrawn response to defense filing D-008. They are apparently now planning to dispute the evidence in the detention logs. However, the Chief Prosecutor did make an admission to the Washington Post: “Col. Lawrence Morris, the military commissions' chief prosecutor, said yesterday that the government acknowledges that Jawad was subject to some form of the frequent-flier treatment.” Josh White, *Detainee's Attorney Seeks Dismissal Over Abuse*, Washington Post, Sunday, June 8, 2008; Page A04.

whether Mr. Jawad had actually violated the law of war, or considered what the element “in violation of the laws of war” meant in any meaningful way. The Chief Prosecutor’s hastily cobbled together “Recommendation of the Chief Prosecutor” (Attachment 1 - undated but presumably forwarded the same day he was appointed interim Chief) contains no legal analysis at all, only conclusions. It purports to set forth the elements of the offenses, but in fact it simply cuts and pastes the entire specifications from the Charge Sheet and does not provide the elements from the MMC or the MCA. The pretrial advice is no better. The pretrial advice states “The Prosecutor asserts that the offense are violations of the law of war because Jawad was not a lawful enemy combatant (*i.e. in personam* jurisdiction exists) and because the attack took place in the context of and in connection with armed conflict.” This sentence reflects that the government has conflated the personal jurisdiction with subject matter jurisdiction. The required element that the actions “took place in the context of and in connection with armed conflict” is separate and distinct from the require element “in violation of the laws of war.” As the defense has detailed at great length in Filing D-007, this is an obvious and important jurisdictional issue with a substantial body of law supporting the defense’s proposition that subject matter jurisdiction is lacking. The Legal Advisor has now apparently realized this distinction. In the Legal Advisor’s Pretrial Advice of the 6 alleged 9/11 co-conspirators (Attachment 2), he includes separate discussions of personal jurisdiction, based on unlawful enemy combatant status, and subject matter jurisdiction. The subject matter jurisdiction includes the following:

The offenses are violations of the law of war as well, because the accused were not lawful enemy combatants, **the attacks violated the principles of the law of war**, and the conduct occurred in the context of and in connection with armed conflict. [Emphasis added]

The highlighted language reflects the evolution of the Legal Advisor’s comprehension of subject matter jurisdiction. The Legal Advisor has now grasped that a violation of the laws of war requires that an attack violate the principles of the law of war, such as by the means or method employed, or the nature of the target. The Legal Advisor also now

seems to understand that personal jurisdiction and subject matter jurisdiction are not one and the same thing. Apparently, these simple concepts still elude the prosecution.

Even in the unlikely event that the commission disagrees with the defense view and declines to dismiss the charges for lack of subject matter jurisdiction, no reasonable jurist would dispute that there is significant merit to the defense position. The best explanation for this glaring oversight on the part of the government is that they were too rushed to conduct a proper proof analysis. As for the Legal Advisor, the most senior and most experienced attorney involved in the process, his failure to mention such a blindingly obvious issue, coupled with other matters discussed in this motion, suggests a lack of objectivity in evaluating the charges against Jawad.

There is another important aspect in the Legal Advisor's Pretrial Advice relating to the 9/11 six. The Legal Advisor, in paragraph e.4, rejected the recommendation of the Chief Prosecutor to refer charges against Mohamed al Kahtani (the alleged 20th hijacker) as capital. He stated "Considering the totality of the circumstances relating to Mohamed al Kahtani, I recommend that the charges against him not be referred as capital." The totality of the circumstances referred to is the well-publicized torture of al Kahtani, which included sleep deprivation. This recommendation proves that the Legal Advisor does take into account abuse of detainees in formulating his recommendations. Unfortunately, in the rush to swear and refer charges against Mr. Jawad, the Legal Advisor did not become aware that Mr. Jawad had been subjected to the frequent flyer sleep deprivation program, so he had no opportunity to consider this critical factor.

CONCLUSION

The government claims that Mohammad Jawad has not been prejudiced by unlawful influence. The evidence presented by the defense will establish that charges that never should have been brought, and never would have been brought if the government had conducted either due diligence or proper legal analysis, were sworn and referred to a war

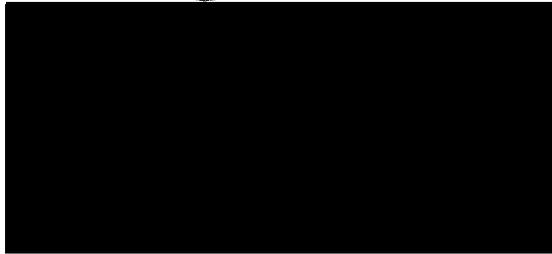
crimes tribunal for an unprecedented war crimes trial against a juvenile. If that is not prejudice, then I don't know what is.

4. Request for public release: The defense requests permission to publicly release all court pleadings as soon as possible.

Respectfully Submitted,


By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel

Attachment:



1. Recommendation of the Chief Prosecutor
2. Legal Advisor's Pretrial Advice 9/11 Co-Conspirators dated Apr 16 2008

Attachment 1

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD
a/k/a Amir Khan, Mir Jan, Sakhen Badsha

)
)
)
) **RECOMMENDATION**
) **OF THE**
) **CHIEF PROSECUTOR**
)

INTRODUCTION

The accused, Mohammed Jawad, is a person subject to trial by military commission for violations of the law of war and other offenses as defined by the Military Commissions Act of 2006, 10 U.S.C. §948a *et seq.*, as an alien unlawful enemy combatant.

JURISDICTION

Jurisdiction for this Military Commission is based on 10 U.S.C. §948d, the Military Commission Act of 2006, hereinafter "MCA," and its implementation by the Manual for Military Commissions (MMC), Chapter II. I have supervised the preparation of the attached charges against Mohammed Jawad and recommend that they be approved and referred for trial by military commission.

The following supports my request for approval and referral of the charges against Jawad:

a. Jurisdiction. At all times material to the charges: It is my opinion that a military commission has both *in personam* and subject-matter jurisdiction over Jawad

b. Elements of proof. The charges recommended for trial by military commission require proof beyond a reasonable doubt of these elements:

Charge I, Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Michael Lyons, U.S. Army, with the intent to kill said Sergeant First Class Lyons.

Charge I, Specification 2:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Christopher Martin, U.S. Army, with the intent to kill said Sergeant First Class Martin.

Charge I, Specification 3:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Assadullah Khan Omerk, a citizen of Afghanistan, then accompanying and employed by U.S. Forces as an interpreter, with the intent to kill said Assadullah Khan Omerk.

Charge II, Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Michael Lyons, U.S. Army.

Charge II, Specification 2:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Christopher Martin, U.S. Army.

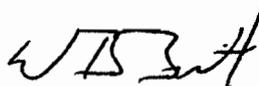
Charge II, Specification 3:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition forces, to wit, Assadullah Khan Omerk, a citizen of Afghanistan, then accompanying and employed by US forces as an interpreter.

c. In accordance with the Regulation for Trial by Military Commissions, paragraph 4-2(4) and Rule for Military Commissions 406(b)(4), consultation with the Office of the Director of National Intelligence has determined that the trial of these charges will not be harmful to national security.

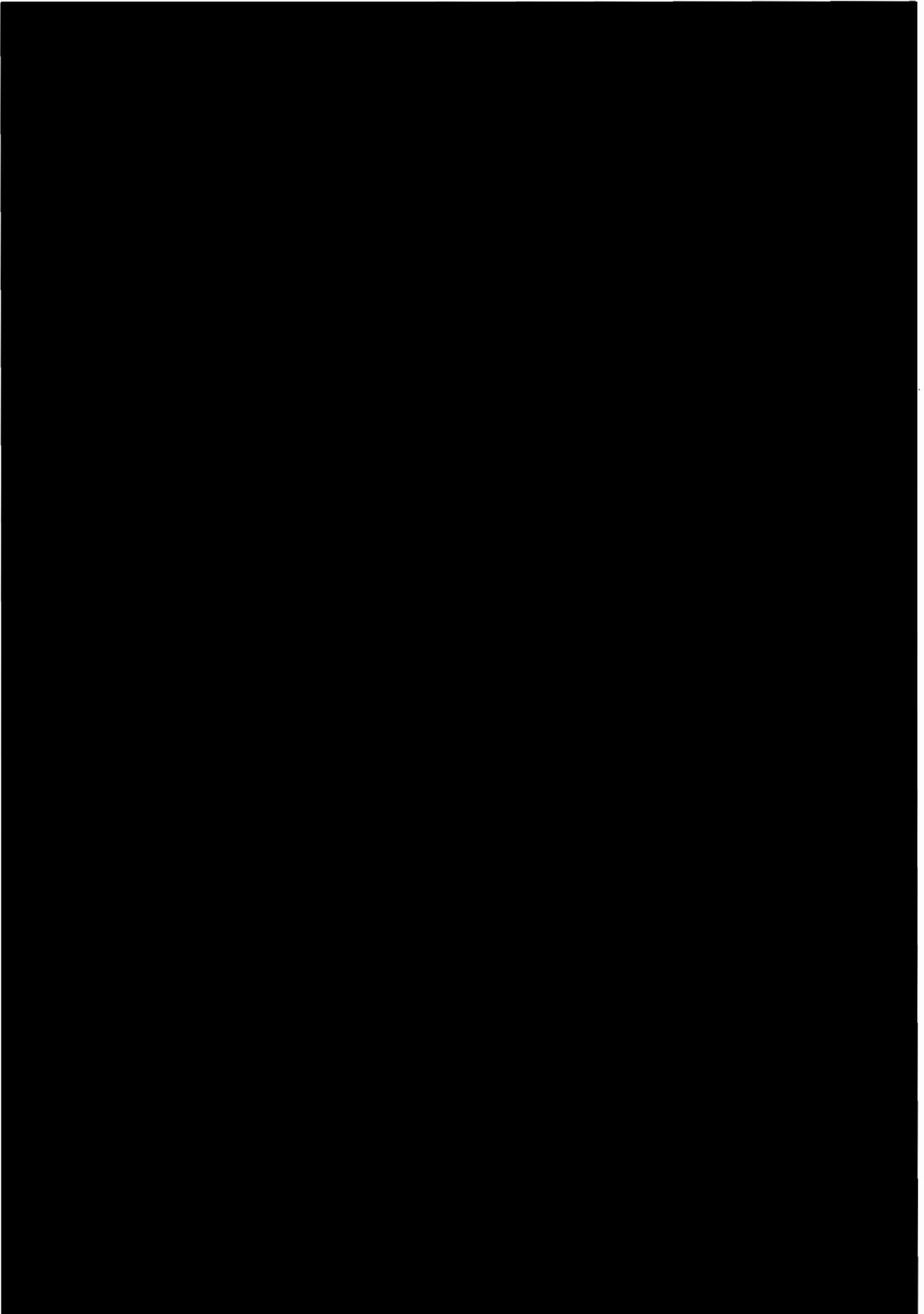
d. Summary of Evidence. A trial brief is provided at TAB B that summarizes the major evidence that satisfies proof of the above charges and specifications; additional information attached at TAB C describes the evidence that the Prosecution intends to use to prove the charges beyond a reasonable doubt.

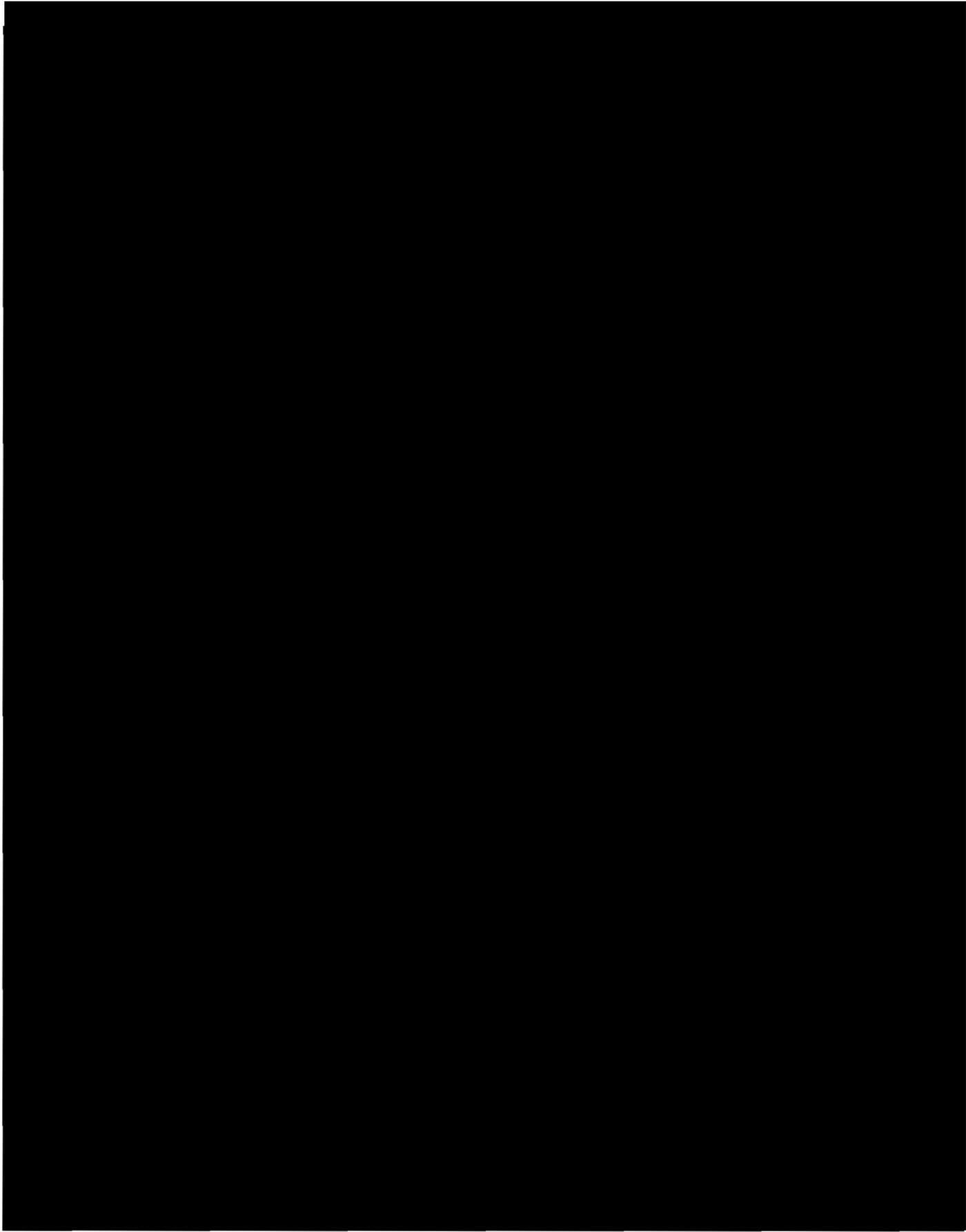
e. Recommendation: That you approve the charges at TAB A and refer them to trial by military commission.

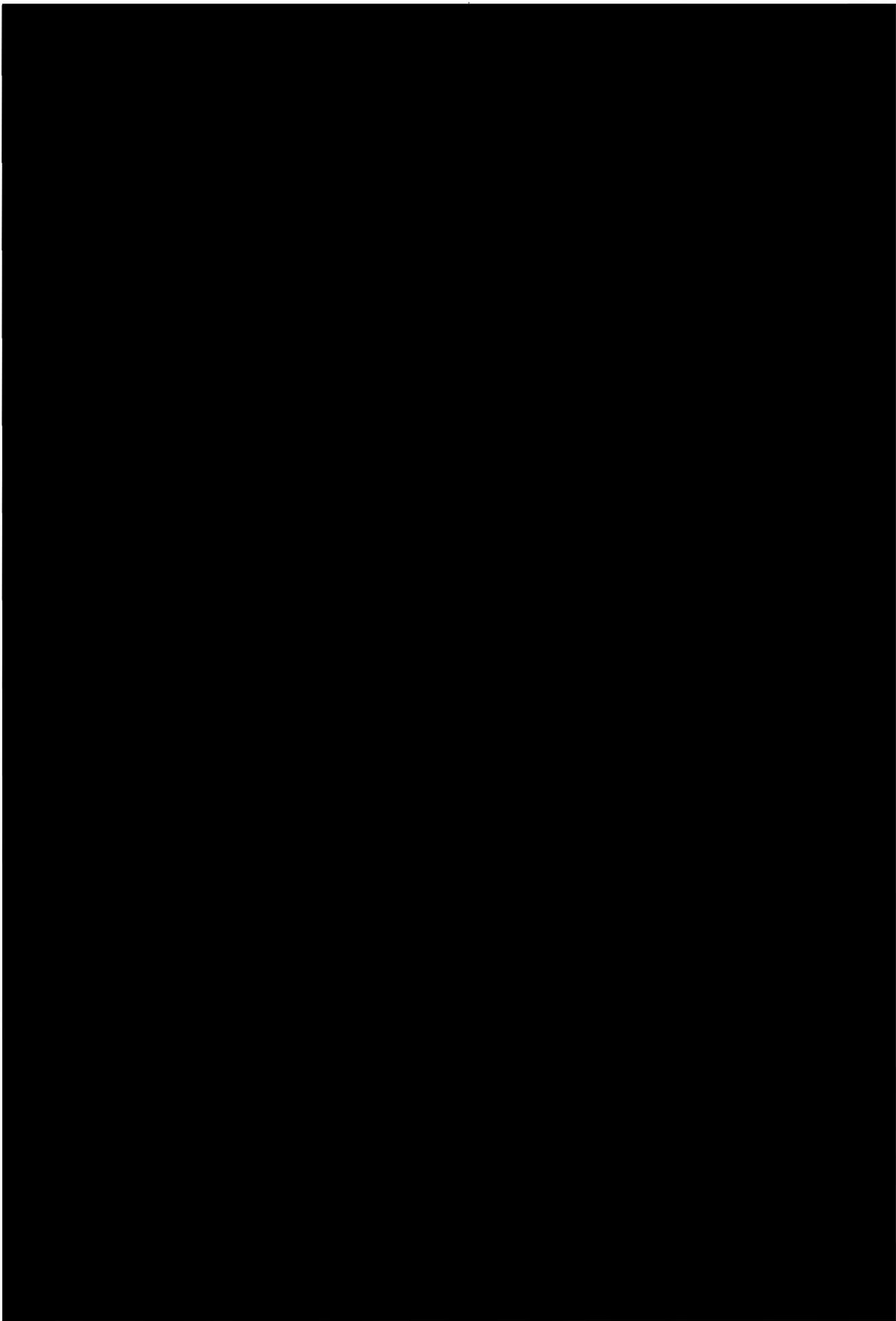


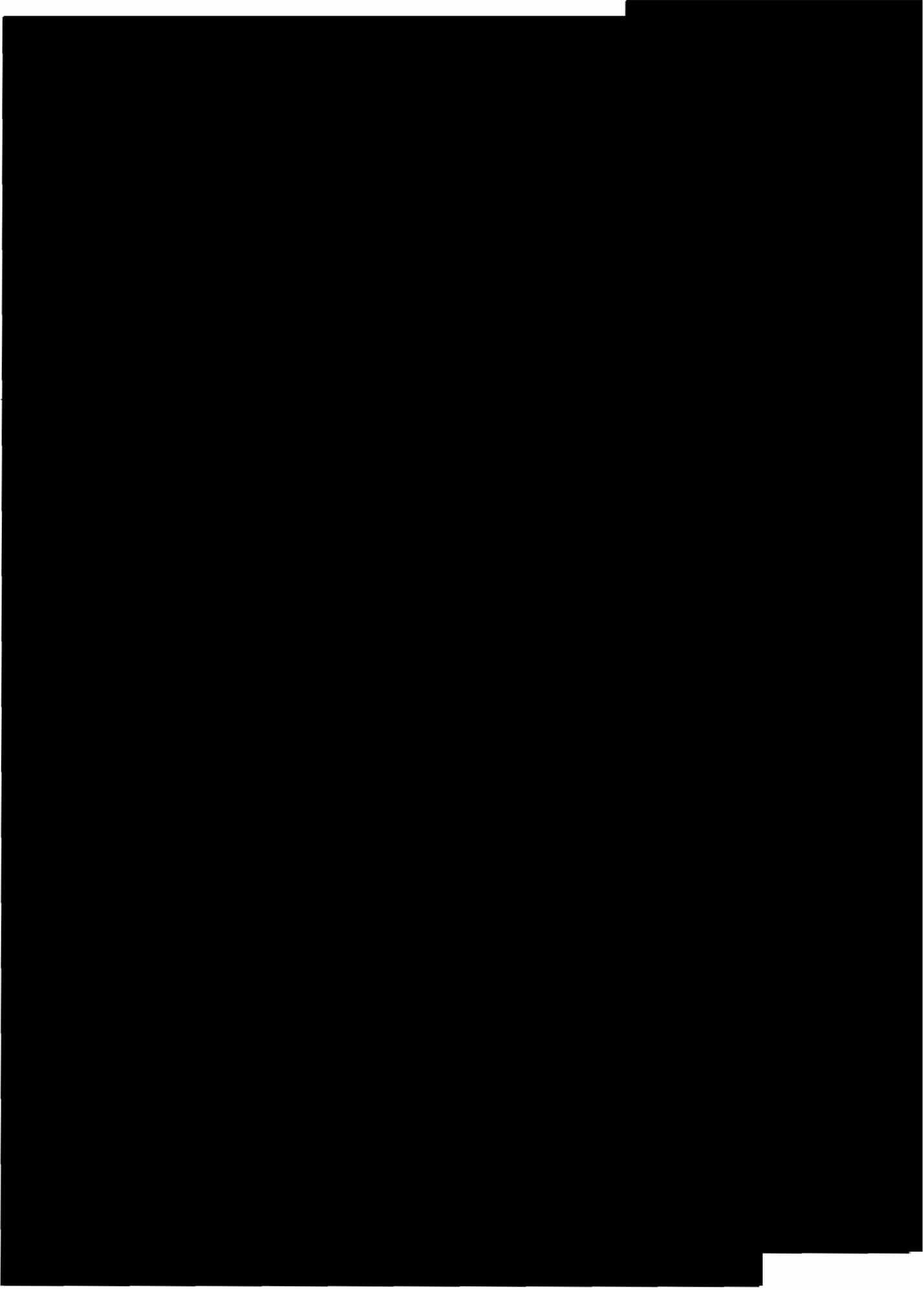
WILLIAM B. BRITT
LTC, JA, USAR
Acting Chief Prosecutor
Office of Military Commissions

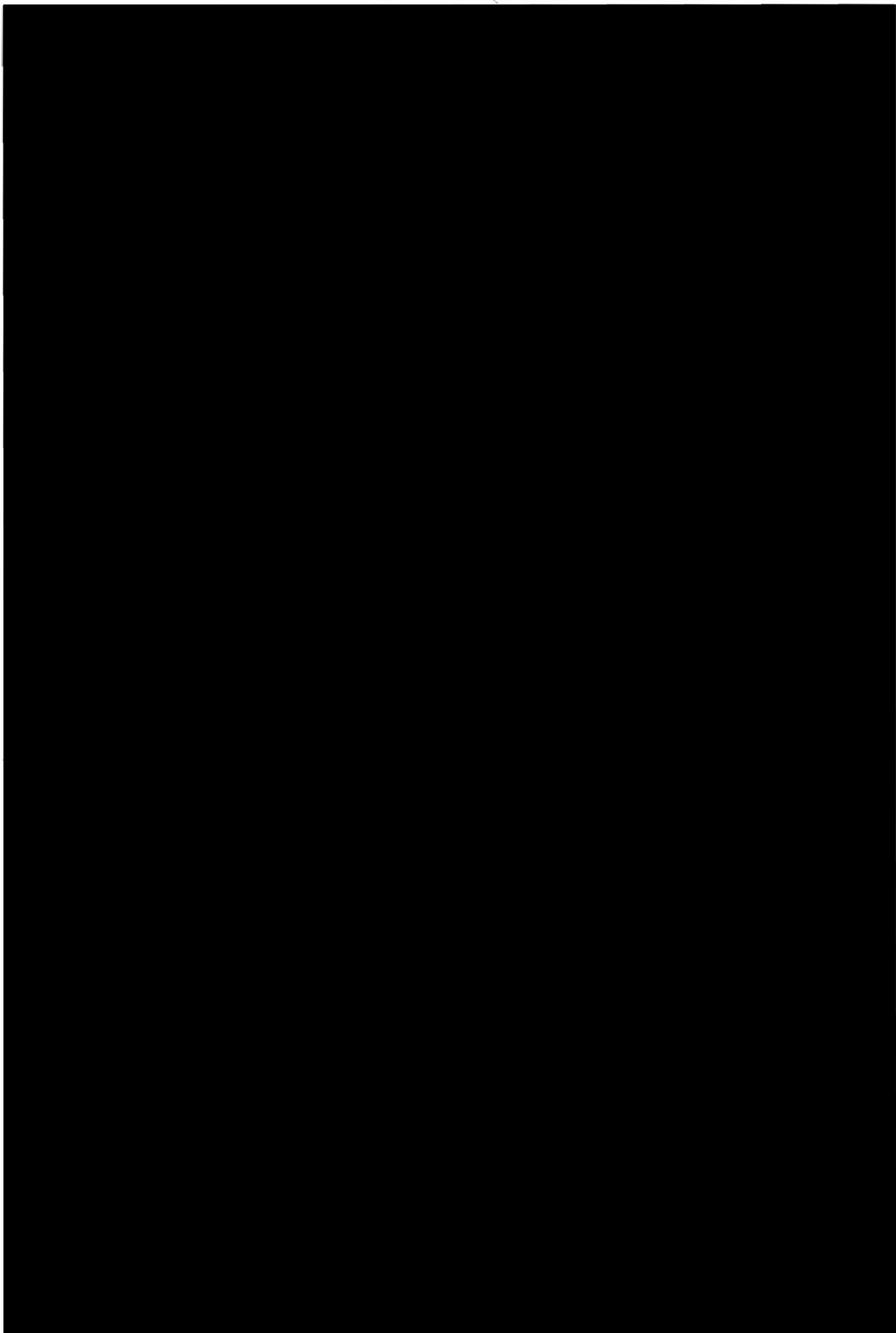
Attachment 2

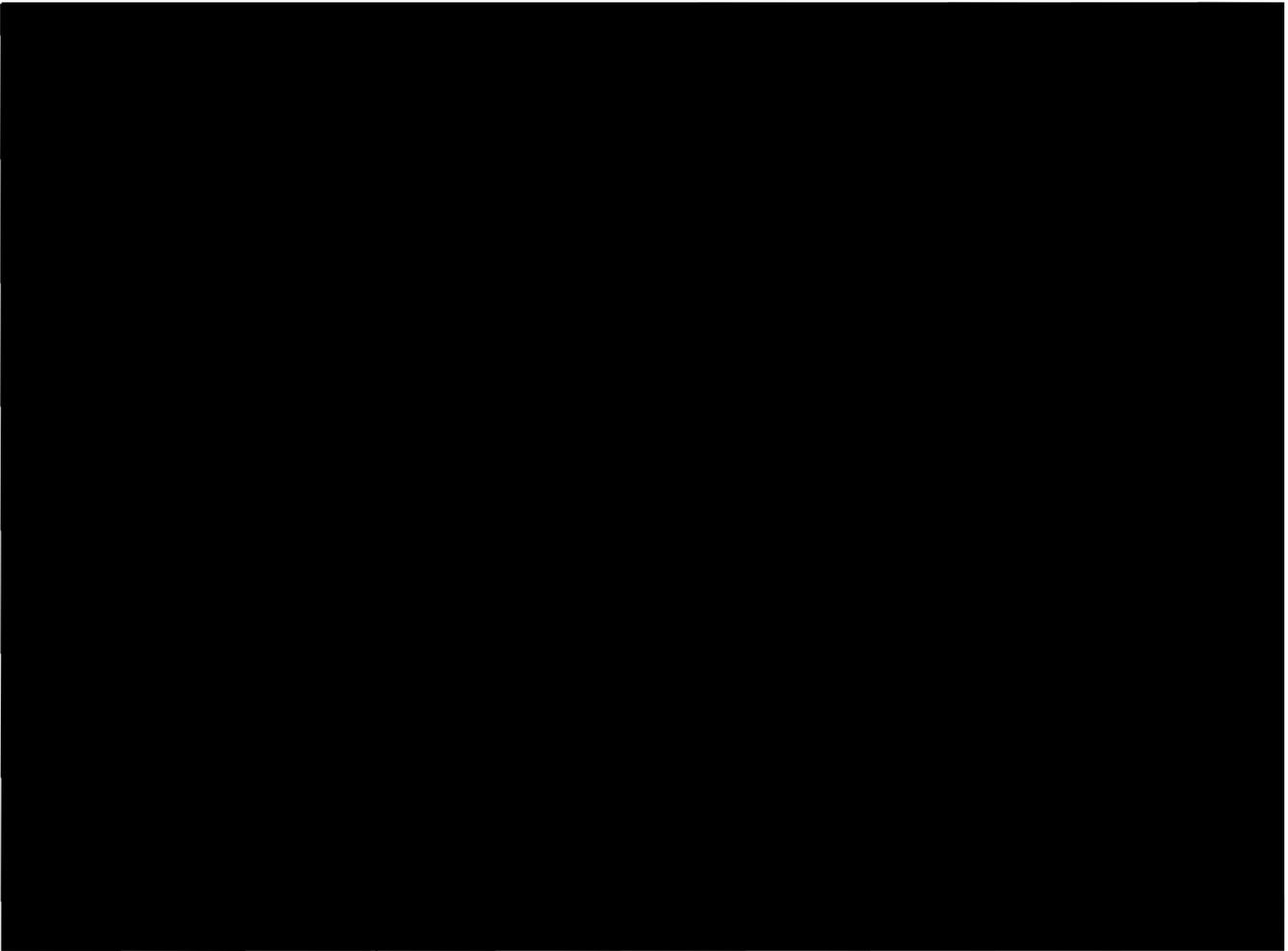












UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-004
RULING ON MOTION TO
DISMISS-UNLAWFUL INFLUENCE**

1. The Accused moves this Commission to dismiss the remaining Charge and specifications alleging the Legal Advisor to the Convening Authority unlawfully influenced the prosecutor's exercise of professional judgment in the execution of his duties in this case. The Government opposes the motion arguing, in part, that the legal advisor's conduct in relation to the Chief Prosecutor and his staff did not amount to unlawful influence but was instead consistent with his dual, and complimentary, roles as supervisor of the Office of Military Commissions-Prosecution and Legal Advisor to the Convening Authority, Department of Defense, Office of Military Commissions. While the Commission ultimately concludes the accused is entitled to relief, dismissal of the charges is not the appropriate remedy.

ESSENTIAL FACTS

2. COL Morris Davis assumed duties as Chief Prosecutor for the Office of Military Commissions around September 2005. BG Thomas Hartmann was assigned as Legal Advisor to the Convening Authority on or about 2 July 2007. At the time of BG Hartmann's assignment, there was no written job description detailing the relationship between the Legal Advisor to the Convening Authority

and the Chief Prosecutor, Office of Military Commissions (OMC-P). BG Hartmann viewed the legal advisor as serving two separate and distinct functions: (1) supervising the chief prosecutor and prosecution staff, to include setting goals and milestones and developing an advocacy training program for the prosecution office; and (2) providing counsel to the Convening Authority, including informed advice on referral decisions and post trial recommendations regarding action on completed cases. BG Hartmann understood case selection and whether and when to swear charges in given cases was within the Chief Prosecutor's discretion.

3. Soon after assuming his duties as Legal Advisor, BG Hartmann became frustrated with what he perceived was a lack of urgency exhibited by the Chief Prosecutor and his staff and disappointed with the pace at which cases were being processed. BG Hartmann let the Chief Prosecutor and members of the prosecution staff know about his dissatisfaction and personally tried to light a fire under what he perceived was a moribund, stagnant and ineffective prosecution office that had not tried a contested case since its inception. His efforts in doing so have been characterized by some in the prosecution office and the Commissions Support Group as "nanomanagment" and "cruel and unusual punishment."

4. On at least one occasion, BG Hartmann suggested to OMC-P that they should have three cases ready to go and recommended they select cases that

would “capture the imagination of the American people.” To BG Hartmann, this meant case materiality. The Chief Prosecutor understood this direction to refer to cases where the accused had “blood on his hands.” BG Hartmann did not mention specific cases or the name of a particular accused.

5. During a prosecution office vetting session for this case on 2 October 2007, all attendees, to include COL Davis and LTC William Britt, agreed that charges in *United States v. Mohammed Jawad* were ready to be sworn. BG Hartmann was not present and unaware of this decision. On 3 October 2007, the Deputy Secretary of Defense issued an appointing letter establishing a “chain of command” for the Office of Military Commissions-Prosecution. The Chief Prosecutor would now work for the Legal Advisor to the Convening Authority and the Legal Advisor would now report to the DOD General Counsel. COL Davis learned of this rating scheme on 4 October 2007 and immediately offered his resignation, which was accepted on Friday 5 October 2007. LTC Britt assumed duties as acting Chief Prosecutor. Monday 8 October 2007 was a federal holiday. On Tuesday 9 October 2007, LTC Britt approved the swearing and transmittal of charges against the Accused. LTC Britt was not rushed; in fact he thought charges were long overdue. While *United States v. Mohammed Jawad* was not the highest priority for OMC-P, LTC Britt thought the case was ready to go to trial and, unlike others, had been cleared by the Office of Director of National Intelligence.

6. While BG Hartmann created and updated a timeline on the processing of various commission cases and required briefings by the prosecutors on their status, to include *United States v. Jawad*, he did not order the swearing of charges in this case. The decision to approve the swearing of charges was an independent decision by LTC Britt as acting Chief Prosecutor and he was not coerced or influenced by BG Hartmann to do so. LTC Britt continued serving as acting chief until on or about 7 November 2007 when COL Lawrence Morris arrived in the office.

7. No political appointee of the U.S. Government discussed this case with BG Hartmann prior to 9 October 2007.

8. On or about 21 January 2008, the Accused's original defense counsel submitted a memorandum to the Legal Advisor detailing various extenuation and mitigation matters and requested it be provided to the Convening Authority contemporaneous with her referral decision. The Legal Advisor declined to append the memo to his 28 January 2008 pretrial advice and not did summarize the points requested. The pretrial advice ultimately recommended a noncapital referral, though a capital sentence is not authorized for the offenses charged in this case. The Convening Authority approved the Legal Advisor's recommendations on 30 January 2008 and referred the charges to trial before a military commission.

9. From at least February 2008 through early April 2008, BG Hartmann scheduled and moderated several secure video teleconferences (SVTC) for senior Joint Task Force- Guantanamo Bay personnel and himself regarding the status of and support to commission cases. To at least one attendee, BG Hartmann appeared to be running the prosecution and ordered all ICRC, medical and intelligence records be sent to him. While BG Hartmann discussed the prosecution plan for particular cases, to include *United States v. Jawad*, he did not tell the other SVTC attendees that he had ordered charges be sworn against this Accused.

CONCLUSIONS OF LAW

Pretrial Influence.

10. The Accused asserts that BG Hartmann violated 10 USC §949b(a)(2)(C) and RMC 104(a)(2) by attempting to coerce or, by unauthorized means, influence the prosecutor's exercise of professional judgment and submits the appropriate remedy is dismissal of the charges. The Commission disagrees.

11. Similar in nature to that given by a Staff Judge Advocate, the Legal Advisor to the Convening Authority provides legal advice and recommendations at two distinct stages, pretrial and post trial. See RMC 103(a)(15). The responsibility of a Legal Advisor at the pretrial stage is clearly distinct from his post trial review functions. This Commission is under no illusion that BG

Hartmann in preparing the RMC 406 pretrial advice as Legal Advisor to the Convening Authority was completely disinterested in the successful prosecution of *United States v. Mohammed Jawad*. See *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993). In fact, strict impartiality of a judicial nature at this stage would be entirely inconsistent with the regulatory requirement that the Legal Advisor provide a personal and independent recommendation to the Convening Authority on the disposition of the case. See generally RMC 406. In order to make an informed appraisal of the charges, there is nothing inherently wrong about a Legal Advisor asking questions about a case to determine its relative strengths and weaknesses, especially in complex, high profile trials. *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979). Further, it is not unreasonable for the Legal Advisor to want to increase the chances of a successful prosecution by establishing an advocacy training program for the prosecutors. In other words, a superior can demonstrate an interest in the successful prosecution of a case without exerting improper influence over it.

12. The evidence establishes that BG Hartmann's pretrial conduct in this case does not constitute unlawful influence over the exercise of the trial counsel's professional judgment. Rather, the Commission finds it is consistent with his supervisory responsibilities as the Legal Advisor to the Convening Authority and the Chief Prosecutor's direct supervisor. While the evidence unequivocally demonstrates BG Hartmann's desire to control the entire military commissions' operation, and some have questioned the methods and leadership style used to

do so, there is no evidence that BG Hartmann induced or swayed the otherwise independent and uncoerced decisions of LTC Britt to approve the swearing of charges against this accused or Judge Crawford to refer them to trial before a military commission. The evidence establishes, and the Commission finds, nothing BG Hartmann has done can reasonably be construed as improper influence of the trial counsel's professional judgment in swearing charges against this Accused. The requested remedy of dismissal of charges is DENIED.

Post Trial Responsibilities.

13. While that part of the Accused's motion to dismiss the charges is denied, the Commission's analysis does not end. The Commission acknowledges that, as is the case here, a Legal Advisor's pretrial duties may on occasion necessitate close association with the prosecution team. This affiliation does not necessarily mean the Legal Advisor is disqualified from fulfilling his pretrial duties. However, a Legal Advisor's post trial responsibilities necessitate he act in a quasi-judicial role; one where he must remain neutral and unbiased. The Commission finds the current Legal Advisor's editorial writings and interviews defending the military commissions' system combined with his active and vocal support of and desire to manage the military commissions process and public statements appearing to directly align himself with the prosecution team have compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post trial recommendation¹. While the Commission finds the Legal Advisor's

¹ In this regard, the Commission notes that the Legal Advisor testified in a previous session as to a contested matter and there exists a material factual dispute regarding his actions relating to the referral of

pretrial conduct does not merit dismissal of the charges, it has impacted his ability to impartially execute his post trial responsibilities and warrants disqualification from preparing any post trial review of the case. See Discussion to RMC 1106. Therefore, the interests of justice suggest, and the Commission orders, that the Convening Authority seek a post trial recommendation from a different Legal Advisor, should one be necessary in this case. See *United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994).

Pretrial Advice.

14. As to the pretrial advice, it should generally include a brief summary of the evidence and discussion of significant aggravating, extenuating and mitigating circumstances. See Discussion to RMC 406. The original defense counsel in this case submitted a memorandum to the Legal Advisor detailing a number of extenuating and mitigating circumstances and requested it be forwarded to the Convening Authority. It was not provided. No explanation was given and the legal advisor did not summarize the information. While failure to include such discretionary matters in a pretrial advice is not jurisdictional error and does not invalidate the Convening Authority's original referral decision,² the issues raised by the original defense counsel warranted consideration. In addition, the Commission notes the Legal Advisor recommended the charges be referred noncapital although death is not an authorized punishment for attempted murder.

charges in this case, which will likely be one of many errors alleged by the defense and addressed in a post trial recommendation. See RMC 1106 (Discussion).

² *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994)

15. To correct this error and afford the accused full opportunity to present relevant extenuating and mitigating factors, the Commission orders that any defense matters will be forwarded to the Convening Authority for consideration not later than 15 September 2008. The Legal Advisor will not supplement his original pretrial advice. The Convening Authority should ratify her original decision as to disposition of the charges or take other action as deemed appropriate not later than 25 September 2008.

So ordered this 14th day of August 2008:



Stephen R. Henley
Colonel, U.S. Army
Military Judge