

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Dismiss
(Unlawful Influence – Removal of
Military Judge)**

31 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905.
2. **Relief requested:** The defense respectfully requests the Military Judge to dismiss all charges and specifications based on unlawful influence.
3. **Burdens of proof and persuasion:** As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A). As to the merits, “the defense has the initial burden of raising the issue of unlawful command influence....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. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (emphasis added).
4. **Facts:**
 - a. The accused, Omar A. Khadr (Mr. Khadr), was shot (in the back) and initially detained by U.S. authorities as a 15 year-old boy in Afghanistan on 27 July 2002. (CITF Report of Investigative Activity (OC-1) of 17 March 2004 (Attachment B to Def. Reply on D-022).) Mr. Khadr was transferred to JTF-GTMO on or about 29 October 2002, where he has been detained since.
 - b. Mr. Khadr was one of ten detainees charged with offenses to be tried by military commission under the authority of the President’s Military Order of 13 November 2001 and Military Commission Order (MCO) No. 1. *U.S. charges five war-on-terror detainees*, Agence France Presse, 8 Nov 05 (Attachment A); (undated charging document issued in connection with prior military commission (Attachment B)). Military commissions convened under the authority of MCO No. 1 were ultimately declared “illegal” by the U.S. Supreme Court in June 2006. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
 - c. In response to *Hamdan*, Congress passed and the President signed into law the Military Commissions Act of 2006, P.L. 109-366 (MCA). In January 2007, the Department of Defense (DoD) issued the Manual for Military Commissions (MMC). Following the issuance of the MMC, but before the issuance of the Regulation for Trial by Military Commission (Regulation) in April 2007, Mr. Khadr became one of three detainees charged with offenses to be

tried under the authority of the MCA. (*See* 2 February 2007 Charge Sheet (Attachment A to Def. Mot. to Dismiss, D-008).)

d. Mr. Khadr (along with detainees Hicks and Hamdan) was charged over the objection of then-Chief Prosecutor, COL Morris Davis, USAF, who was directed to move forward with charges against the three detainees notwithstanding the fact that the Regulation had not been issued and the military commission system was not yet in place. *United States v. Hamdan*, Military Commission Record of Trial at 731-37, 744, 782 (Tr. of testimony of COL Davis) (Attachment A to Def. Mot. to Dismiss filed concurrently) [hereinafter *Hamdan R.*].

e. Mr. Khadr was scheduled for arraignment on 4 June 2007. Prior to that session, then-military judge, COL Peter E. Brownback III, JAGC, USA, disregarded a prosecution request for an R.M.C. 802 conference to discuss previous Detailed Defense Counsel's (LTC Colby Vokey) removal from the case by then-Chief Defense Counsel, COL Dwight Sullivan, USMC. (Bley e-mail of 1 June 2007 (Attachment C); MAJ Groharing e-mail of 31 May 2007 (Attachment D).) As a result, LTC Vokey did not travel to GTMO in connection with the 4 June session of the Commission and performed no further duties in connection with this case. During an R.M.C. 802 session at GTMO on the evening of 3 June 2008, prosecutor, MAJ Jeffrey Groharing, USMC, expressed frustration with the fact that the effect of letting COL Sullivan's decision stand would result in the removal of defense counsel who had been detailed to the case for "sixteen months."¹

f. In response to a request by Detailed Defense Counsel at the 3 June 802 session for additional time to meet and develop an attorney-client relationship with Mr. Khadr prior to arraignment, COL Brownback indicated that he intended to raise a jurisdictional issue *sua sponte*. The following day, 4 June 2007, COL Brownback dismissed charges and specifications without prejudice for lack of jurisdiction over Mr. Khadr as an "unlawful enemy combatant" under the MCA. (AE 015.) Not only did COL Brownback determine that Mr. Khadr had not been found to be an "unlawful enemy combatant," COL Brownback ruled that the Military Commission lacked authority to make the jurisdictional determination for itself. COL Brownback subsequently denied a prosecution motion for reconsideration. (AE 023.)

g. CAPT Keith Allred, JAGC, USN, military judge in the case of *United States v. Hamdan*, granted a defense motion to dismiss on similar grounds as those raised by COL Brownback on 4 June 2007. In contrast to COL Brownback, however, CAPT Allred did not reach or decide the question of whether a military commission could determine jurisdiction for itself. (Decision and Order, *United States v. Hamdan*, of 4 June 2007 (Attachment E).) Thus, despite the similarities in the rulings, it was COL Brownback's decision that was responsible for delaying the resumption of military commission proceedings in Guantanamo Bay.

h. COL Brownback's ruling drew public criticism from the White House and DoD. *See Failed terror trials leave U.S. Defense Department scrambling, emboldens Democrat critics,*

¹ LTC Vokey had served as Mr. Khadr's counsel in the prior military commission, convened under the authority of MCO No. 1.

Associated Press, 5 June 2007 (Attachment F); *Review of Khadr ruling sought; Pentagon asks judge to reconsider dismissal*, Toronto Star, 9 June 2007 (Attachment G). In addition to causing five months of unexpected delay,² the ruling caused the DoD significant embarrassment due to the fact that the DoD had to “scramble” to create a court capable of hearing the government’s appeal of COL Brownback’s decision. *See Pentagon plans to appeal dismissal of Khadr charges*, Star Phoenix, 9 June 2007 (Attachment H). COL Brownback later acknowledged that he had taken “heat” in connection with this decision, a statement that was reported in the news media. *Decks Are Stacked in War Crimes Cases, Lawyers Say*, New York Times, 9 November 2007 (Attachment I).

i. At that same session of the Commission, COL Brownback drew intense criticism from MAJ Groharing for not allowing the prosecution to go forward with a hearing on Mr. Khadr’s purported status as an “unlawful enemy combatant.” MAJ Groharing’s complaint related nominally to the prosecution’s frustration over having prepared for the status determination and having transported witnesses for the hearing. But MAJ Groharing’s remarks during the session suggest that the true basis for the prosecution’s frustration was that it would not be allowed to present highly-prejudicial factual evidence relating to the charges, which would have bolstered the perceived legitimacy of the this prosecution and the military commissions generally at a critical period. (*See R. at 83-85.*)³ That this was a major concern of the prosecution is amply demonstrated by the inclusion of various extraneous (and highly prejudicial) “facts” in its response briefs to defense *law motions*, which, unlike almost all subsequent motions filed in this case, were promptly released for publication on the DoD “military commissions” website. (*See generally* Gov’t responses to Def. motions D-008 through D-023.)

j. On 28 November 2007, over vigorous prosecution objection, COL Brownback issued the Schedule for Trial, which established a 5 May 2008 date for assembly of members in Guantanamo Bay. (Schedule for Trial, dated 28 November 2007 (Attachment J).) This followed an e-mail from MAJ Groharing, dated 21 November 2007, in which MAJ Groharing complained about comments defense counsel had made during an overseas trip to interview potential witnesses and experts, and urged COL Brownback to accelerate the pace of the case. (MAJ Groharing e-mail of 21 November 2007 (Attachment K).) The prosecution had initially proposed a trial date in January 2008. (Pros. Proposed Trial Schedule of 30 October 2007 (Attachment L).)

k. On 13 March 2008, over vigorous prosecution objection, COL Brownback granted a defense 15 February motion for to continue a 27 February evidentiary motions deadline and the 1 April hearing to allow the defense to litigate discovery motions (D-024). (AE 069.) Although the ruling addressed only the date for evidentiary motions, not the trial date, the

² Mr. Khadr was not ultimately arraigned until 8 November 2007.

³ Curiously, a videotape purporting to show Mr. Khadr engaged in the manufacture of explosive devices, subject to Protective Order No. 1 and not known to be in the possession of anyone except the defense and components of the U.S. government, was leaked and appeared on the CBS news program *60 Minutes* within weeks of this session. (Link available at http://www.cbsnews.com/stories/2007/11/16/60minutes/main3516048.shtml?source=mostpop_story.)

practical effect of the ruling was to vacate the 5 May 2008 trial date that the Schedule for Trial established. Significantly, however, COL Brownback had already, in effect, granted the defense continuance motion by setting a deadline for initial defense discovery motions and ordering a hearing for 13 March 2008 to address discovery matters. (LTC Chappell e-mail of 21 February 2008 (Attachment M).) This followed a feverous effort by the prosecution to arrange a telephonic 802 session, during which MAJ Groharing attempted to compel COL Brownback to immediately deny the defense continuance motion, citing “logistical arrangements” the prosecution had ostensibly made based on the 5 May 2008 trial date. (LTC Chappell e-mail thread of 19 February 2008 (Attachment N); R.M.C. 802 Conference Memorandum for Record of 21 February 2008 (Attachment O).)⁴

l. Sessions of the Military Commission were conducted on 13 March 2008, 11 April 2008, and 8 May 2008. On numerous issues, COL Brownback rejected the prosecution’s narrow view of its discovery obligations and granted defense requests in connection with discovery matters. (*See, e.g.*, AE 070; AE 072; AE 073.) This led to heated exchanges between MAJ Groharing and COL Brownback, and two prosecution motions for reconsideration of COL Brownback’s discovery rulings on key issues. (P-005 (reconsideration of order to produce “Tate Investigation”); P-006 (reconsideration of order to depose LTC “W”).) In addition, COL Brownback raised the issue *sua sponte* of whether the prosecution would be able to admit evidence of “9/11 matters” and other evidence of conduct by persons other than Mr. Khadr before June 2002. (MJ-012.)

m. Throughout the course of the three discovery sessions, COL Brownback rejected repeated, vociferous requests by MAJ Groharing to set a trial date before the completion of discovery. In the course of the 8 May 2008 session of the Commission, COL Brownback threatened to abate the proceedings if the prosecution did not provide certain discovery matters relating to Mr. Khadr’s detention at JTF-GTMO by 22 May 2008. (R. at 314.) In the course of this same session, anticipating another tirade by MAJ Groharing, COL Brownback stated that he had been “badgered and beaten and bruised by MAJ Groharing since the 7th of November to set a trial date” in the case. (R. at 318.) COL Brownback’s threat to abate and comments on MAJ Groharing’s behavior were widely reported in the news media. (*See, e.g.*, *Judge threatens to suspend war court trial*, Miami Herald, 8 May 2008 (Attachment P); *Khadr probe details could have scuttled case: lawyer*; *Judge threatens to suspend trial*, Calgary Herald, 9 May 2008 (Attachment Q).)

⁴ MAJ Groharing’s February references to “throwing off the trial schedule” and “logistical” concerns take on added significance in light of the disclosure of BG Hartmann’s “Master” timeline for commissions cases. (Attachment DD.) In a declaration filed in the military commissions case of *United States v. Jawad*, BG Hartmann states that he keeps the timeline to assist in the projection of “logistical needs.” (Decl. of BG Thomas Hartmann (Attachment EE).) Given the abundant evidence of BG Hartmann’s excessive interference in the prosecutorial function, it would not be surprising if MAJ Groharing’s strenuous effort to “shut down” the defense continuance request was preceded by contact with BG Hartmann or other individuals in the Convening Authority’s office. (*See* matters cited in Def. Mot. to Dismiss, filed concurrently, regarding BG Hartmann’s unlawful influence over the Office of the Chief Prosecutor.) In any event, the ample evidence of unlawful interference by an individual as closely connected to the process as BG Hartmann strengthens the appearance of unlawful influence in this matter.

n. On 23 May 2008, COL Brownback granted a defense request to continue, in part, a 28 May 2008 deadline for the submission of “evidentiary motions.”⁵ (COL Brownback e-mail thread of 23 May 2008 (Attachment R).) The defense subsequently filed five discovery motions to be heard at the next session of the Commission -- then scheduled for 18 June 2008. This elicited a response from the prosecution, urging COL Brownback to reject the motions as “untimely.” (See MAJ Groharing e-mail of 28 May 2008 (Attachment S).) The motions were assigned filing designations and accepted by the Commission. (See D-057 through D-061.)

o. Following these events, on 29 May 2008, the Chief Trial Judge, COL Ralph Kohlmann, USMC, “changed” the military judge in this Military Commission, detailing COL Patrick Parrish, JAGC, USA, as military judge, and effectively relieving COL Brownback of further duties in this case. (LTC Sowder e-mail of 29 May 2008 (Attachment A to Def. Mot. to Dismiss, D-067).)

p. COL Kohlmann initially provided no explanation for COL Brownback’s removal, however, on 31 May 2008, a DoD spokesman issued a press statement describing COL Brownback’s departure as the result of a “mutual decision between the Judge and the Army.” *Army Judge Is Replaced For Trial Of Detainee*, New York Times, 31 May 2008 (Attachment T).

q. On 2 June 2008, COL Kohlmann issued a “comment” in connection with his decision to change judges in this case. The comment said, in part, that “the change of military judge in US v. Khadr was made by me solely because COL Brownback would not be on active duty to try the case to completion.” COL Kohlmann indicated that despite a request to extend COL Brownback’s period of active duty recall from retirement, the Army had elected “not to extend” COL Brownback’s recall orders. COL Kohlmann indicated that the decision had been made in February. The comment was very clear in stating that COL Brownback had expressed complete willingness to remain on active duty and had not requested to return to retired status (i.e., his termination was involuntary). (LTC Sowder e-mail thread of 2 June 2008 (Attachment B to Def. Mot. to Dismiss, D-067).)

r. COL Kohlmann’s comment further indicated that the decision not to extend COL Brownback had been made by the Army “based on a number of manpower management considerations.” (*Id.*) COL Kohlmann did not elaborate further on what was meant by “manpower management considerations.” However, days later, on 9 June 2008, the Legal Advisor to the Convening Authority for Military Commissions, BG Thomas Hartmann, JAGC, USAF, was quoted as saying that military commissions had been “declared the number one

⁵ Curiously, in his 23 May 2008 e-mail, COL Brownback also indicated that the Commission “may or may not rule on MJ-012.” The statement is odd in light of the fact that COL Brownback himself raised the issue, which, if decided against the government, would preclude the prosecution from presenting its obscenely prejudicial (and largely irrelevant) “Al Qaeda Plan” movie at trial. Such a ruling could, of course, set an adverse precedent for the government in subsequent military commission cases. COL Brownback’s sudden departure thus gives the prosecution the added advantage of litigating the admissibility of the “Al Qaeda Plan” and the balance of its “Al Qaeda 101” evidence in front of a judge not already pre-disposed (correctly) against its effort to prejudice the members against Mr. Khadr with volumes of prejudicial information having little or nothing to do with the central allegations in this case.

priority” for provision of legal services by uniformed lawyers within DoD, and that over 100 uniformed personnel would be shortly joining the commissions process. *Pentagon accused of ‘rushing’ Cuba trials before election*, Irish Times, 9 June 2008 (Attachment U).

s. On 3 June 2008, the defense served a discovery request on the prosecution, requesting production of various documents relating to COL Brownback’s recall to active duty and the Army’s apparent decision to involuntarily return him to retired status. (Supp. Def. Disc. Req. of 3 June 2008 (Attachment V).) The request was served via e-mail, with a note requesting the prosecution to provide certain information relating to OCP’s knowledge of COL Brownback’s removal. (LCDR Kuebler e-mail of 3 June 2008 (Attachment W).) To date, the prosecution has responded to neither the request nor the e-mail.

t. On 6 June 2008, the defense attempted to contact COL Brownback via e-mail, requesting to speak with him about the circumstances of his departure. On 8 June 2008, LTC [REDACTED] forwarded an unsigned, undated, “statement” purporting to be from COL Brownback to the military judge and counsel in this case. (LTC [REDACTED] e-mail thread of 8 June 2008 (Attachment X).) Among other things, the “statement” confirms that COL Brownback’s departure was involuntary and that he had learned in February 2008 that recall would be terminated from a discussion with COL Henley (Chief Judge of the Army). (Statement – COL Peter E. Brownback III, COL, JA, USA (Attachment Y).) COL Brownback’s e-mail indicated that he would have the statement “sworn” when he was in GTMO on 17 June. (LTC [REDACTED] e-mail thread (Attachment X).)

u. On 9 June 2008, the defense sent a request for additional judicial disclosures to the Military Commissions Trial Judiciary (MCTJ), requesting, *inter alia*, disclosure of communications surrounding COL Brownback’s issuance of the “statement” and production of any prior drafts of the statement. (LTC [REDACTED] e-mail thread of 1 July 2008 (Attachment Z).) The e-mail was ignored. The parties traveled to GTMO and held a session of the Commission on 19 June 2008. It is not known whether COL Brownback traveled to GTMO that week, but, to the knowledge of the defense, the statement was never sworn or otherwise produced either to the military judge or counsel.

v. On 30 June 2008, the defense sent a subsequent e-mail to the MCTJ, reiterating its request for additional disclosures concerning COL Brownback’s statement. The defense indicated therein that examination of the “metadata” on COL Brownback’s statement suggested that the statement had been revised subsequent to the time reflected on COL Brownback’s forwarding e-mail to LTC [REDACTED] (prompting the defense to seek production of any prior drafts). LTC [REDACTED] subsequently responded, on behalf of COL Kohlmann, indicating that “COL Kohlmann will not be responding to your request.” (*Id.*)

w. On 3 July 2008, the defense requested to speak with COL Henley (who is now part of the MCTJ) about the circumstances surrounding COL Brownback’s departure. COL Henley has, on two occasions, without explanation, declined the request to be interviewed, instead asking the defense to submit interrogatories. ([REDACTED] e-mail of 25 July 2008 (Attachment AA).)

x. COL Brownback's removal was widely-reported in the news media and has elicited expressions of concern over the perceived fairness of this Military Commission. *See, e.g., Editorial: An appearance of interference*, Globe and Mail, 3 June 2008 (Attachment BB).

5. **Law and argument:**

a. **COL Brownback's sudden removal, without reasonable explanation, raises creates a clear and unequivocal appearance of unlawful influence.**

(1) Article 37 of the UCMJ prohibits, *inter alia*, any person subject to the UCMJ from attempting to "coerce or, by any unauthorized means, influence the action" of courts-martial or military tribunals. The Military Commissions Act of 2006 ("MCA"), under the authority of which this Military Commission is convened, *broadens* the protections of Article 37, extending the scope of the prohibition to "any person" – not only those subject to the UCMJ – and prohibits attempts to coerce or influence the "exercise of professional judgment by trial counsel or defense counsel" – not just the action of court-martial or military tribunals. MCA § 949b(a)(2)(C). There could be no stronger evidence of the seriousness with which Congress viewed the threat of unlawful influence in connection with military commission proceedings and its desire to eliminate comprehensively this "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

(2) Under established military case law applying Article 37 in the context of court-martial proceedings, the defense bears the initial burden of raising the issue of unlawful command influence. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). 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.* (citation omitted). 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).

(3) Even if actual unlawful influence is not shown, relief is still warranted where there is an appearance of unlawful influence. *Id.* at 42 ("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"); *see also* Regulation for Trial by Military Commission [hereinafter M.C. Reg.] 1-4 ("All convening authorities, *legal advisors*, trial counsel, and others involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence . . .") (emphasis added). The appearance of unlawful command influence is "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Lewis*, 63 M.J. 405, 406 (C.A.A.F. 2006) (citing *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)). Even in the absence of actual command influence, 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). The appearance of unlawful command influence exists where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

(4) There could be no clearer example of unlawful influence than a situation in which the government seeks removal of a particular, disfavored judge from a case. *See id.* In *Lewis*, the Court of Appeals for the Armed Forces held that government attempts to orchestrate the recusal of a particular military judge created an appearance of unlawful command influence that warranted dismissal of charges with prejudice. *See id.* at 416. Noting the inability of any remedy short of dismissal to cure the taint of unlawful influence in such circumstances, the court concluded by affirming that no other remedy could “eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system[.]” *Id.*

(5) As in *Lewis*, the facts here clearly give rise to (at least) the appearance of unlawful influence. A number of factors support this conclusion:

(i) First, COL Brownback’s removal was caused by the government. It is beyond question that “the Army” is an agency within the exclusive jurisdiction and control of the United States Government, i.e., a party to this case. *See* (Charge Sheet (AE 001) (“*United States of America v. Omar Ahmed Khadr*”)); R.M.C. 502(d)(5) (“trial counsel shall prosecute cases on behalf of the United States . . .”). Thus, COL Brownback’s removal from this case is the direct result of a decision taken by a party to this case. Unlike the military judge in *Lewis*, there was no need to compel COL Brownback to recuse himself, the United States could (and did) exercise complete control over that decision. And suggesting that there is no appearance of unlawful influence because the decision was made by “the Army” is akin to suggesting attempts to improperly influence the judge by Chevrolet are of no importance in a lawsuit involving General Motors.

(ii) Second, there is little question that COL Brownback’s removal was *involuntary*. Despite a first effort by the DoD to explain COL Brownback’s removal as the result of a “mutual decision,” COL Kohlmann’s comment indicates that COL Brownback had expressed his desire to remain on active duty and see the case to completion. (LTC ██████ e-mail thread of 2 June 2008) (Attachment B to Def. Mot. to Dismiss, D-067.) Although never sworn, COL Brownback’s unsigned “statement” (if taken at face value) tends to confirm this fact. (COL Brownback “statement” (Attachment Y).) Moreover, apparently, no one ever explained to *COL Brownback* why “the Army” had decided to return him to retired status. In his “statement,” ostensibly prepared on or about 8 June 2008, COL Brownback states that he was “not told the reason or reasoning behind” the decision not to extend him, and that, as of that date, he still did not know nor had he been told why he was not extended. (*Id.*) This is not, therefore, a case in which COL Brownback’s removal can be explained as the result of a decision by COL Brownback, or even one made with his understanding and acquiescence. He was simply, and without explanation, forced out.

(iii) Third, the decision followed a series of unfavorable decisions to the government on discovery issues, and, most significantly, COL Brownback’s rejection of repeated prosecution demands to terminate discovery and set a trial date. The decision came in the wake of a hearing in which COL Brownback had threatened to abate the proceedings if the prosecution did not comply with a discovery order. (R. at 314.) To make matters worse, the decision came the day after COL Brownback had rejected another prosecution harangue to end discovery. MAJ Groharing’s harangues (which have been so frequent and “over-the-top”) even prompted COL Brownback to comment that he had been “beaten, badgered, and bruised” by the

prosecution to set a trial date. (R. at 318.) Absent a compelling explanation to the contrary, any disinterested, objective observer would likely conclude that COL Brownback's sudden removal by the United States was retribution for his failure to yield the prosecution's repeated badgering and bruising.

(iv) That the decision not to extend COL Brownback was made in "February" (assuming that to be the case) does not diminish the appearance of unlawful influence. COL Brownback's failure to move at the prosecution's pace had drawn fire long before his threat to abate the proceedings in May. His dismissal of the proceedings without possibility of cure by the commission itself clearly irritated senior levels of the Executive branch and was responsible for a five-month delay in the resumption of military commission proceedings in Guantanamo Bay. Indeed, COL Brownback stated that he took "heat" for the decision. Also, COL Brownback's rejection of the prosecution's trial schedule in November 2007 drew prosecution criticism. (R. at 66.) And, significantly, it was precisely in *February* – reportedly at or near the time when "the Army" decided not to extend him – that COL Brownback took a number of actions over strenuous prosecution objection that had the effect of vacating, *sub silentio*, the 5 May 2008 trial date initially set in the case. (LTC ████████ e-mail thread of 21 February 2008 (Attachment M)); R.M.C. 802 MFR (Attachment O). COL Brownback's rejection of extreme prosecution positions on the scope of its discovery obligations and rejection of repeated calls to prematurely establish a trial date in March, April, and May only compounded the government's apparent frustration with COL Brownback – a frustration that started (and was expressed) long before.

(v) No reasonable, legitimate explanation for COL Brownback's termination has been offered. COL Kohlmann's vague hearsay reference to "manpower management considerations" is patently unconvincing in light of public statements by the Convening Authority's Legal Advisor that military commissions are a "national priority" for purposes of staffing and assignment of legal resources – a fact amply corroborated by the exponential growth of the Office of Military Commissions in recent months. *See Pentagon accused of 'rushing' Cuba trials before election*, Irish Times, 9 June 2008 (Attachment U). COL Brownback had been extended a number of times in the past even when there were no active military commission cases. If COL Brownback's statement is to be taken at face value, the Army extended COL Brownback on *two occasions when no active military commission cases were pending* – 13 July 2005 and 13 June 2006.⁶ (COL Brownback "statement" (Attachment Y).) With military commissions in full swing (and COL Brownback presiding over one of the first and highest-profile cases to go through the system), having presided over this case for more than a year, having ruled on dozens of motions, having developed a familiarity with the unique factual and legal issues in this case, and having motions (briefed and argued) pending before him, it would simply be beyond belief to any disinterested, objective observer that "manpower management considerations" would actually cause "the Army" to not extend COL Brownback

⁶ COL Brownback's first extension came *after* the DoD administration stayed all military commission cases in the wake of Judge Robertson's 8 May 2004 injunction in the *Hamdan* case, and *before* the Court of Appeals' reversal of Judge Robertson's decision on 15 July 2005. *See Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). A subsequent extension followed another administrative stay of all military commission cases preceding the Supreme Court decision in *Hamdan*. *See* Memorandum of John D. Altenberg, Jr., Appointing Authority for Military Commissions, of 10 June 2006 (Attachment CC).

for a billet that is the “number one priority” for provision of legal services by uniformed lawyers and a mission to which more than 100 lawyers were being assigned. *Pentagon accused of ‘rushing’ Cuba trials before election*, Irish Times, 9 June 2008 (Attachment U).

(vi) The appearance issue stemming from the absence of a legitimate justification for COL Brownback’s termination is compounded by the initial DoD proffer of an apparently false one. As noted above, a DoD spokesman initially described COL Brownback’s removal as the result of a “mutual decision” between COL Brownback and the Army – a suggestion that COL Brownback expressly denied in his “statement,” and *suggesting* an initial effort to get COL Brownback to “go along” with a story to explain the issue away. At the very least, the inconsistency between the initial account and COL Kohlmann’s subsequent unequivocal statement that COL Brownback’s departure was involuntary creates an additional cloud over these events.

(vii) The appearance problem is lastly exacerbated by the frustration of defense efforts to investigate the circumstances of COL Brownback’s departure. While the defense does not believe it has any *obligation* to investigate the issue – indeed, the burden is clearly on the *government* to dispel the appearance of unlawful influence – it made an effort to do so in this case, which has been largely stonewalled. To begin with, while the prosecution and defense have rarely agreed on the scope of the government’s discovery obligations, the prosecution has not simply *ignored* a defense request for discovery as it has in connection with this matter. Moreover, it is difficult to understand why COL Henley, who now, unfortunately, appears to have a connection with the military commission process that he did not in the past (compounding the appearance problem), will not agree to be interviewed by defense counsel (except through interrogatories). If there is, in fact, a legitimate “manpower” issue of which he is aware, why not simply pick up the phone and say what it is? Lastly, COL Kohlmann’s selective disclosure of information regarding the matter, and refusal to provide additional information when confronted with the claim that he (or members of his staff) may have been involved in influencing the substance of COL Brownback’s testimony, creates an added level of doubt with respect to the propriety of the government’s conduct in this matter.

(6) Based on the foregoing, any “objective, disinterested observer” would tend to believe that COL Brownback was removed (i.e., not extended on active duty by the United States) because of his failure to give the prosecution what it wanted – an end to the discovery process and an expeditious trial date, or, at the very least, harbor a strong suspicion thereof. Even if COL Kohlmann’s “explanation” is taken at face value, it does nothing to dispel the appearance of unlawful influence – quite the contrary, it enhances it. This case, having been a holdover from the “old” commission system, was supposed to be a vehicle for early validation of the military commission process under the MCA (hence, MAJ Groharing’s initial frustration when COL Brownback did nothing to keep LTC Vokey on the case).⁷ It was in February 2008, as the result of decisions COL Brownback made regarding the discovery process, that a May trial became an impossibility and that it became increasingly unlikely the case would serve its apparent intended function as a public relations exercise to lend legitimacy to the military

⁷ It should be noted that Mr. Khadr did not terminate LTC Vokey to delay proceedings. He had actually terminated LTC Vokey (and other counsel) in 2006. For some reason, however, LTC Vokey was re-detailed to this case after charges were preferred under the MCA.

commission process before the commencement of cases against the so-called “high value detainees.”⁸ Not only has the government done nothing to dispel the resulting appearance of unlawful influence, it has, by stonewalling defense efforts to investigate the issue, exacerbated the appearance problem.

b. No remedy short of dismissal can cure the appearance of unlawful influence over these proceedings or restore public confidence in the military commission system.

(1) While the military judge possesses discretion in fashioning an appropriate remedy, *Lewis* teaches that in the circumstances presented here – where there is the appearance of direct, calculated interference in the judicial function, no remedy short of dismissal can “eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system.” *Lewis*, 63 M.J. at 416.

(2) With respect to the perceived fairness of *these proceedings*, no remedy short of dismissal can cure the taint of apparent unlawful influence. As with the military judge improperly forced off the bench in *Lewis*, restoring COL Brownback to his position would be of no moment. Having apparently been terminated once for failing to yield to the prosecution’s will, COL Brownback would be chilled (or at least perceived to be chilled) from ruling for the defense in subsequent proceedings. Likewise, any decision a subsequent military judge makes in favor of the prosecution (especially on matters relating to discovery and scheduling) may be *perceived* as being influenced by the example set by the government’s termination of COL Brownback. This is not to suggest that any decision would be *actually* so influenced, only that the appearance of unlawful influence necessarily creates doubt for a reasonable observer as to the motivation behind any ruling (even if completely correct and justified) for the prosecution.

(3) Moreover, dismissal is necessary to restore whatever public confidence can be restored in the military commission process. Judge Robertson, the U.S. District Court judge presiding in the *Hamdan* case noted, just days ago, that the “eyes of the world are on Guantanamo.” There can be no more serious threat to the perceived legitimacy of the military commission system than the suggestion that judges can be removed at the will of the Executive if they do not rule advantageously to the government.⁹ Dismissal, with prejudice, of charges in

⁸ There is little question that DoD officials involved in the commission process, e.g., BG Hartmann, consciously factored in the “public relations” component of the commission process, and placed a premium on cases that would “capture the public’s imagination.” *United States v. Jawad*, Military Commission Record of Trial at 29-30 (attachment C to Def. Mot. to Dismiss, filed concurrently); COL Davis 23 Sept 07 Complaint, para. 16 [hereinafter Davis Complaint] (Attachment I to Def. Mot. to Dismiss, filed concurrently); Sworn Statement of LTC Britt, 7 Sept 07 at 11 (attachment H to Def. Mot. to Dismiss, filed concurrently). BG Hartmann’s direction to COL Davis to charge cases that were “sexy” or “had blood on them” provides additional insight into his thought process. *See Hamdan R.* at 752 (Attachment A to Def. Mot. to Dismiss, filed concurrently).

⁹ Incidentally, the prosecution has taken advantage of COL Brownback’s removal to seek “reconsideration” of COL Brownback’s rulings on D-019 and D-047 (striking the “enterprise” language from Charge III). There has been, however, no intervening change in the law to warrant reconsideration – only a change in judge. The mere fact that the prosecution would file such a motion, and the expectations it suggests, compounds the appearance problem resulting from COL Brownback’s removal.

this case may not be *sufficient* to restore public confidence in the military commission process, but it is certainly *necessary*. And if it is necessary to give the system of tribunals that will try Khalid Sheik Mohamed and the other alleged masterminds of 9/11 and Al-Qaeda atrocities against the United States, credibility in the “eyes of the world,” dismissal of charges against a then-15-year-old boy is a small price to pay.

c. Conclusion.

(1) The available evidence creates a clear and unequivocal appearance of unlawful influence exercised over the proceedings of this Commission. The specter of military justice’s “mortal enemy” has appeared and dismissal is the appropriate remedy to ensure basic fairness and restore public confidence in these proceedings and the military commission process as a whole.

6. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) (“Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.”). Oral argument will allow for a thorough consideration of the issues.

7. **Witnesses and evidence:**

CITF Report of Investigative Activity (OC-1) of 17 March 2004 (Attachment B to Def. Reply on D-022)

2 February 2007 Charge Sheet (Attachment A to Def. Mot. to Dismiss, D-008)

Tr. of testimony of COL Davis in *U.S. v. Hamdan* (Attachment A to Def. Mot. to Dismiss filed concurrently herewith)

AEs 023, 069, 070, 072, and 073

LTC Sowder e-mail thread of 2 June 2008 (Attachment A to Def. Mot. to Dismiss, D-067)

Attachments A through EE

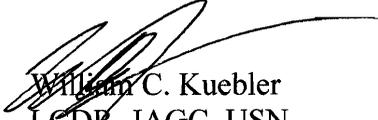
8. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

9. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. **Attachments:**

- A. *U.S. charges five war-on-terror detainees, Agence France Presse*, 8 November 2005
- B. Undated charging document issued in connection with prior military commission
- C. Bley e-mail of 1 June 2007
- D. MAJ Groharing e-mail of 31 May 2007
- E. Decision and Order, *United States v. Hamdan*, of 4 June 2007
- F. *Failed terror trials leave U.S. Defense Department scrambling, emboldens Democrat critics*, Associated Press, 5 June 2007
- G. *Review of Khadr ruling sought; Pentagon asks judge to reconsider dismissal*, Toronto Star, 9 June 2007
- H. *Pentagon plans to appeal dismissal of Khadr charges*, Star Phoenix, 9 June 2007
- I. *Decks Are Stacked in War Crimes Cases, Lawyers Say*, New York Times, 9 November 2007
- J. Schedule for Trial, dated 28 November 2007
- K. MAJ Groharing e-mail of 21 November 2007
- L. Pros. Proposed Trial Schedule of 30 October 2007
- M. LTC Chappell e-mail of 21 February 2008
- N. LTC Chappell e-mail thread of 19 February 2008
- O. R.M.C. 802 Conference Memorandum for Record of 21 February 2008
- P. *Judge threatens to suspend war court trial*, Miami Herald, 8 May 2008
- Q. *Khadr probe details could have scuttled case: lawyer; Judge threatens to suspend trial*, Calgary Herald, 9 May 2008
- R. COL Brownback e-mail thread of 23 May 2008
- S. MAJ Groharing e-mail of 28 May 2008
- T. *Army Judge Is Replaced For Trial Of Detainee*, New York Times, 31 May 2008
- U. *Pentagon accused of 'rushing' Cuba trials before election*, Irish Times, 9 June 2008
- V. Supp. Def. Disc. Req. of 3 June 2008

- W. LCDR Kuebler e-mail of 3 June 2008
- X. LTC Sowder e-mail thread of 8 June 2008
- Y. Statement – COL Peter E. Brownback III, COL, JA, USA
- Z. LTC [REDACTED] thread of 1 July 2008
- AA. [REDACTED] e-mail of 25 July 2008
- BB. *Editorial: An appearance of interference*, Globe and Mail, 3 June 2008
- CC. Memorandum of John D. Altenberg, Jr., Appointing Authority for Military Commissions, of 10 June 2006
- DD. BG Hartmann’s undated timeline for military commissions cases
- EE. BG Hartmann’s declaration filed in the military commissions case of *United States v. Jawad* of 23 July 2008


William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

40 of 105 DOCUMENTS

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Agence France Presse -- English

November 8, 2005 Tuesday 1:13 AM GMT

LENGTH: 714 words**HEADLINE:** US charges five war-on-terror detainees**DATELINE:** WASHINGTON Nov 7**BODY:**

Five war-on-terror detainees were charged Monday with terrorism related offenses, raising to nine the number of prisoners who now face trial by military commission at Guantanamo Bay, Cuba, the Pentagon said Monday.

The Pentagon forged ahead with the charges on the same day that the US Supreme Court said it would rule on the legality of the military commissions in response to a challenge by lawyers of another prisoner, Salim Ahmed Hamdan.

"We don't expect any changes to our current commissions procedures or schedules," a Pentagon official said, speaking on condition of anonymity.

The Center for Constitutional Rights, a rights group that has challenged the legality of the military commissions, called the government's move "a brazen and cynical act of disdain for our democratic institutions."

The Pentagon identified those charged as Bhassan Abdullah al Sharbi and Jabran Said bin al Qahtani of Saudi Arabia; Sufyian Barhoumi of Algeria; Binyam Ahmed Muhammad of Ethiopia; and Omar Ahmed Khadr of Canada.

In addition, the authority who appoints the military commission, John Altenburg, lifted a stay on a military trial of another prisoner who had previously been charged, Ali Hamza Ahmad Sulayman al Bahlul.

With the latest action, charges have now been brought against nine war-on-terror suspects held at Guantanamo.

A trial date has been set only in the case of Australian David Hicks, who is scheduled to go before a military commission at Guantanamo on November 18.

Four of those charged Monday -- Al-Sharbi, Al-Qahtani, Barhoumi and Binyam Muhammad -- were accused of conspiracy to attack civilians, to attack civilian objects, commit murder by an unprivileged belligerent, destruction of property and terrorism.

Khadr, a 19-year-old who was born in Toronto but raised in Pakistan, was charged with murder of a US soldier, attempted murder, aiding the enemy as well as the other conspiracy charges.

Khadr's lawyer, Muneer Ahmad, said in a statement that his client was only 15 at the time of his capture.

"Through torture, abuse, and three years of illegal detention, this government has robbed Omar of his youth. Now, they are demanding his appearance before a kangaroo court, wholly lacking in fundamental principles of due process," he said.

Khadr's charge sheet said he killed Sergeant First Class Christopher Speer with a grenade during a firefight in which two Afghan militia members were shot and killed and several US servicemembers wounded.

US charges five war-on-terror detainees Agence France Presse -- English November 8, 2005 Tuesday 1:13 AM GMT

Binyam Muhammad, an electrical engineer and recent convert to Islam, was accused of receiving explosives training and sent to the United States with Jose Padilla to carry out bombings there, according to his charge sheet.

Padilla, a US national, was later captured in Chicago in April 2002 and charged with conspiring to set off a dirty bomb in the United States.

According to the charges, they met with two top al-Qaeda operatives, Saif al Adel and Khalid Sheikh Mohammad, in Karachi before leaving for the United States.

They told Binyam Muhammad that "their mission would involve targeting high-rise apartment buildings that utilized natural gas for its heat and also targeting gas stations," the charges said.

"The apartment building plan called for renting an apartment and utilizing the natural gas in the buildings to detonate an explosion that would collapse all of the floors above," it said.

Binyam Muhammad was captured at the Karachi airport on April 10, 2002 trying to get on a plane to London with a forged passport, the charge sheet said.

It also said he trained at one point in Afghanistan in September 2001 with Richard Reid, the British man who was caught attempting to detonate explosives in his shoes on a trans-Atlantic flight, according to the charges.

Barhoumi, the Algerian, was trained in electronics and explosives at an al-Qaeda affiliated training camp in Afghanistan and later trained al-Qaeda members in explosives at remote locations, the charge sheet said.

In March 2002, after fleeing from Afghanistan to Pakistan, Barhoumi allegedly trained al-Sharbi and Al Qahtani to build small hand-held remote-detonation devices for explosives at a guest house in Faisalabad.

They were captured along with Abu Zubayda, a top al-Qaeda leader, in a raid on the safe house in Faisalabda March 28, 2002, the charge sheets said.

LOAD-DATE: November 8, 2005

UNITED STATES OF AMERICA	)	CHARGES:
v.	)	CONSPIRACY;
OMAR AHMED KHADR	)	MURDER BY AN UNPRIVILEGED
a/k/a Akhbar Farhad	)	BELLIGERENT;
a/k/a Akhbar Farnad	)	ATTEMPTED MURDER BY AN
	)	UNPRIVILEGED BELLIGERENT;
	)	AIDING THE ENEMY

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 30, 2005 that Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, hereinafter Khadr) is subject to his Military Order of November 13, 2001.
2. Khadr's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS (AL QAIDA)

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa*

18. In the summer of 2002, Khadr received one-on-one, private al Qaida basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades and explosives.

19. After completing his training, Khadr joined a team of other al Qaida operatives and converted landmines into remotely detonated improvised explosive devices, ultimately planting them at a point where U.S. forces were known to travel.

20. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of one U.S. service member.

CHARGE 1: CONSPIRACY

21. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

22. In furtherance of this enterprise and conspiracy, Khadr and other members of al Qaida committed the following overt acts:

- a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives.
- b. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.
- c. On or about July 2002, Khadr received one month of land mine training.
- d. On or about July 2002, Khadr joined a group of Al Qaida operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
- e. On or about July 27, 2002, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound.

During the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer. In addition to the death of SFC Speer, two Afghan Militia Force members who were accompanying U.S. Forces were shot and killed and several U.S. service members were wounded.

CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT

23. Omar Ahmed Khadr did, in Afghanistan, on or about July 27, 2002, murder Sergeant First Class Christopher Speer, U.S. Army, while in the context of and associated with armed conflict and without enjoying combatant immunity, by throwing a hand grenade that caused Sergeant First Class Speer's death.

CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

24. Omar Ahmed Khadr did, in Afghanistan, between, on, or about June 1, 2002 and July 27, 2002, attempt to murder divers persons, while in the context of and associated with armed conflict and without enjoying combatant immunity, by converting land mines to improvised explosive devices and planting said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

CHARGE 4: AIDING THE ENEMY

25. Omar Ahmed Khadr did, in Afghanistan, on divers occasions between on or about June 1, 2002 and July 27, 2002, while in the context of and associated with armed conflict, intentionally aid the enemy, to wit: al Qaida.

Kuebler, William, LCDR, DoD OGC

From: [REDACTED]
Sent: Friday, June 01, 2007 10:11 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: US vs Khadr Schedule/802 Session on 3 June 07

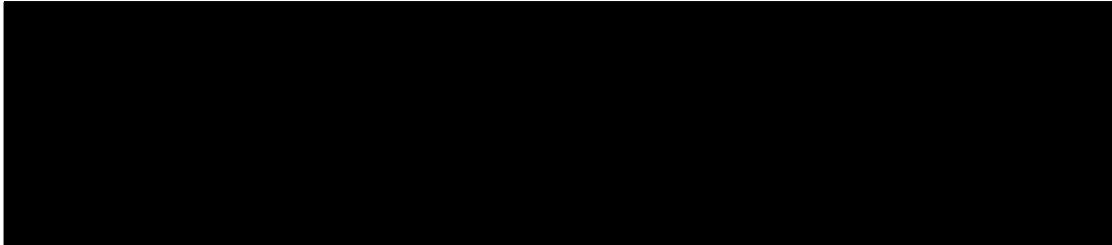
By direction of COL Brownback:

- 1) Regarding the request by prosecution for a conference call today; any discussion of this matter can be raised at the 802 session currently scheduled for 3 June 07 in the Judges Chamber.
- 2) Further communication at this time regarding any matters in the 4 June 07 hearing and 3 June 07 802 session of U.S. v. Khadr should be addressed via LTC Chappell at his SOUTHCOM email address. Please understand there will be short delay in return communications due to travel schedules of participants.

[REDACTED]
Attorney Advisor
Military Commissions Trial Judiciary
(703) 607-0621, ext. 188
fax (703) 607-1842
[REDACTED]

Kuebler, William, LCDR, DoD OGC

From:
Sent:
To:
Cc:



Subject:

Importance: High

Attachments: 31 May 2007 - Email from CDC.pdf

Sir,

Please pass to Colonel Brownback:

The Prosecution requests a conference call today with the Military Judge, the Chief Defense Counsel, Lieutenant Colonel Vokey, and Lieutenant Commander Kuebler.

The Prosecution received an email yesterday from Colonel Sullivan stating that he had removed Lieutenant Colonel Vokey from the case and detailed Lieutenant Commander Kuebler. In light of this recent development, the Prosecution requests a conference call to discuss outstanding issues regarding counsel.

V/R,



1 May 2007 - Email
from CDC.p...

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
(703) 602-4215, ext 142



UNITED STATES OF AMERICA	)	Decision and Order --
	)	Motion to Dismiss for
v.	)	Lack of Jurisdiction
)	
SALIM AHMED HAMDAN)	

The Defense has moved this Military Commission to dismiss all charges and specifications against the accused on the basis that the Commission lacks Jurisdiction over him. The Government opposes the motion. Both parties have filed written briefs and attached various documents to their briefs without objection. These documents attached to the motions have been admitted without objection by either side. The Commission heard oral argument in open court on 4 June 2007.

The Court finds that the following facts are true:

1. Mr. Hamdan (hereinafter "the accused") was captured in Afghanistan in November of 2001 and thereafter came into the custody of the United States. The accused has been held by the United States, either in Afghanistan or in Guantanamo Bay, since that time.
2. On February 7, 2002 the President issued a Memorandum entitled "Humane Treatment of al Qaeda and Taliban Detainees" in which he concluded that "Taliban detainees are unlawful combatants and therefore do not qualify as Prisoners of War under Article 4" of the Geneva Conventions.
3. On 7 July 2004, the Deputy Secretary of Defense published an Order Establishing Combatant Status Review Tribunals (CSRT). This Order defined "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."
4. The Order directed that a Tribunal be held for each detainee to determine whether he was an "enemy combatant" using that definition. The Tribunals were also directed to determine whether "the detainee is properly detained as an enemy combatant."
5. On 2 October, 2004, the accused appeared before a CSRT at Guantanamo Bay and participated in such a hearing. The Tribunal received evidence and determined that he was a part of or associated with Al-Qaeda forces, and was properly detained as an "enemy combatant." The CSRT was not charged with determining, and therefore did not determine that the accused is an "alien unlawful enemy combatant."
6. Charges under the MCA were referred against this accused on 10 May 2007, alleging that he is subject to the jurisdiction of this tribunal as an "alien unlawful enemy combatant".

7. The accused challenges the jurisdiction of the Court on the basis that the Government cannot show, nor has it determined in a competent tribunal, that the accused is subject to the jurisdiction of the Commission. He claims, therefore that he is entitled to the protections that are accorded to a Prisoner of War until such a determination is made.

SUMMARY OF THE LAW

1. On 17 October, 2006, the Military Commissions Act (MCA) became law. The MCA limits the jurisdiction of Military Commissions to offenses made punishable by that Act or the law of war when committed by "an alien unlawful enemy combatant". 10 USC §948d(a). RMC 201(b)(1) is in accord.

2. The MCA defines "unlawful enemy combatant" to mean "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or "(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of the United States." 10 USC §948a(1).

3. The MCA makes a CSRT determination, whenever made, that a detainee is an "alien unlawful enemy combatant" dispositive of that issue for purposes of determining whether a detainee is subject to the jurisdiction of a Military Commission. Such a determination must be made by a CSRT or another competent tribunal established by the President or the Secretary of Defense. 10 USC §948d(c).

4. A Military commission is a court of limited jurisdiction. RMC 201(a)(1).

5. The burden is on the Government to show by a preponderance of the evidence that the accused is subject to the Jurisdiction of this Tribunal. RMC 905(c)(1);(2)(B).

DISCUSSION AND DECISION

The Government invites the Court to find that the 2004 determination that the accused is an "enemy combatant", coupled with the President's 2002 determination that members of al-Qaeda or the Taliban are unlawful combatants, amount to a finding that the accused is subject to the jurisdiction of this court. The Court declines to do so for the following reasons:

1. The 2004 CSRT determination that the accused is an "enemy combatant" was made for the purposes of determining whether or not he was properly detained, and not for the purpose of determining whether he was subject to trial by military commission.

2. The CSRT finding was made using a different standard than the one the MCA establishes for determining unlawful enemy combatant status. The definition of "enemy combatant" used by the 2004 CSRT is less exacting than the definition of "unlawful enemy combatant" prescribed in the MCA. The CSRT could have found a civilian not taking an active part in hostilities, but "part of" or "supporting" Taliban or al Qaeda forces engaged in hostilities to be an "enemy combatant". Yet the MCA limits this Court's jurisdiction to those who actually "engaged in hostilities or who . . . purposefully and materially supported hostilities." The CSRT did not apply this definition, and its finding therefore does not support the jurisdiction of this Tribunal.

3. The CSRT finding preceded the MCA by two years. The accused's participation in the CSRT may well have been much different had he realized its finding would be used to impose criminal jurisdiction upon him before a Military Commission.

4. The President's determination applied to members of al-Qaeda as a group, and did not represent an individualized determination that this accused supported or engaged in hostilities.

The MCA offers another route to a finding of jurisdiction: a finding by a CSRT "before, on, or after" the enactment of the MCA, that an accused is an alien unlawful enemy combatant. The October 2004 CSRT finding was before the enactment of the MCA, but it found only that the accused was an enemy combatant.

There may well be evidence in the Government's possession that could readily support a determination that the accused is subject to the jurisdiction of this Court. The Government may be able to easily demonstrate that jurisdiction by reopening the 2004 CSRT, or by organizing a different one, and directing it to clearly decide the accused's status. He is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful enemy combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government having failed to determine, by means of a competent tribunal, that the accused is an "unlawful enemy combatant" using the definition established by Congress, it has not shown, by a preponderance of the evidence, that the accused is subject to the jurisdiction of this Commission.

The Defense Motion to Dismiss all Charges and Specifications, for lack of jurisdiction, is GRANTED, without prejudice.

So Ordered this 4th day of June, 2007.



Keith J. Allred
Captain, JAGC, US Navy
Military Judge

10 of 11 DOCUMENTS

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Associated Press Worldstream

June 5, 2007 Tuesday 10:02 PM GMT

SECTION: INTERNATIONAL NEWS

LENGTH: 939 words

HEADLINE: Failed terror trials leave U.S. Defense Department scrambling, emboldens Democrat critics

BYLINE: By ANNE FLAHERTY, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Failed attempts to charge two terror suspects at Guantanamo Bay left the Defense Department scrambling Tuesday to determine a next step and emboldened Democrats who said the rulings exposed a flawed court system.

Military judges ruled Monday that the Pentagon could not prosecute Salim Ahmed Hamdan and Omar Khadr because they had not first been identified as "unlawful" enemy combatants, as required by a law that Congress enacted last year.

Hamdan, of Yemen, is believed to have been chauffeur to al-Qaida leader Osama bin Laden. Khadr is a Canadian who was arrested at 15 on an Afghan battlefield, accused of killing a U.S. soldier.

The decision dealt a blow to the Bush administration in its efforts to begin prosecuting dozens of detainees regarded as the nation's most dangerous terrorist suspects.

U.S. officials chalked up the ruling to semantics and said they were considering their options.

"We certainly disagree with the ruling," said White House spokeswoman Dana Perino on Tuesday. The Defense Department "is looking at the opportunities for appeal, and what they would say."

Lawmakers and legal experts agreed the decision was not necessarily a show stopper for the trials, and new legislation might not be necessary to convict Hamdan and Khadr. Democratic critics, however, said the ruling proved the current law was shabbily written.

Last year, Republicans and the White House pushed through legislation authorizing the war-crimes trials after the Supreme Court threw out President Bush's previous system as illegal and in violation of international treaties.

Bush established the specialized tribunal system shortly after the Sept. 11, 2001, attacks but had not been able to convict any terrorists because of legal hurdles. After the law passed, the administration convicted Australian David Hicks, who pleaded guilty in March to providing material support to al-Qaida. He is serving a nine-month sentence in Australia.

"Five-and-a-half years later, we find what happens with that kind of arrogant, go-it-alone attitude even conservative courts say 'no,'" said Sen. Patrick Leahy, Democratic chairman of the Senate Judiciary Committee.

Leahy and other Democrats have drafted legislation that would deal with various aspects of the law they say is unfair or unconstitutional.

On Thursday, Leahy's panel is expected to pass a bill that would allow detainees to protest their detentions in federal court; the law passed last year specifically stripped federal courts of their ability to hear habeas corpus challenges.

Attachment F

Failed terror trials leave U.S. Defense Department scrambling, emboldens Democrat critics Associated Press
Worldstream June 5, 2007 Tuesday 10:02 PM GMT

The measure is likely to be offered as an amendment to a \$649 billion (euro479.6 billion) defense policy bill on the Senate floor this month.

Co-sponsors of the bill include Sen. Arlen Specter, the top Republican on the Judiciary Committee, and four Democratic presidential candidates: Sens. Hillary Rodham Clinton, Barack Obama, Christopher Dodd and Joe Biden.

"The current system of prosecuting enemy combatants is not only inefficient and ineffective, it is also hurting America's moral standing in the world and corroding the foundation of freedom upon which our nation was built," said Dodd, who has a separate proposal that would make more sweeping changes.

The defense policy bill, drafted by Democratic Sen. Carl Levin and approved by his Senate Armed Services Committee, already is on track to grant new rights to terror suspects held at Guantanamo Bay, including access to lawyers regardless of whether the prisoners are put on trial. The bill also would narrow the definition of an enemy combatant and tighten restrictions on the types of evidence used to keep a person detained.

Sen. Dianne Feinstein, another Democrat, a member of the Judiciary Committee, said she wants to go further and to close Guantanamo Bay prison altogether. The prison holds some 380 military detainees suspected of terrorism.

Republicans are expected to oppose most of the Democratic proposals, particularly Leahy's attempt to restore habeas corpus rights for detainees.

Sen. Lindsey Graham, a Republican who helped write the law being used to prosecute detainees, said he thought Monday's ruling showed the process was working.

"In the rule of law, words matter," said Graham, referring to the distinction made by the judges that the detainees must be specifically deemed "unlawful" before being subjected to the military commission. "Lawful" enemy combatants are entitled to prisoner of war status under the Geneva Conventions.

"The best thing we can do is let the legal community work this out before we try to jump in," said Graham, a member of the Armed Services and Judiciary committees.

Navy Cmdr. Jeffrey Gordon, a Pentagon spokesman, said Tuesday the prosecution is considering its options, which include filing an appeal, and noted that the court of military commissions review would be the "appropriate venue for the appeals process."

One hurdle, however, is that the review court does not exist yet, said Marine Col. Dwight Sullivan, chief of military defense attorneys at Guantanamo Bay.

Another hurdle is sentiment in Congress that Democrats were not involved in helping create the trials and that the law was hastily written. Then there is the administration's patience in general.

"The only way this will spell the end of the military commissions is if this is the straw that breaks the camel's back," said Gregory S. McNeal, a law professor at Pennsylvania State University. "In other words, it only means the end if this is the final delay which forces the executive branch to reconsider their whole policy. I don't believe that is likely."

Associated Press writer Michael Warren in Mexico City contributed to this report.

LOAD-DATE: June 6, 2007

7 of 16 DOCUMENTS

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The Toronto Star

June 9, 2007 Saturday

SECTION: WORLD AND COMMENT; Pg. AA01

LENGTH: 386 words

HEADLINE: Review of Khadr ruling sought;
Pentagon asks judge to reconsider dismissal

BYLINE: Tim Harper, Toronto Star

DATELINE: WASHINGTON

BODY:

The Pentagon has formally requested a military judge reconsider his decision to dismiss war crimes charges against Canadian Omar Khadr.

Officials here say such a request is "standard practice" but others said yesterday it appeared to be an attempt by the Bush administration to buy enough time to properly establish a three-judge military appeals panel and launch an appeal of two decisions at Guantanamo Bay, Cuba, which left its military commissions process in disarray.

Navy Cmdr. Jeffrey Gordon, a Pentagon spokesperson, said if the judges refuse to reconsider their rulings, appeals will be launched.

Khadr, the 20-year-old Canadian who has languished at the Cuban prison for five years, and Salim Ahmed Hamdan, a Yemeni alleged to have been Osama bin Laden's driver, had charges against them dismissed Monday.

Khadr was 15 when he was captured in 2002 on the battlefield in Afghanistan following a pitched battle with U.S. forces. He is charged with killing one U.S. soldier and wounding another.

The judges in the two cases said the Pentagon could not prosecute them because they had not been identified as "unlawful" enemy combatants.

The U.S. defence department maintains the judges' decisions were rooted in semantics, but a number of analysts here believe the ruling goes to the heart of the system for trying combatants in the war on terror which U.S. President George W. Bush has fruitlessly tried to begin. The 2006 legislation passed by the U.S. Congress which created the military commissions gave them jurisdiction over "alien unlawful enemy combatants" but the Pentagon has classified Khadr, Hamdan and an estimated 380 others detainees as "enemy combatants."

Gordon said the U.S. government believes it is "implicit" in that classification that those at Guantanamo are unlawful combatants.

"All of them are unlawful by the nature of their activities," he said.

He said the Pentagon judges them unlawful because they are not members of the armed forces of any recognized nation state, serve in no army with an official chain of command, do not display their arms openly, do not wear a uniform and do not have any rank insignia.

Bryan Whitman, the chief Pentagon spokesperson, said there was no "material" difference between the two terms.

Most observers consider it unlikely the judges would change their minds.

Review of Khadr ruling sought; Pentagon asks judge to reconsider dismissal The Toronto Star June 9, 2007 Saturday

LOAD-DATE: June 9, 2007

6 of 58 DOCUMENTS

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The Star Phoenix (Saskatoon, Saskatchewan)

June 9, 2007 Saturday
Final Edition

SECTION: WORLD; Pg. A13

LENGTH: 503 words

HEADLINE: Pentagon plans to appeal dismissal of Khadr charges

BYLINE: Sheldon Alberts, CanWest News Service

DATELINE: WASHINGTON

BODY:

WASHINGTON -- The Pentagon announced Friday it will challenge a military judge's decision to dismiss all terrorism charges against Canadian Omar Khadr, even as the Bush administration scrambles to assemble an appellate court to hear a formal appeal of the ruling.

Jeffrey Gordon, a Pentagon spokesperson, said military prosecutors will file a motion asking army Col. Peter Brownback to reconsider his decision earlier this week to throw out the U.S. government's case against the 20-year-old Canadian detainee.

"It's the first route you take. It's standard procedure," Gordon said. "If you don't agree with the judge's findings, you file a motion to reconsider. That way, when you go to the appeals court, you will have exhausted every possible way to get your case resolved."

During a court hearing Monday at the American military base in Guantanamo Bay, Cuba, Brownback ruled U.S. military commissions lacked jurisdiction to put Khadr on trial because the Pentagon had failed to show he was an "unlawful enemy combatant" as required by law.

Khadr, accused of throwing a grenade that killed U.S. army Sgt. Christopher Speer in a 2002 firefight in Afghanistan, had previously been designated an "enemy combatant," leaving open the possibility he was lawfully waging war against American troops.

The distinction is potentially important for Khadr because he would be entitled to full prisoner-of-war rights if deemed to be a lawful combatant.

While the Pentagon claims the charges against Khadr were dismissed on a "semantic" technicality, human rights groups argue the ruling could lead to the collapse of the Bush administration's controversial war crimes tribunals.

The Khadr ruling initially caught the Pentagon off guard, with no avenue to appeal the decision because the Court of Military of Commission Review had not yet been assembled.

As of Friday, the appeals court "has been established, judges have been appointed, and the court is prepared to receive appeals," Gordon said.

The Pentagon acknowledged, however, the fledgling court was not yet ready to hear appeals.

Khadr's defence attorneys said the Pentagon's decision amounts to a delaying tactic as the Bush administration plots its next move.

Pentagon plans to appeal dismissal of Khadr charges The Star Phoenix (Saskatoon, Saskatchewan) June 9, 2007
Saturday

"I think, strategically, the prosecution's gambit is to use the motion for reconsideration to buy time to get this appeals court up and running in some form and fashion," said Lt.-Cmdr. William Kuebler, the military defence attorney detailed to Khadr's case.

"I don't think it exists in the sense that we would think a court exists. They have a clerk, so theoretically they have a warm body you could send an appeal to."

Khadr, who has been detained at Guantanamo since late 2002, had been charged with murder, attempted murder, conspiracy, spying and providing material aid to terrorists.

In the wake of the legal developments at Guantanamo this week, Democratic and Republican lawmakers have said they are considering legislation to amend the Military Commissions Act to clarify the law establishing the war crimes tribunals.

LOAD-DATE: June 9, 2007

6 of 15 DOCUMENTS

Copyright 2007 The New York Times Company
The New York Times

November 9, 2007 Friday
Late Edition - Final

SECTION: Section A; Column 0; National Desk; Pg. 23

LENGTH: 676 words

HEADLINE: Decks Are Stacked in War Crimes Cases, Lawyers Say

BYLINE: By WILLIAM GLABERSON

DATELINE: GUANTANAMO BAY, Cuba, Nov. 8

BODY:

The administration's problem-plagued military commission system started up here again Thursday, but it began with contentious new claims that the war crimes cases are unfairly stacked against detainees.

Military defense lawyers said that on the eve of the hearing, military prosecutors told them for the first time of a government witness who might be able to help a detainee, Omar Ahmed Khadr, counter the war crimes charges on which he was arraigned Thursday.

Mr. Khadr, the only Canadian detainee at Guantanamo, has been held here since he was 16. He is now 21.

"It is an eyewitness the government has always known about," said Lt. Cmdr. William C. Kuebler of the Navy, Mr. Khadr's chief military lawyer, who questioned why the military was only now informing the defense. Mr. Khadr is charged with the murder of an American soldier, spying, material support for terrorism and other charges.

In court, military prosecutors accomplished one of their goals after a long delay in the commission cases by completing the new arraignment for Mr. Khadr. It was the first arraignment since all Guantanamo war crimes cases were stalled by legal rulings against the prosecutors in June that were later overturned.

Thursday's proceedings were important for Bush administration officials, who are frustrated at the pace of the Guantanamo war crimes cases, which have repeatedly been halted by practical difficulties and court rulings.

Mr. Khadr appeared in court wearing a white prison uniform -- the color indicated he was a compliant detainee -- and was relaxed throughout the two-hour hearing.

Mr. Khadr's case has drawn wide attention, both because of his age and because his Toronto family has deep ties to Al Qaeda. His lawyers argue that he should be treated with the leniency often accorded child soldiers under international law, since he was a teenager at the time of the alleged crimes. Mr. Khadr did not enter a plea, and no trial date was set.

The controversy over the witness emerged after the hearing was completed. Defense lawyers said the new disclosures by prosecutors in closed-door meetings showed that the system was not intended to be fair.

Michael J. Berrigan, the deputy chief military defense lawyer for the Guantanamo cases, told reporters that defense lawyers had been told Tuesday night of the existence of a witness who could provide information that could help Mr. Khadr.

Decks Are Stacked in War Crimes Cases, Lawyers Say The New York Times November 9, 2007 Friday

"How we can have newly discovered evidence is beyond me," since prosecutors have been pursuing charges against Mr. Khadr for years, Mr. Berrigan said. The lawyers said they could not describe the witness because prosecutors told them the information was classified.

"Every time you all come down here you see the problems in this process," Mr. Berrigan said. Spokesmen for the military said prosecutors turn over information that could help a defendant when they learn of it. The military prosecutors declined to answer questions from reporters.

In response to defense assertions that military commission participants are under pressure from superiors to get war crimes cases moving quickly, a spokeswoman for the Office of Military Commissions, Lt. Catheryne Pully, said, "Our interest is in making sure the process is done correctly, not quickly."

Commander Kuebler used the courtroom session to mount a strenuous challenge to the military judge hearing the case, Col. Peter E. Brownback III of the Army.

Commander Kuebler noted that the judge had barred the defense from raising challenges at this stage of the case to the constitutionality of the military commission system. He added that the judge had told him in a closed-door meeting that he had "taken a lot of heat" after issuing one of the rulings in June that stalled the commission cases. Pentagon officials and a White House spokesman said they disagreed with the June rulings.

Colonel Brownback, clearly irritated, said he had not intended Commander Kuebler to disclose that conversation but said, "I never said anyone who had any influence over me said anything."

URL: <http://www.nytimes.com>

GRAPHIC: PHOTO: A detention area at Guantanamo Bay, Cuba, where a military commission began hearing new claims yesterday. (PHOTOGRAPH BY TODD HEISLER/THE NEW YORK TIMES)

LOAD-DATE: November 10, 2007

UNITED STATES
OF
AMERICA

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Schedule for Trial

28 November 2007

1. The following trial schedule is ordered.

a. Law Motions:

Defense law motions are due as detailed below. Prosecution shall give notice of any law motions NLT 1630 hours, 7 December 2007 - due dates for such motions will be established upon receipt of notice of motions.

1. 7 December 2007 - 7 law motions.
2. 11 January 2008 - 7 law motions.
3. 18 January 2008 – All remaining law motions.

Note 1: Motions will have as their underlying legal premise no more than one legal basis. If there is more than one legal basis, then there should be more than one motion. Law motions include motions relative to sentencing.

Note 2: Motions, response, and reply due dates are a No Later Than date. Counsel for both sides are advised that any motion, response, or reply which is ready for submission prior to the due date should be submitted when completed. The efficient and proper process of motion practice will NOT be enhanced by delivering multiple motions, responses, or replies to the Commission or opposing party at the last possible moment.

Note 3: The due dates set in this order apply to those motions about which counsel should currently be aware -- changes in the law or in factual circumstances may require further motions.

b. 4-8 February 2008: Hearing in Guantanamo re law motions.

Note: The Commission is blocking off the entire week of 4-8 February to hear law motions. The exact date within that block time will be established following receipt of motions and other information.

c. 28 February 2008: Evidentiary Motions.

Evidentiary motions due to the military judge and opposing counsel. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence. They also include motions which require a substantial number of witnesses and production of evidence to litigate. If counsel intend to submit more than ten (10) evidentiary motions, counsel will tell the military judge and opposing counsel the total number of evidentiary motions which counsel intend to present NLT 1200 hours, 21 February 2008.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

d. 1 April 2008: Hearing in Guantanamo re Evidentiary Motions.

1 April 2008 : Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. See R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

e. 15 April 2008: Submission of requested group voir dire questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

15 April 2008: Hearing re witness production/unresolved issues

f. 5 May 2008: Assembly and voir dire of members in Guantanamo.

2. Counsel should direct their attention to the Rules of Court, RC 3, Motions Practice, and specifically Form 3-1, 3-2, and 3-3, for the procedures established for this trial. Counsel should also be aware of the additional standards set regarding the numbering of

paragraphs and subparagraphs in correspondence. All motions, responses and replies shall comport with the requirements of RC 3.6 in terms of timeliness.

3. Requests for deviations from the timelines for hearings or for submission of motions established by this order must be submitted not later than 20 days prior to the date established. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response; such requests need not be extensive in nature, but they must identify with particularity the response or reply to which the request applies.

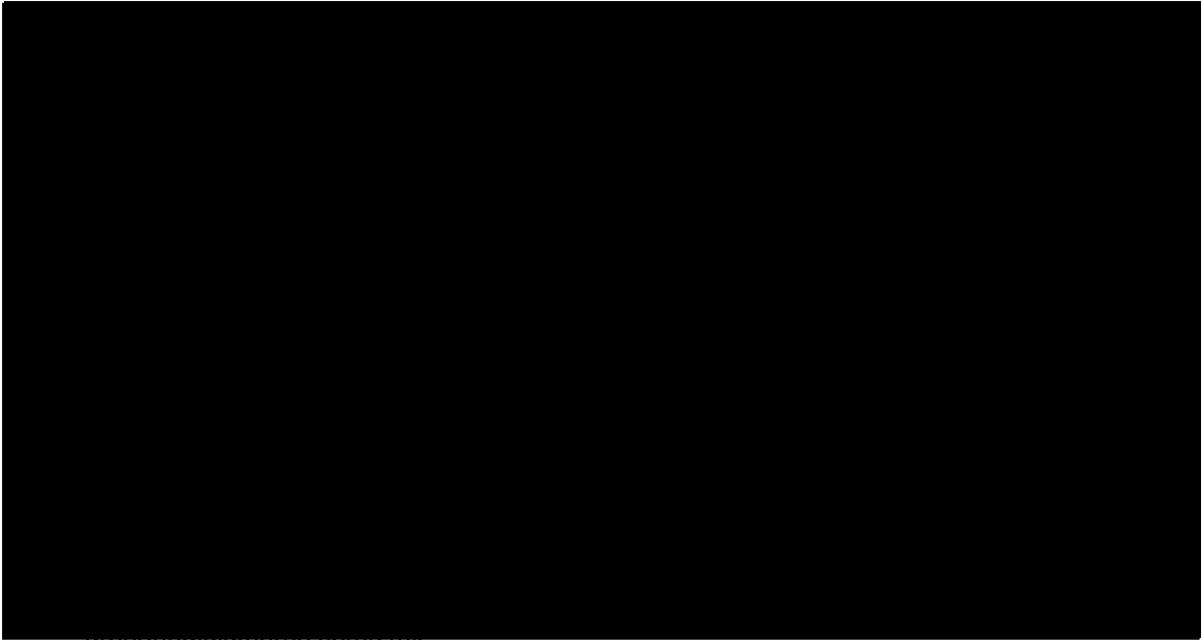
Peter E. Brownback III
Colonel, USA
Military Judge

Kuebler, William, LCDR, DoD OGC

From:
Sent:
To:

Cc:

Subject:
Signed By:



Attachments: Proposed Trial Schedule - Gov't response to MJ 9 Nov email.doc; 19 Nov 2007 - Times Online Article.pdf; 20 Sept 2007 Canada.com Article.pdf; 8 Nov 2007 - Canada.com article.pdf



Proposed Trial Schedule - Gov'...



19 Nov 2007 - Times Online Art...



20 Sept 2007 Canada.com Articl...



8 Nov 2007 - Canada.com articl...

Sir,

1. The Government has reviewed the two proposed trial schedules and requests the Military Judge adopt the attached schedule. This proposed schedule takes into account the motions filing dates previously agreed to by the parties at the 802 session held on 7 November 2007, and allows the Defense significant additional time to prepare for trial.

2. Due to the number of motions to be filed, the Government requests an extension until 21 December to respond to the Defense motions that will be filed on 7 December.

3. The Government reiterates that we are prepared to proceed to trial and notes that the trial dates proposed by the Military Judge result in trial on the merits over one year after referral of charges and over 14 months after the current Defense Counsel was detailed to the case.

4. The Defense has had ample time to prepare legal challenges to the Military Commission, review materials provided by the Government, and prepare their defense to these charges.

5. During the 802 session held on 7 November 2007, the Defense requested additional time from the schedule proposed by the Government in order to prepare and file their "first 7-10 'law motions.'" The Government, in good faith, agreed to a 7 December 2007 filing deadline, in order to allow the Defense that additional time to prepare for motions.

6. Contrary to their assertions regarding the necessity for additional time to prepare legal motions, as of the date of this filing, Defense counsel are in London - at Government expense - attempting to rally support for their

lobbying effort to bring about the release of the accused from GTMO. (See attached article "Lawyers seek help in Britain for 'child soldier' at Guantanamo"). As the Government stated during the 9 November 2007 802 session, we do not believe the Defense has any intention to go to trial and continues to focus their efforts to affect a political resolution of this case (see other attached articles) rather than preparing to defend the accused at trial. The most recent efforts by the Defense appear to have little relation to preparing legal motions or preparing to defend the accused at a Military Commission. The Military Judge should not grant further requests for delay by the Defense absent a showing that they are actively engaged in preparing to defend the accused.

7. The Government respectfully requests the Military Judge issue the attached schedule.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions

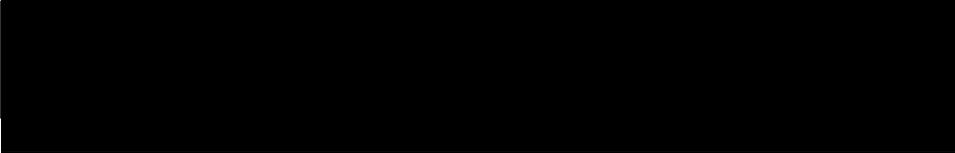


COL Brownback has directed that I send the email below and the attachments to the parties.

V/r,



Senior Attorney Advisor
Military Commissions Trial Judiciary
Telephone: [REDACTED]



Fax: DC - [REDACTED]
Email: DC - [REDACTED]

-----Original Message-----

From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Sent: Friday, November 09, 2007 4:09 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Proposed Trial Schedule - 9 November 2007

LT [REDACTED]

Please forward the email below to the parties in the case of United States v. Khadr. Please furnish a copy to other interested persons. Please forward a copy of the summary of the RMC 802 conference to all concerned when it is available.

COL Brownback

Counsel in the case of US v. Khadr,

1. References:

- a. Defense proposed trial schedule of 29 October 2007.
- b. Prosecution proposed trial schedule of 30 October 2007.
- c. Military Judge proposed trial schedule of 7 November 2007 (attached).
- d. RMC 802 conference, 7 November 2007, AE 049.
- e. RMC 802 conference, 9 November 2007 - summary being prepared.
- f. Military Judge proposed trial schedule of 9 November 2007 (attached).

2. As noted on the record of trial on 8 November 2007, an RMC 802 conference was scheduled for 9 November 2007 at 1500 to address issues concerning the proposed trial schedule. For reasons not relevant to this email, the RMC 802 conference was not able to address the proposed trial schedule.

3. The military judge provided the participants in the 802 conference (Defense - LCDR Kuebler, Ms. Snyder, Mr. Whitling, Mr. Berrigan, Prosecution - MAJ Groharing, CPT Petty, Mr. Murphy) a copy of reference 1e.

4. Counsel for both sides should provide any comments on reference 1e NLT 21 November 2007.

5. By separate email, the military judge will be allocating, absent a change in reference 1e, a continuance for the time period from 20 November 2007 to 11 January 2007 to the defense in accordance with reference 1a. Further accounting for time periods will be done as required.

Peter E. Brownback III
COL, JA, USA
Military Judge

Prosecution Proposed Trial Schedule, 30 October 2007
United States v. Khadr

*The Government is providing this proposal for motion and trial schedule pursuant to COL Brownback's e-mail sent at 1556hrs on 25 September 2007, as amended by the e-mail sent at 1351hrs, 28 September 2007.

#	Event	Date	
1.	Arraignment	8 Nov 07	
2.	"Law" Motions: <i>Motion</i> ¹	16 Nov 07	
3.	"Law" Motions: <i>Response</i>	30 Nov 07	
4.	"Law" Motions: <i>Reply</i>	7 Dec 07	
5.	Evidentiary motions: <i>Motion</i>	30 Nov 07	
6.	Evidentiary motions: <i>Response</i>	14 Dec 07	
7.	Evidentiary motions: <i>Reply</i>	21 Dec 07	
8.	Defense Witness requests for evidentiary motions, trial, and sentencing ²	30 Nov 07	
9.	Prosecution Response to Witness Requests	7 Dec 07	
10.	Defense Motion to Produce Witness for Evidentiary Motions, trial, and sentencing	14 Dec 07	
11.	Prosecution Response to Defense Motion to Produce Witness for Evid. Motion	21 Dec 07	
12.	Motions Hearings: "Law Motions" & "Evidentiary motions"	14 Jan 08	
13.			
14.	Voir dire of members	28 Jan 08	
15.	Trial	29 Jan 08	

¹ A "law motion" is any motion except that to suppress evidence or address another evidentiary matter.

² Defense must concurrently notify the Office of the Convening Authority sufficiently in advance and provide all required information to enable the Office of the Convening Authority to arrange for transportation of the requested witnesses to Guantanamo Bay.

Kuebler, William, LCDR, DoD OGC

From: [REDACTED]
Sent: Thursday, February 21, 2008 6:29 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Commission Session - US v. Khadr - 13-14 March 2008

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

[REDACTED]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [mailto:abnmj@cfl.rr.com]
Sent: Thursday, February 21, 2008 17:26
To: [REDACTED]
Subject: Commission Session - US v. Khadr - 13-14 March 2008

[REDACTED]

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to:

- a. D-024 and the government response thereto.
- b. D-025.
- c. Email, [REDACTED] February 2008, 3:29, Subject: Discovery Motions - Khadr.

Attachment M

7/22/2008

d. Email, LCDR Kuebler, 21 February 2008, 11:55, Subject: Special Request for Relief - Discovery Motion - US v. Khadr.

e. RMC 802 Conference, 1500 hours, 21 February 2008 - Summary Being Prepared.

2. References 1a thru 1e establish that the parties are in complete disagreement about the status of the case. A significant problem affecting the case status is discovery.

3. Counsel for both sides will provide each other all discovery motions NLT 4 March 2008. If the short time period does not allow full briefing of the motion, counsel will provide a modified notice of motion - sufficient to identify the specific item of discovery, the need for the item, and the efforts already made to obtain the item. Counsel will respond to such motions NLT 10 March 2008. If a motion is set forth in notice of motion style, the response may be in the same style.

4. A session will be held in Guantanamo on 13 March 2008 and may run as late as noon on 14 March 2008. This session will resolve all pending discovery issues. The courtroom is available on 13 and 14 March. The military judge will be available for RMC 802 conferences on 11 and 12 March 2008.

5. Any discovery issue currently known to counsel must be identified to the commission.

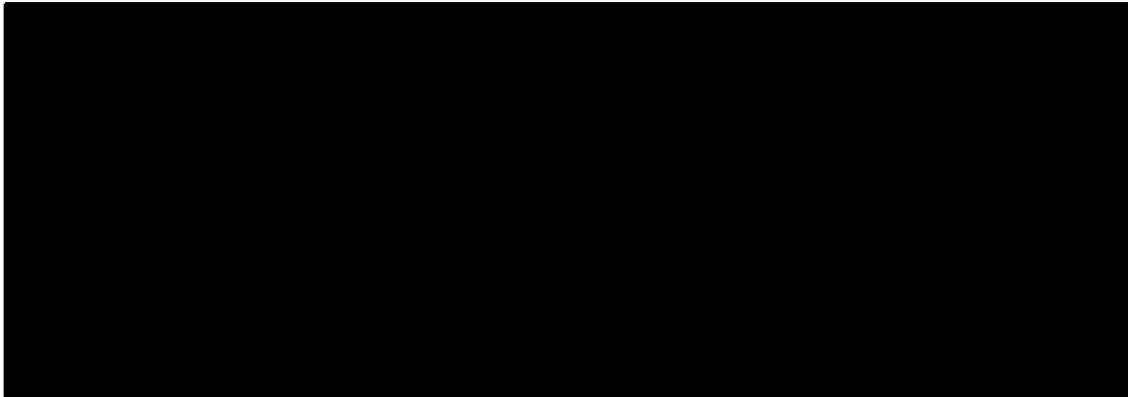
Peter E. Brownback III
COL, JA, USA
Military Judge

Kuebler, William, LCDR, DoD OGC

From:
Sent:
To:

Cc:

Subject:

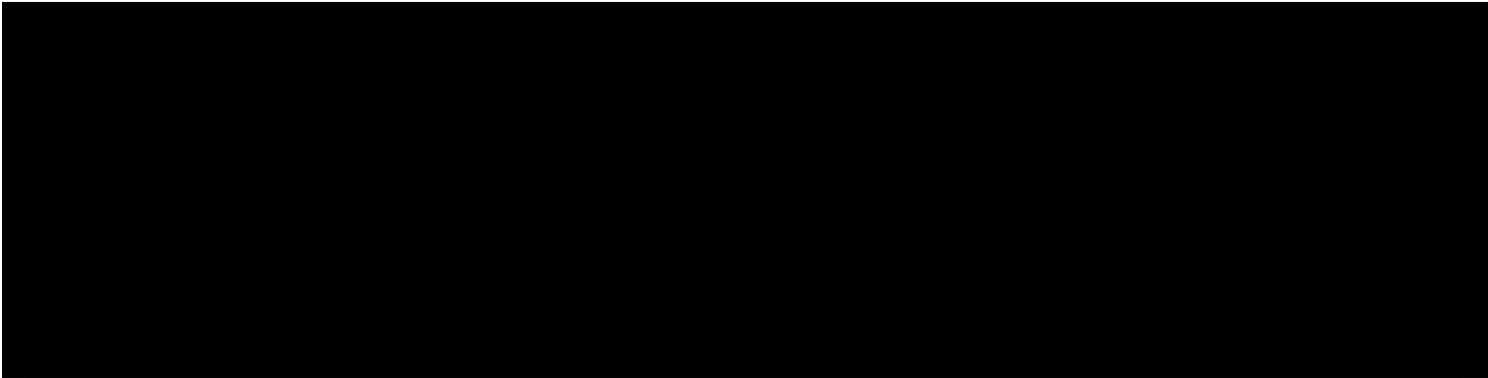


Per COL Brownback, if the need for an 802 Conference is imperative because of the response deadlines issued by COL Brownback, then the deadline will be extended.

If there are other reasons for having a conference, then a telephonic 802 Conference will be held at 1500 hours on 21 February 2008.

v/r,


>Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

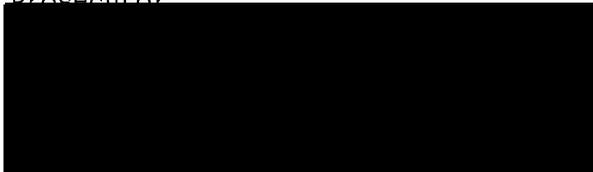


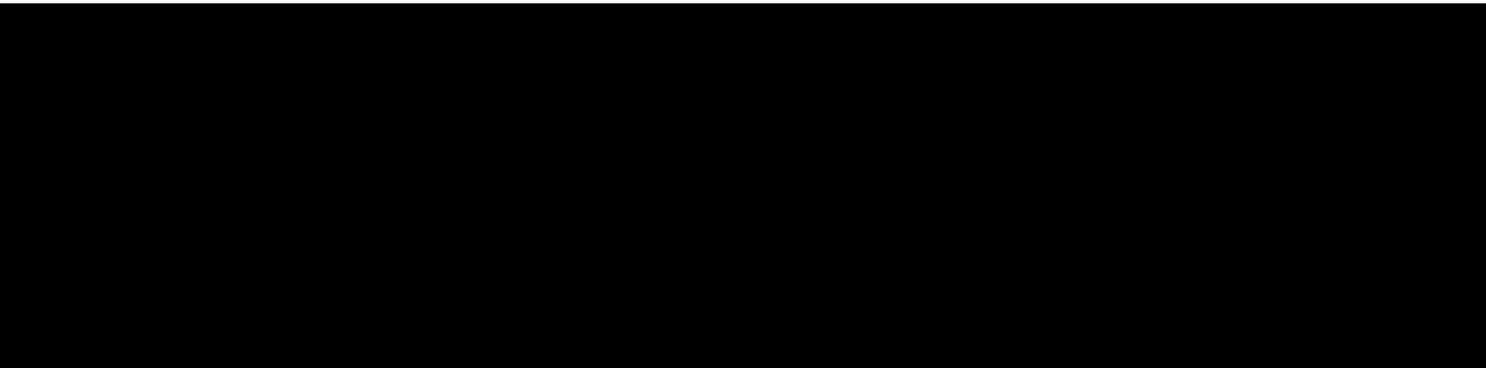
Sir,

The prosecution feels that it is imperative to conduct an 802 in order to discuss the defense filing and its possible impact upon the current trial schedule. We are available anytime.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor



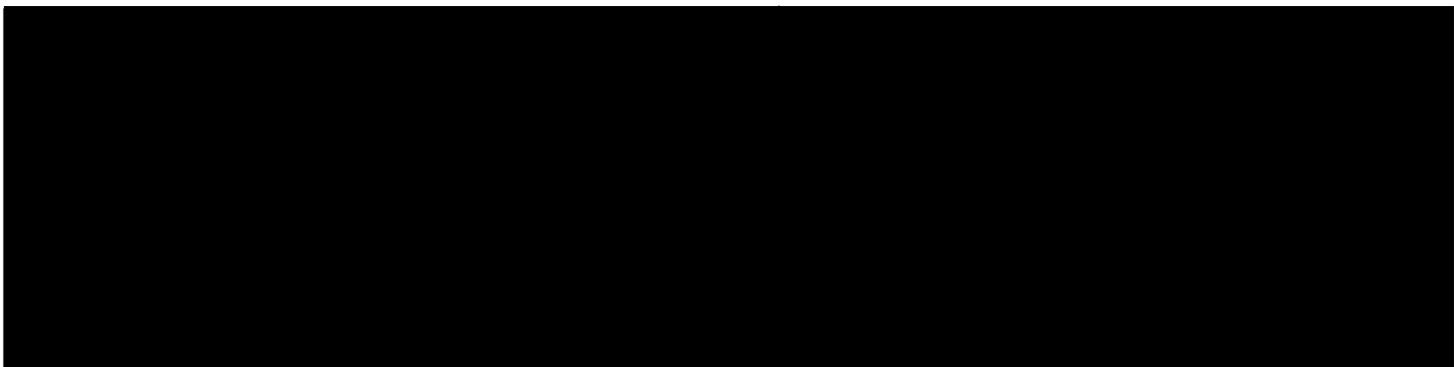


Sir,

Defense counsel are unavailable for an 802 either today or tomorrow. We have a meeting this afternoon (away from our office) and are scheduled to commence an approximately 24 hour TAD immediately thereafter. We have so informed the prosecution.

VR,

LCDR Kuebler

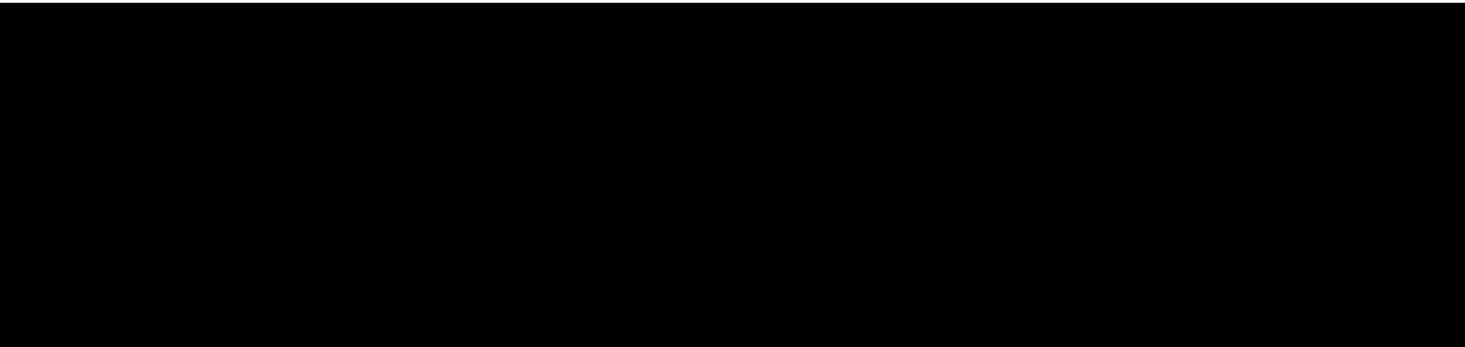


Sir,

The Prosecution requests an 802 with the Military Judge and the defense to discuss the subject request. We are available anytime today or tomorrow, at the Military Judge's convenience.

V/R,

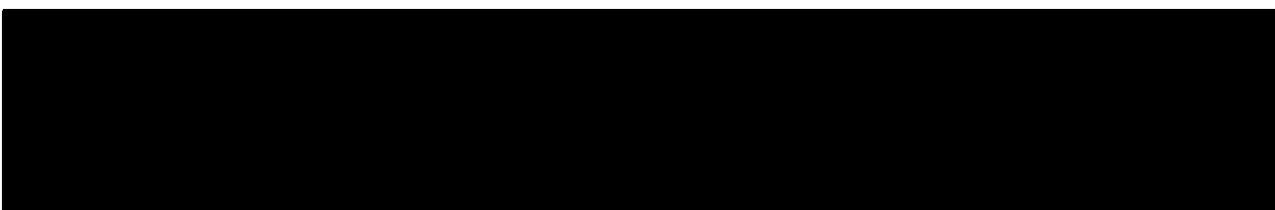
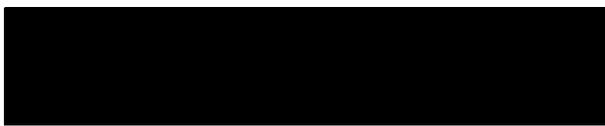
Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions





Per COL Brownback, does the Prosecution intend to respond to the request for continuance submitted by the Defense in the email below? Any Prosecution response should be received NLT 1630 hours, 21 February 2008.

v/r,



Please determine if the Prosecution intends to respond to the request for continuance submitted by the Defense in the email below. Any response should be received NLT 1630 hours, 21 February 2008.



Sir,

Please find attached for filing a defense motion for continuance.

VR,

LCDR Kuebler

Memorandum for Record

Subject: RMC 802 Conference - 21 February 2008

1. At the request of the government, an RMC 802 conference was held by telephone from 1500-1525 hours, 21 February 2008.
2. Participating were:
 - a. COL Brownback
 - b. MCTJ - LTC Chappell, LTC Sowder
 - c. Defense - LCDR Kuebler, Ms. Snyder
 - d. Government - MAJ Groharing, CPT Petty, Mr. Oldham, Mr. Murphy
3. The conference was initially requested by the government based upon D-024 - a defense request for a continuance - which was submitted on 19 February 2008. The conference was further focused on D-025 - a defense discovery motion. [While D-024 was received on 19 February 2008, the motion itself was dated 15 January 2008. LCDR Kuebler stated that the date on the motion was a typographical error.] D-025 generated an email from LTC Chappell, on 20 February at 3:29, Subject: Discovery Motions - Khadr, in which the military judge established a NLT date for discovery motions. That 20 February email brought an email from LCDR Keubler, on 21 February at 11:55, Subject: Special Request for Relief - Discovery Motion - US v. Khadr. The government response to D-024 was received by the commission and parties 2:38 on February 21, 2008.
4. MAJ Groharing stated that he was concerned that D-024 would throw off the established trial date - his concern was also evident in his response to D-024. He requested the RMC 802 conference to find out what other justifications the defense has for moving the trial date. The military judge stated that he would allow the defense to respond to D-024 in writing rather than during the RMC 802 conference.
5. LCDR Kuebler recognized that a delay in the proceedings would indeed delay the established trial date. He voiced his objection to comments made in the government response to D-024.
6. The military judge stated that he was not going to rule on D-024 at this time.
7. The military judge stated that he was looking prospectively rather than retrospectively. He noted that the parties had been in Guantanamo with the military judge and an empty courtroom on the afternoon of 4 February and all day 5 February. The issues raised by D-024 were generally addressed in an RMC 802 conference at Guantanamo, but the discovery issues raised in D-025 and in LCDR Kuebler's email of 11:55, 21 February, were not presented to him by either party.
8. LCDR Kuebler set forth his view on the efforts that the defense has made in filing and litigating the law motions and is making to resolve discovery issues. Those efforts were related in his 21 February email. LCDR Kuebler explained that the defense had litigated fifteen motions with one-third of the government's resources. LCDR Kuebler also explained that the defense

had attempted to meet with the government to discuss discovery issues before filing discovery motions that discussions with the government could have rendered unnecessary, but that the government was unwilling to meet with the defense.

9. The military judge stated that he was not assigning blame to either party - except perhaps to himself. He urged the government to review their response to the defense discovery request to determine what discovery they could provide. He urged the defense to review the discovery request to identify what items of discovery it needs.

10. The military judge stated that the parties would meet in Guantanamo on 13 March 2008 and the discovery issues would be resolved then. He noted, in response to LCDR Kuebler's concern about future issues, that he was not precluding future discovery requests - however, the twelve or so motions to which LCDR Kuebler alluded in his 21 February 2008 email were certainly ripe for resolution. The military judge further stated that he would send an email establishing the session and setting out what would be covered at the session.

11. The military judge recognized that preparing the discovery issues in the time allotted might not allow for full and formal briefing. He pointed out that counsel could give notice of motion type identification - the discovery item in question, the need for it, the attempt to resolve it.

12. Both parties were asked if they had any significant obstruction to being in Guantanamo on 13 March. Neither party did.

3. The military judge stated that he would prepare a summary of the RMC 802 conference and coordinate with Ms. Snyder on it. Both sides agreed to have Ms. Snyder serve as the initial review person.

14. This summary was approved by counsel for both sides before it was adopted by the military judge. *See* Email, Ms. Snyder, 22 February 2008, 5:01 PM, Subject: Fw: KHADR Draft - RMC 802 Conference Summary - 21 February 2008.

Peter E. Brownback III
COL, JA, USA
Military Judge
1710 hours, 22 February 2008

Distribution: All Conference Participants

7 of 10 DOCUMENTS

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The Miami Herald

Found on Miami.com
The Miami Herald

May 8, 2008 Thursday

LENGTH: 1078 words

HEADLINE: Judge threatens to suspend war court trial

BYLINE: CAROL ROSENBERG, crosenberg@MiamiHerald.com

BODY:

GUANTANAMO BAY NAVY BASE, Cuba -- A military judge in the trial of Canadian captive Omar Khadr threatened Thursday to suspend the terror trial unless the prison camp releases a detailed log of Khadr's treatment in more than five years of detention as an alleged al Qaeda terrorist.

Khadr, 21, is accused of throwing a hand grenade in a July 2002 firefight between U.S. forces and al Qaeda suspects in Afghanistan. A Special Forces medic, Sgt. 1st Class Christopher Speer, 28, of Albuquerque, N.M., died of his wounds. Khadr was 15.

His attorney, Navy Lt. Cmdr. William Kuebler, wants the log in a pretrial effort to limit the scope of evidence given to a jury of U.S. military officers at his upcoming trial, expected in late summer. He argues the circumstances of some interrogations would exclude some of his statements from the trial.

Thursday morning, the military judge, Army Col. Peter E. Brownback III, agreed with the defense that it should get copies of the log entries from the prison camp's Detainee Information Management System, or DIMS.

Brownback is believed to be the first war court judge to threaten to "abate" the proceedings if the prison camp's command staff does not turn over the evidence.

"I find that this is relevant because it shows the day-by-day, hour-by-hour track of Mr. Khadr throughout his detention here at Guantánamo Bay," the colonel said.

The extensive document is "a method of determining how he went through the system."

The hearing took place in the original military commissions courtroom, an old air traffic control tower on a hill overlooking "Camp Justice."

A day earlier, war court staff retreated from the Pentagon's showcase \$12 million "Expeditionary Legal Complex" following a series of technical glitches, including a power outage, in a first test use of a maximum-security, snoop-proof court created for the trial of six alleged 9/11 conspirators.

The log the Khadr defense team seeks would draw back a layer of secrecy surrounding Khadr's treatment at this offshore Navy base, where

the Toronto-born teen grew into bushy-bearded, six-foot-two adulthood behind the razor wire of Camp Delta.

The detention center did not immediately respond Thursday afternoon to a question on why the log was so sensitive, or why the prison camps objected to it being released to Khadr's attorneys.

Judge threatens to suspend war court trial The Miami Herald May 8, 2008 Thursday

Defense lawyers argue that Khadr, the son of an alleged senior al Qaeda financier, has been subjected to repeated mistreatment at Guantánamo to reinforce a confession he gave in detention at the Bagram air base in Afghanistan.

They argue he was coerced into a confession soon after his capture, injured with two bullet wounds in his back -- and punished here if he didn't stick to that first account.

Prison camp commanders have consistently denied that Khadr has been mistreated -- and say its enemy combatant detention regime is safe and humane, for both detainees and their military guards.

Khadr was sent here in 2002 after his 16th birthday and has been held in the cellblocks with other adult prisoners classified as "enemy combatants," -- not at Iguana House, a special prison camp set up for juvenile combatants since sent home.

In early 2005, his attorneys sought a criminal investigation into allegations that guards used Khadr as a human mop to clean up an interrogation room at the prison camps.

According to their description, Khadr had been left shackled so long in an interrogation booth in March 2003 that he urinated on himself. To clean it up, they claimed, guards poured a cleaning solvent on his soiled prison camp uniform and dragged him across the floor to wipe it up.

In March, a Pentagon spokesman, Navy Cmdr. Jeffrey Gordon, said there ``was no evidence to substantiate these claims.'

Brownback noted that Khadr's defense attorneys -- Kuebler and Rebecca Snyder, a civilian Pentagon lawyer -- are cleared to see any sensitive national security information that might be included in the log.

He set a deadline of 5 p.m. May 22 for authorities to turn over the log or find a remedy for the standoff over access to the details of Khadr's confinement.

"If not," Brownback said, ``we stop."

After the hearing, Air Force Maj. Gail Crawford, a military commissions legal expert, said there has been no abatement so far at the war court, which is now receiving pretrial motions in six cases and has charge sheets for seven more in the wings.

"If you can't get discovery, you can't go forward," Crawford said.

Brownback's ultimate remedy after abatement, she said, would be to dismiss the charges entirely. ``If after a time the clock runs out, and the judge can dismiss it because they've busted the speedy trial clock."

Different war court judges have been struggling with their authority to issues orders related to the running of the prison, a razor-wire-ringed series of camps that sprawl across a bluff overlooking the Caribbean -- miles away from the tribunal building.

The judge in the case of Osama bin Laden's driver, expected to be the first at trial, has set late May for a hearing on the conditions of confinement of the driver, Salim Ahmed Hamdan.

Hamdan's lawyers say he is so emotionally unstable after years of isolation in the camps that he is not competent to assist in his defense.

Last week the driver declared he would boycott the proceedings after the judge, Navy Capt. Keith Allred, postponed a hearing on the topic.

"I don't have any control over the conditions of your confinement," Allred told Hamdan. ``I've read in the newspapers that you and others are unhappy with them, and I understand that."

Then Wednesday, a defense attorney in the case of Afghan detainee Mohammed Jawad, captured at 17, point blank asked Brownback whether he had the authority to intervene in the circumstances of his client's captivity. Brownback hedged a reply.

Jawad is accused of throwing a grenade into a U.S. military jeep at a bazaar in Kabul and injuring two American soldiers and their interpreter. He claims he was punished for refusing to come to his war court arraignment in March.

In order to get him there, his lawyer said, guards dragged him from his cell. In March, he was brought into the court in leg shackles, a war court first.

Judge threatens to suspend war court trial The Miami Herald May 8, 2008 Thursday

"I believe that some court should have some supervisory power over the administration of the detention facility. Up until now, it has been an empire unto itself," said Jawad's attorney, Air Force Reserves Maj. David J.R. Frakt, who is in civilian life a California law professor.

LOAD-DATE: May 8, 2008

1 of 9 DOCUMENTS

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The Calgary Herald (Alberta)

May 9, 2008 Friday
Final Edition

SECTION: NEWS; Pg. A6

LENGTH: 286 words

HEADLINE: Khadr probe details could have scuttled case: lawyer; Judge threatens to suspend trial

BYLINE: Steven Edwards, Canwest News Service

DATELINE: U.S. NAVAL BASE GUANTANAMO, Cuba

BODY:

The United States pulled the plug on a crucial 2006 U.S. army probe that would have likely scuttled the case against Omar Khadr had it continued, the Canadian terror suspect's military-assigned lawyer charged Thursday.

Speaking after Khadr appeared before the U.S. military war crimes commission here, Lt.-Cmdr. Bill

Kuebler said investigators appeared headed toward documenting serious interrogator abuse during the three months Khadr, then 15, was held at the Bagram detention facility in Afghanistan in the aftermath of his July 2002 capture.

Putting any abuse in the official military record would throw doubt on the legitimacy of statements he made at the time -- statements which now may be used against him in an eventual trial.

"The government realized that if they pulled the string on Omar's treatment in Bagram . . . that this case would have collapsed in 2006," Kuebler said.

There was also drama during the hearing when Judge Peter Brownback, a U.S. army colonel, appeared to threaten to suspend the entire case over the prosecution's failure to hand over Khadr's Guantanamo confinement records.

Kuebler seeks the so-called Detainee Information Management System records, or DIMS, to develop a detailed picture of Khadr's treatment during detention as he tries to uncover reasons why incriminating statements should be suppressed.

Brownback was angry the case's chief prosecutor, Maj. Jeffrey Groharing, had been pressing him to go to trial quickly.

"I have been badgered, beaten and bruised by Maj. Groharing since the 7th of November to set a trial date," Brownback said. "To get a trial date, I need to get discovery done."

He ordered the government to provide the DIMS by May 22, or he would suspend proceedings.

GRAPHIC:

Photo: Janet Hamlin, CBC; A courtroom sketch shows Omar Khadr, charged with war crimes, appearing before a U.S. war crimes commission in Guantanamo Thursday. ;

LOAD-DATE: May 9, 2008

Kuebler, William, LCDR, DoD OGC

From:
Sent:
To:
Cc:

Subject:

Counsel in the case of US v. Khadr,

1. The commission has considered the defense request below (Email, LCDR Kuebler, 23 May 2008, 1509 hours.) . The commission has not received any input from the government - due in large part to the outage of email in Guantanamo and other factors. Consequently, the commission is making its decision based solely on the defense request and the needs of justice.

2. The commission is aware that the defense has received a great deal of discovery materials. The commission notes that the defense, which asserts the amount of discovery received as one of the reasons which causes the defense to request a delay, has filed five discovery motions in the past forty-eight hours. The commission further notes, as it has on the record, that the commission was not advised of any deficiencies in discovery until after 1 February and it was not advised formally of any deficiencies in discovery until after the session on 4 February 2008.

3. The commission further notes the position taken by the prosecution at the 8 May 2008 session. The commission believes that there is a considerable amount of merit in the prosecution's position.

4. The commission declines to delay any dates based on a ruling on MJ-012. MJ-012 was a request by the commission for the parties positions on various matters. The commission may or may not rule on MJ-012. The commission may or may not allow the parties to argue MJ-012. Consequently, the lack of a ruling or ability to argue on MJ-012 is not a basis for delay.

5. The commission takes the defense at its word that it is working to enter into a stipulation of fact with the prosecution. The commission expects that both parties will work in good faith to enter into a stipulation on those matters which no reasonable person could contest. Given the obvious savings of time, energy, and court member attention, the commission has and does encourage a stipulation of fact. Consequently, the commission grants a delay as to the filing of those motions in limine referred to in paragraph 1a of the email below.

6. The commission anticipates receiving all of the motions concerning those matters referred to paragraph 1c and 1d of the email below NLT 28 May 2008.

7. In the interests of justice, the commission grants a delay for the motions referred to in paragraph 1b of the email below. In granting this delay, the commission notes that with the discovery it has received, the defense should have some idea of which statements it believes it has a good faith basis to suppress. The commission does not direct, but does suggest, that the prosecution advise the defense concerning which statements of Mr. Khadr it intends to offer. The motions referred to in paragraph 1b of the email below will be due on a schedule to be established at the next session.

Peter E. Brownback III
COL, JA, USA
Military Judge

> Ma'am,
>
> 1. The defense anticipates filing evidentiary motions falling into
> four broad categories in this case:
>
> a. Motions in limine (approximately 6) to exclude (or limit the use
> of) evidence of pre-June 2002 conduct of persons other than Mr.
> Khadr, including evidence relating to the activities of "al Qaeda"
> (including a response to the government's motion to admit the "al
> QaedaPlan" motion picture, P003);
>
> b. Motions to suppress statements of Mr. Khadr (undetermined
> number) based on MCRE 304 (i.e., statements that are the product of
> torture or coercion, or the fruit of such conduct);
>
> c. Motions to suppress statements of Mr. Khadr (1-3) on other
> grounds (e.g., as a remedy for detention and interrogation in
> violation of the Optional Protocol on children involved in armed
> conflict); and
>
> d. One motion to exclude the testimony of a prosecution expert
> relating to IEDs due to the government's failure to preserve relevant
> evidence.
>
> 2. The defense expects to be able to enter into a stipulation of fact
> with the prosecution (as suggested by the ruling on D-055), which
> should obviate the need to file the motions referred to in para. 1a as
> the prosecution has stated to the defense that it will not offer
> evidence of pre-June 2002 activities of al Qaeda if the parties
> stipulate.
> However, unless defense counsel are able to meet with Mr. Khadr and
> obtain his consent to such a stipulation before 28 May 08 (the current
> deadline for evidentiary motions), the defense will be required to
> file the anticipated motions in limine (and expend the time and effort
> to do so).
> There is no possibility that defense counsel will be able to meet with
> Mr. Khadr before 28 May 08. Moreover, notwithstanding any
> stipulation, the Military Commission's ruling on MJ-012 could have a
> substantial impact on the evidence the defense would be seeking to
> exclude. As things stand, it does not appear that MJ-012 will be
> resolved before the parties have the opportunity to argue matters
> relating thereto at the next session of the Commission (18 Jun 08).
>

> 3. Based on the foregoing, the defense respectfully requests that the
> Military Judge extend the deadline for evidentiary motions referred to
> in para 1a until such time as the Military Judge rules on MJ-012. In
> practical terms, this means the defense would have the opportunity to
> meet with Mr. Khadr in advance of the 18 Jun 08 session, obtain his
> consent, and enter into the stipulation of fact on the record, thereby
> effectively mooting MJ-012. If for some reason, the parties are not
> able to enter into a stipulation, the Military Judge will rule in
> connection with MJ-012 and the defense will file motions in accordance
> with the ruling.

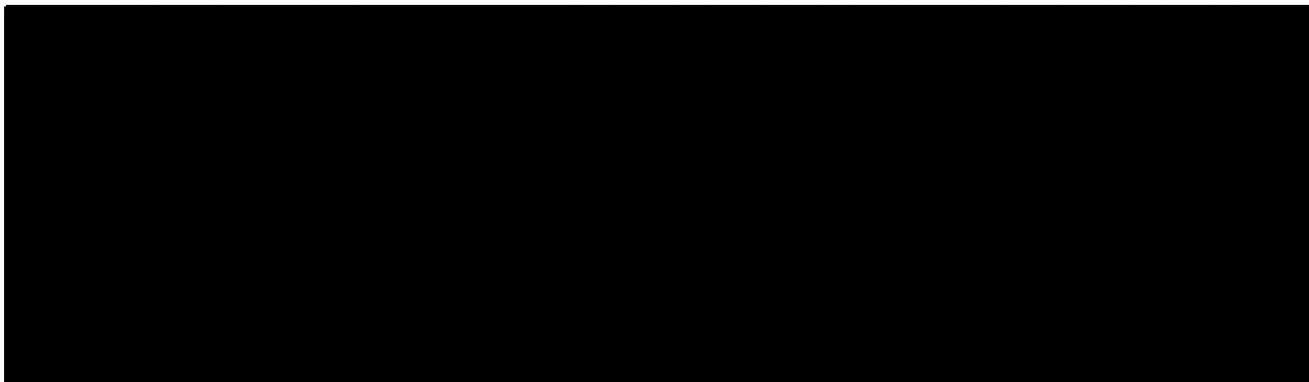
>
> 4. With respect to motions referred to in para. 1b, the defense
> simply cannot file such motions until it has completed discovery into
> the circumstances of Mr. Khadr's detention and interrogation at Bagram
> and Guantanamo Bay. The process of discovery into these matters is
> ongoing. The prosecution has not completed service of discovery
> relating to these matters. And the defense has not had time to
> adequately digest the discovery that has been provided thus far. The
> defense has received in excess of 7,000 pages of material in response
> to previous discovery requests and orders of the Commission -- most of
> that material was served just in April and nearly 1000 pages was
> served within the last week. In addition, there are literally
> hundreds of pages of material that defense counsel can only review in
> the prosecution offices relating to the motions to suppress Mr. Khadr's
> statements. The defense has been served with approximately 144
> interrogation summaries of Mr. Khadr (some are duplicates), spanning
> over three years of interrogation, and involving dozens of
> interrogators. Defense counsel simply have not had the time to
> competently investigate and prepare to litigate motions to suppress
> Mr. Khadr's statements, which, of course, form almost the entire basis
> for the government's case against Mr. Khadr on all charges (except,
> perhaps, Charge II). Finally, the defense believes that it is
> entitled to expert assistance and/or testimony relating to the
> admissibility of these statements. The defense has requested funding
> for these experts from the convening authority - two were denied this
> week and one is still outstanding. The defense is currently drafting
> motions to compel production of these experts and expects to be
> prepared to litigate them in connection with the 18 Jun 08 session of
> the Commission.

>
> 5. Based on the foregoing, the defense respectfully requests that the
> Military Judge modify the existing deadline for evidentiary motions to
> allow the defense to file motions covered by para 1b after the
> completion of discovery and litigation of expert requests regarding
> these matters. The defense notes that this process might be assisted
> if the prosecution was required to provide notice of which specific
> statements it intends to introduce evidence of at trial.

>
> 6. The defense intends to file motions covered by paras 1c and 1d IAW
> the Commission's current deadline.

>
> V/R
>
> LCDR Kuebler
>

Kuebler, William, LCDR, DoD OGC



Subject: Defense Motions to Compel

Ms. Bley,

Please pass to Colonel Brownback.

1. In the past week the Defense has filed five additional motions to compel discovery. The motions filed by the Defense have not been assigned filing designations.
2. In the Military Judge's ruling on D-056, he noted that the commission would consider the timeliness of these additional motions in due course.
3. With the exception of the Defense Motion to Compel Production of ICRC Documents, each of the Defense motions is based on a discovery request filed during May 2008, over a year after this case was referred for trial and over seven months after the Court of Military Commission Review decision. The Motion to Compel ICRC Documents is based on a 3 March 2008 discovery request. The Defense has provided little, if any, explanation regarding the delay in making these requests.
4. The subject discovery motions could have, and should have, been filed many months ago. It is time for this case to proceed to trial. The Prosecution has provided all discovery required by the Military Commissions Act and Manual for Military Commissions. Absent compelling justification for submitting additional discovery requests or motions to compel discovery, the Military Judge should reject the Defense filings as untimely.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor, Office of Military Commissions

A small rectangular area at the bottom of the signature block is redacted with a solid black fill.

Attachment S

7/26/2008

1 of 10 DOCUMENTS

Copyright 2008 The New York Times Company
The New York Times

May 31, 2008 Saturday
Late Edition - Final

SECTION: Section A; Column 0; National Desk; Pg. 14

LENGTH: 444 words

HEADLINE: Army Judge Is Replaced For Trial Of Detainee

BYLINE: By WILLIAM GLABERSON

BODY:

The chief judge at Guantanamo replaced the military judge in one of the most closely watched war crimes cases on Thursday, creating a new controversy in the military commission system and the potential for new delays.

The decision to replace the judge, Col. Peter E. Brownback III, came without explanation from the chief military judge, Col. Ralph H. Kohlmann. Judge Brownback has been presiding over pretrial proceedings in the prosecution of Omar Ahmed Khadr, a 21-year-old Canadian charged with the killing of an American serviceman in Afghanistan.

Pentagon spokesmen said Judge Brownback, a retired Army judge who was recalled to hear Guantanamo cases in 2004, would return to retirement as a result of "a mutual decision" between the judge and the Army.

But defense lawyers and critics of Guantanamo said there had been no warning of the change and suggested that he had been removed because of a recent ruling that was a rebuke to prosecutors.

During a proceeding on May 8, Judge Brownback expressed irritation that military prosecutors had failed to turn over records of Mr. Khadr's incarceration to defense lawyers. He threatened to stop pretrial proceedings if the records were not supplied by May 22. They met that deadline.

At the time, Judge Brownback said he had been "badgered and beaten and bruised" by the chief military prosecutor in the case, Maj. Jeffrey D. Groharing, to move the case toward a trial quickly.

Mr. Khadr's military defense lawyer, Lt. Cmdr. William C. Kuebler, on Friday called the replacement of the judge "very odd."

"The judge who was frustrating the government's forward progress in the Khadr case," Commander Kuebler said, "is suddenly gone."

A trial had been expected as soon as this summer.

Major Groharing said on Friday that the prosecution had always acted ethically and "didn't have anything to do with a new judge being assigned to this case."

Some of Judge Brownback's rulings had been setbacks for Mr. Khadr, including a decision in April that rejected a central argument of the defense that Mr. Khadr, who was 15 when he was first detained, should not be prosecuted but granted protection as a child soldier.

Jennifer Daskal, an observer for Human Rights Watch at Guantanamo, said the change of judges suggested "political meddling" in the process.

In a terse e-mail message to a court clerk, Judge Kohlmann simply appointed a new judge, Col. Patrick Parrish.

Army Judge Is Replaced For Trial Of Detainee The New York Times May 31, 2008 Saturday

There are no listed telephone numbers for the chambers of Guantanamo judges and a spokesman for the Office of Military Commissions at the Pentagon, Capt. Andre Kok, said he could provide no way of reaching Judge Brownback.

URL: <http://www.nytimes.com>

LOAD-DATE: May 31, 2008

5 of 21 DOCUMENTS

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The Irish Times

June 9, 2008 Monday

SECTION: WORLD; Other World Stories; Pg. 13

LENGTH: 382 words

HEADLINE: Pentagon accused of 'rushing' Cuba trials before election

BODY:

UNITED STATES:THE Pentagon has declared the Guantanamo war crimes trials a national priority and will more than double the number of military lawyers assigned to them, even as critics say the US government is rushing because it wants to influence the November presidential elections.

Air Force Brig Gen Thomas Hartmann, legal adviser to the Pentagon appointee overseeing the trials, told journalists visiting Guantanamo that about 108 uniformed military lawyers would be added to the prosecution and defence teams in the next three months.

The two teams currently each have 19 military lawyers and nine military paralegals, he said. Each side will get 20 to 25 more uniformed lawyers and 20 to 25 more paralegals, and the defence will also get more than a dozen analysts.

"Very recently and consistently with past practice the department of defence has made the determination that providing fair, just and transparent trials in these commissions is the number one obligation for legal services in the department of defence," Brig Gen Hartmann said.

The announcement came hours before last Thursday's arraignment of five accused al-Qaeda prisoners who could be executed if convicted of plotting the September 11th attacks.

Pressed for details on the timing, Brig Gen Hartmann said: "I don't know that it always wasn't the number one priority but I know that it was formally declared the number one priority in the last two or three weeks" by deputy defence secretary Gordon England.

Prosecutors and especially defence lawyers have complained for years about a lack of manpower and resources in the widely criticised Guantanamo legal system created by the Bush administration to try suspected al-Qaeda operatives outside the regular civilian and military courts.

More than six years after the US began sending captives to the Guantanamo Bay naval base in Cuba, not one case has gone to trial. Nineteen cases are now pending, including some that have been delayed repeatedly amid challenges to the legality of the Guantanamo court.

A former chief prosecutor, who quit in October because of what he characterised as meddling by political appointees, complained that prosecutors were being pushed to get the accused September 11th plotters' cases moving before the November presidential election.

- (Reuters)

LOAD-DATE: June 9, 2008

3 June 2008

From: LCDR William C. Kuebler, JAGC, USN, Detailed Defense Counsel
To: MAJ Jeffrey Groharing, USMC, Trial Counsel

Subj: SUPPLEMENTAL DISCOVERY REQUEST ICO U.S. V. KHADR

Ref: (a) R.M.C. 701
(b) COL R. H. Kohlmann e-mail of 2 Jun 08

1. Pursuant to reference (a), the defense respectfully requests production of the following materials in the possession, custody, or control of the U.S. Government:

a. Mobilization orders, orders directing recall from retirement to active duty, or similar documents, relating to COL Peter E. Brownback, USA, from 2004 to the present;

b. Requests for extension of COL Brownback's mobilization or active duty service, from 2004 to the present, including, without limitation, any writing reflecting or relating to the "additional extension" requested by COL Kohlmann referenced in reference (b);

c. All e-mail communications or other correspondence relating to COL Brownback's mobilization, requests to extend said mobilization, or denial of such requests, including, without limitation, e-mail communications in the possession of the Office of Military Commissions, the Military Commissions Trial Judiciary, the Office of the Chief Prosecutor, or the Department of the Army;

d. Supplemental mobilization orders, or other documents approving or denying requests by COL Brownback or other persons to extend COL Brownback's active duty service from 2004 to the present;

e. Any document or writing, including email communications, reflecting or relating to the February 2008 "decision" by the Army not to extend COL Brownback's active duty service, referenced in reference (b), including, without limitation, any writing reflecting or relating to a denial of such request;

f. Any document or writing, including email communications, reflecting or relating to the natural expiration of the last period of mobilization.

g. COL Brownback's Army personnel file or similar record (whether in computerized form or otherwise) relating to the period of COL Brownback's mobilization from retired status (i.e., 2004 to the present);

h. All e-mail communications or other correspondence between Col Kohlmann or anyone directed by Col Kohlmann or under his chain of command and Col Brownback

Attachment V

generated on or after 4 June 2008 relating to, directing or potentially affecting COL Brownback's review of, consideration of, or ruling on any issue in *US v. Khadr*;

i. All e-mail communications or other correspondence between COL Kohlmann or anyone directed by COL Kohlmann or under his chain of command and COL Brownback generated on or after 4 June 2008 relating to COL Brownback's mobilizations from 2004 to the present, including, but not limited to, any communications relating to requests for an extension of the period of service, denial of such requests, or expiration of the last mobilization period.

j. All e-mail communications or other correspondence between COL Kohlmann and any other person relating to or referencing COL Brownback's actions in the military commission case of *U.S. v. Omar A. Khadr* or COL Brownback;

k. Any memorandum for record, e-mail communication, or other writing reflecting communications between COL Brownback and COL Kohlmann (or other members of the MCTJ) relating to the military commission case of *U.S. v. Omar A. Khadr*.

l. Any memorandum for record, or similar writing, reflecting or relating to the "full discussion" referenced in reference (b);

m. Any file or compilation of records maintained by COL Kohlmann, the Office of Military Commissions, MCTJ, or other person or agency relating to COL Brownback.

2. The defense seeks production of the aforementioned documents in order to adequately investigate potential claims of unlawful command influence. The requests therefore seek production of matters "material to the preparation of the defense" within the meaning of reference (a). The defense notes that reference (b) appears to constitute a waiver of any claim of "judicial" or similar privilege as it relates to the matters requested herein.

3. The defense requests that the prosecution forward a copy of this request to relevant departments and agencies of the U.S. government with specific instructions to preserve matters responsive thereto, even if the prosecution disputes its obligation to produce materials in response to the request.

4. Should you have additional questions regarding this request, please contact me at



/s/
W. C. KUEBLER

Kuebler, William, LCDR, DoD OGC

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Subject: FW: Supp Disc Req

Attachments: 2008-06-03 Def Supp Disc Req.pdf

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED] DoD OGC
Cc: [REDACTED]
Subject: Supp Disc Req

Jeff/Keith,

Please find attached a supplemental discovery request relating to the circumstances of COL Brownback's dismissal. Please note the request in paragraph 3 of the document.

Can you also please tell us (1) when your office learned of COL Brownback's expected departure (i.e., when your office learned that the "request" for his extension had been denied); and (2) when any member of the prosecution team in this case learned of COL Brownback's expected departure (i.e., when one of you learned that his extension had been denied or that he was otherwise expected to leave the MCTJ before completion of the case)?

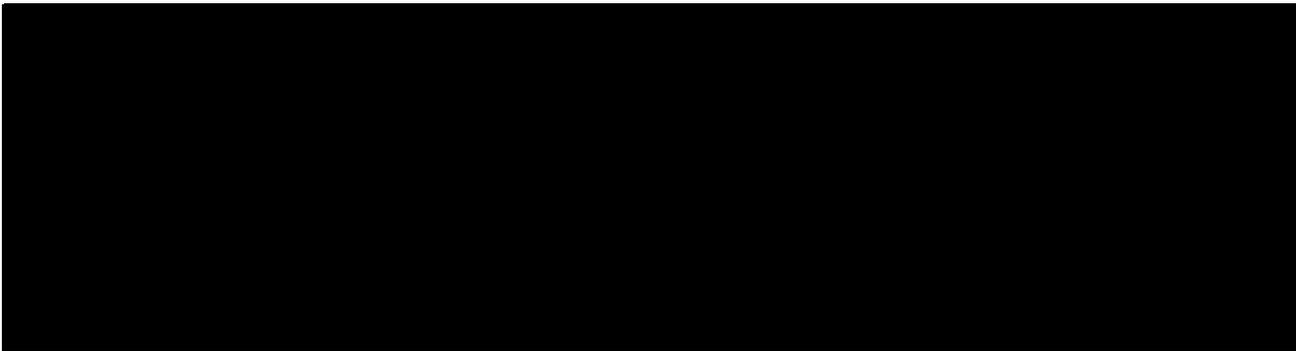
Thank you.

V/R

Bill



2008-06-03 Def
Supp Disc Req.p...



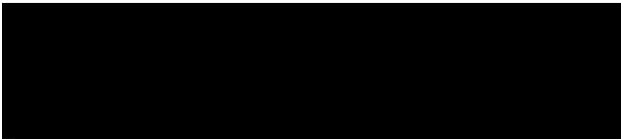
Subject: U.S. v. Khadr - Statement of Former Military Judge (COL Brownback)

Attachments: Statement - COL Brownback.pdf

COL Brownback has directed that the below email and the attachment be forwarded to COL Parrish and counsel in US v Khadr.

v/r.

[Redacted]
Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense



LTC [Redacted]

1. Please forward the email below and the attachment to the military judge and counsel in the case of United States v. Khadr.
2. I will have the statement sworn when I am in Gitmo on 17 June.

COL Brownback

----- Original Message -----

From: [Redacted]
To: Pe [Redacted]
Sent: [Redacted]
Subject: [Redacted]

Sir,

I hope this finds you well.

Obviously, we were surprised by the news of your replacement as military judge in the Khadr case last week. We appreciate Col. Kohlmann's explanation of events, but note the inconsistency with OMC's initial statement last Friday.

Attachment X

7/26/2008

In view of the circumstances in the case at the time of your departure, I believe that I am ethically bound to investigate the matter further. We have served a discovery request for documents relating to your recall and request for extension, as well as documents relating to Col. Kohlmann's discussions with the Army. However, this is not a substitute for actually speaking to you about the matter. Please let me know if you would be willing to discuss these events with Ms. Snyder and myself (initially "off the record" if you wish). I can be reached at [REDACTED] Thank you.

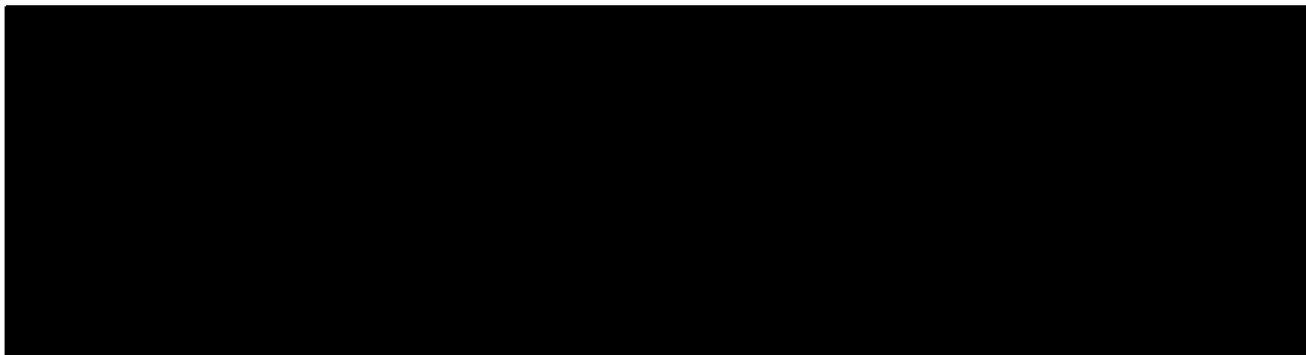
V/r

LCDR Kuebler

Statement - Peter E. Brownback III, COL, JA, USA

1. I am currently recalled to active duty pursuant to
 - a. AHRC-PLM-P Orders M-07-401542 dated 14 July 2004 (recall for the period 13 July 2007 for NTE 365 days), as amended by
 - b. AHRC-PLM-P Orders M-07-401542A01 dated 23 Nov 2004, as amended by
 - c. AHRC-PLM-P Orders M-07-401542A02 dated 13 Jul 2005 (recall extended until 30 June 2006), as amended by
 - d. AHRC-PLM-P Orders M-07-401542A03 dated 13 Jun 2006 (recall extended until 30 June 2007), as amended by
 - e. AHRC-PLM-P Orders M-07-401542A04 dated 28 Jun 2007 (recall extended until 29 June 2008).
2. I was detailed as military judge in the case of United States v. Khadr by the Chief Trial Judge of the Military Commissions, COL Kohlmann, on 24 April 2007. .
3. In December 2007, COL Kohlmann and I discussed the progress in Khadr. We both wanted to insure that the case would be successfully concluded. Recognizing the possibility that my tour might not be extended, we tried to decide how to handle the progress of the case. We both agreed that if certain timelines were not met, it would be best to have another military judge detailed to the case. We further agreed that an appropriate time to detail another military judge would be after all of the law motions in the case were resolved.
4. On 20 February 2008, COL Henley, Chief Trial Judge of the US Army, told me that orders extending me beyond 29 June 2008 would not be issued. I was not told the reason or reasoning behind that decision. I still do not know nor have I have told the reason or reasoning behind that decision. I have never spoken to the current chief of the Personnel, Plans, and Training Office and I have not spoken to The Judge Advocate General since sometime in 2005 - when he was a brigadier general.
5. I note that no rulings in any law or discovery motion were distributed before I was told that I would not be extended.
6. After the 11 April 2008 trial session, I realized that I could not schedule a trial date which would allow me to conclude the case before 29 June 2008. I reported that determination to COL Kohlmann. Based on the persons designated to the pool of judges, he told me that he was planning to detail COL Parrish as military judge.

Peter E. Brownback III
Colonel, United States Army



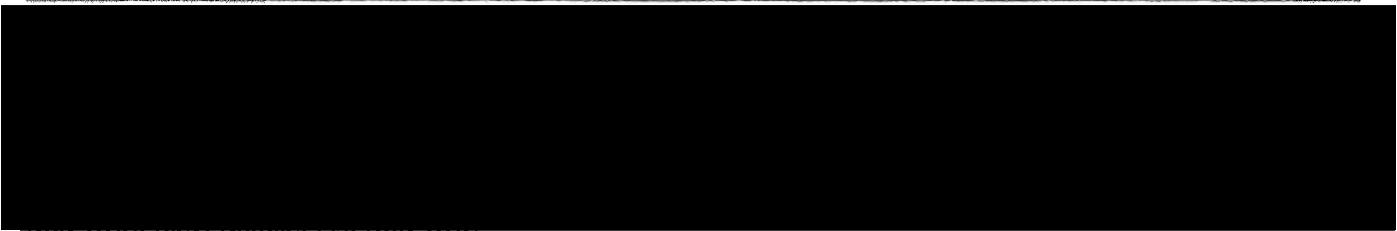
Subject: RE: U.S. v. Khadr - Request for Additional Judicial Disclosures (Follow up)

Col Kohlmann will not be responding to your request.

V/r,

[Redacted Name]

LTC
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense



Subject: U.S. v. Khadr - Request for Additional Judicial Disclosures (Follow up)

Sir,

1. On 9 Jun 08, the defense in the case of U.S. v. Khadr submitted the below Request for Additional Judicial Disclosures, requesting COL Kohlmann to supplement disclosures previously made *sua sponte*. To date, the defense has not received a response to its request.
2. The defense respectfully reiterates its request for this information, or a response of some kind.
3. The defense notes that review of the "metadata" extracted from COL Brownback's 8 Jun 08 statement indicates that the document was last modified (and the PDF version created) well *after* the time reflected on COL Brownback's 8 Jun 08 e-mail to LTC Sowder, directing that the statement be forward to the parties. This suggests that there exist (or existed) previous drafts of the document, which may have been reviewed by members of the MCTJ staff before the final document was released to the parties. For obvious reasons, information contained in any prior drafts would be germane to determining the entirety of COL Brownback's testimony concerning the circumstances surrounding his departure.

V/R

LCDR Kuebler

Attachment Z

7/26/2008



Subject: U.S. v. Khadr - Request for Additional Judicial Disclosures

Sir,

1. The defense is in receipt of COL Kohlmann's e-mail of 2 Jun 08 commenting on COL Brownback's replacement as military judge in the case of U.S. v. Khadr, as well as COL Brownback's e-mail of 8 Jun 08, attaching his "statement."
2. The defense notes that both COL Kohlmann and COL Brownback have elected to disclose the contents of communications between members of the Military Commissions Trial Judiciary (MCTJ) relating to (1) COL Brownback's status with respect to his recall to active duty and matters relating thereto, and (2) COL Brownback's conduct as military judge presiding over U.S. v. Khadr more generally (e.g., "In December 2007, COL Kohlmann and I discussed the progress in Khadr. We both wanted to insure that the case would be successfully concluded.")
3. On 3 Jun 08, the defense served the attached supplemental discovery request on the prosecution, requesting production of various materials in connection with this matter. The prosecution has not yet responded. The defense wishes to draw the attention of all parties to paragraph 3 of the request and specifically requests members of the MCTJ staff to preserve all evidence potentially responsive to the supplemental discovery request.
4. In light of COL Brownback's e-mail of 8 Jun 08, the defense respectfully requests COL Kohlmann to make or cause to be made the following additional judicial disclosures:
 - a. Disclosure of all previous drafts of the "statement" referenced in paragraph 1 hereof, whether in the text of e-mails, MS Word documents, or whatever other form;
 - b. Disclosure of the fact and contents of any communications between COL Kohlmann (and/or other MCTJ staff) and any representative or employee of the Department of Defense relating to COL Brownback's statement or the e-mail from defense counsel which prompted it, including, without limitation, any communications between COL Kohlmann and the Office of Military Commissions or DoD Public Affairs Personnel on Sunday, 8 Jun 08;
 - c. Disclosure of the fact and contents of any communications between COL Kohlmann (and/or other MCTJ staff) and COL Brownback relating to Col Brownback's statement or the e-mail from defense counsel which prompted it.

V/R

LCDR Kuebler

Attachment Z

7/26/2008

Kuebler, William, LCDR, DoD OGC

Fr
Se
To
Cc

Subject: RE: Request to speak with Col Henley

Col Henley has asked that I respond on his behalf. He requests that you use the interrogatories first and then, if you still believe it necessary, you can pursue any follow up or clarification with him.

v/r

Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----

From: Kuebler, William, LCDR, DoD OGC
Sent: Wednesday, July 23, 2008 9:44 AM
To: [REDACTED]
Subject: RE: Request to speak with Col Henley

Sir,

Please pass to COL Henley.

Sir,

Thank you for your previous response. I do not believe that interrogatories are an appropriate substitute for a person-to-person discussion regarding this matter. I am not seeking to interview you in your capacity as an MCTJ trial judge (or judge at all), but as a potential witness in the Khadr case with (presumably) relevant knowledge of the circumstances surrounding COL Brownback's removal and return to retired status. If you consent to be interviewed, please let me know and we can arrange a convenient time to speak. Otherwise, please confirm your unwillingness to discuss the matter with me. Thank you.

V/R

LCDR Kuebler

-----Original Message-----

Subject: FW: Request to speak with Col Henley

The Military Judge has requested that you submit interrogatories.

v/r

Attorney Advisor
Military Commissions Trial Judiciary



From:
Sent:
To:
Cc:
Subject:



Sir,

Please pass to Col Henley.

Sir,

In a statement dated 8 June 2008, which was provided to counsel in the case of U.S. v. Omar Khadr, former military judge, Col Brownback, stated that he had a conversation with you concerning the termination of his active duty status in February 2008. Defense counsel for Mr. Khadr would like to speak with you (in your capacity as Chief Judge of the Army) concerning this conversation and your knowledge of the circumstances surrounding Col Brownback's departure from the MCTJ. Would you be willing to speak with us about this matter? Thank you.

V/R

LCDR Kuebler

5 of 16 DOCUMENTS

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The Globe and Mail (Canada)

June 3, 2008 Tuesday

SECTION: EDITORIAL; KHADR AT GUANTANAMO; Pg. A18**LENGTH:** 488 words**HEADLINE:** An appearance of interference**BODY:**

The sudden removal of the United States military judge overseeing a Canadian's war-crimes case at Guantanamo Bay, Cuba, is disquieting, to say the least. Judicial independence is the core of any fair hearing, and the removal of a judge who had quarrelled with the prosecution makes the new military-commission system for suspected terrorists held at Guantanamo appear to lack independence.

The official explanation from the U.S. tribunals yesterday does not remove the taint of political interference from the military commission that will try Omar Khadr, who was arrested at 15 in Afghanistan and charged with the war crime of murder, being alleged to have killed the U.S. soldier Christopher Speer with a grenade in battle. The tribunals' chief judge says it was the U.S. Army's decision to return the judge, Colonel Peter Brownback, to his retirement. When he says, in wishy-washy language, that the reasons were innocent, he is unconvincing.

The initial explanation turns out to have been not the whole truth. Last week, a tribunal spokesman, Air Force Captain Andre Kok, said the removal was "a mutual decision between Col. Brownback and the Army that he revert to his retired status when his current active-duty orders expire in June." Mr. Khadr's lawyer, Lieutenant-Commander William Kuebler, had argued that the removal was political interference with a judge who had taken Mr. Khadr's side in demanding disclosure from the prosecution during pre-trial hearings. "The judge who was frustrating the government's forward progress is suddenly gone," he said.

Colonel Ralph Kohlmann said yesterday he felt it necessary to address concerns about the independence of the judiciary. Col. Brownback, the chief judge said in a written statement, had been recalled from retirement by the military in 2004 to serve for one year on the Guantanamo military commissions. Three times, the military extended his recall orders, a year at a time, and Col. Kohlmann had personally requested an additional extension so Col. Brownback could see the Khadr trial through to its completion. Col. Brownback, too, was prepared to stay on; he had said he would "continue in the service of his country for as long as deemed appropriate by the cognizant authorities."

As for why those authorities deem it no longer appropriate, Col. Kohlmann said "my understanding" is that it was "based on a number of manpower management considerations unrelated to the Military Commissions process." Given what is at stake for the United States in this trial that is to test the new military-commissions process, given the request from the chief judge that Col. Brownback stay on, and given the strange timing after years of extensions, this explanation is not enough to allay the impression of political interference.

The Stephen Harper government insists it wants to let the process work, but as the judge's removal suggests, this is a questionable process.

LOAD-DATE: June 3, 2008



**DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**

**APPOINTING AUTHORITY
FOR MILITARY COMMISSIONS**

June 10, 2006

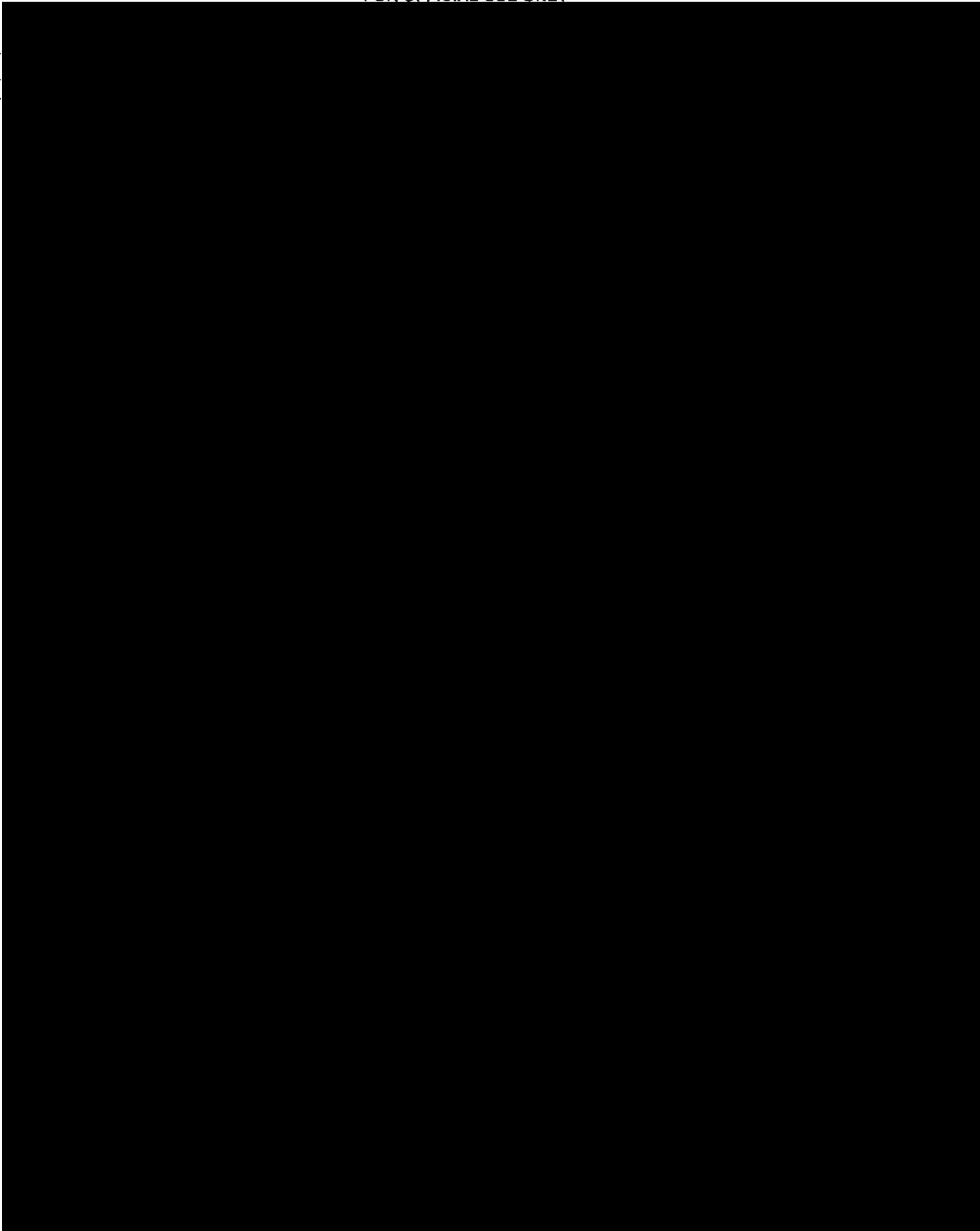
All sessions in all cases currently referred to trial by Military Commissions are stayed until further notice.

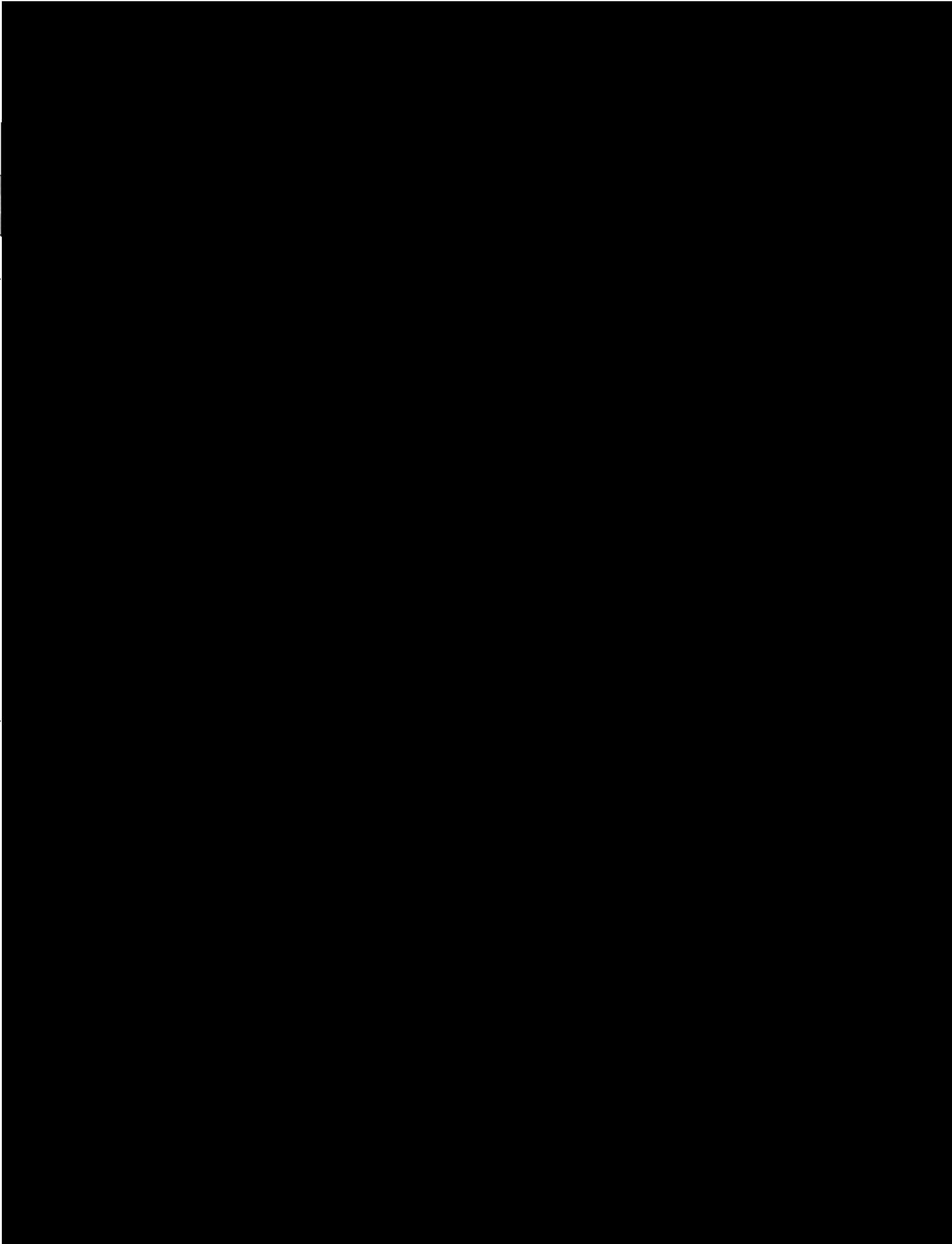
Except for those cases stayed by other, separate orders of the Appointing Authority, the Presiding Officers may conduct or direct others to conduct any business of the Commission - except holding a session of the Commission - as they deem necessary. This includes but is not limited to: issuing orders, issuing rulings, accepting filings, all aspects of motion practice, and those matters the Presiding Officers deem appropriate to prepare for the resumption of trial sessions.

A handwritten signature in black ink, appearing to read "John D. Altenburg, Jr.", is positioned above the typed name.

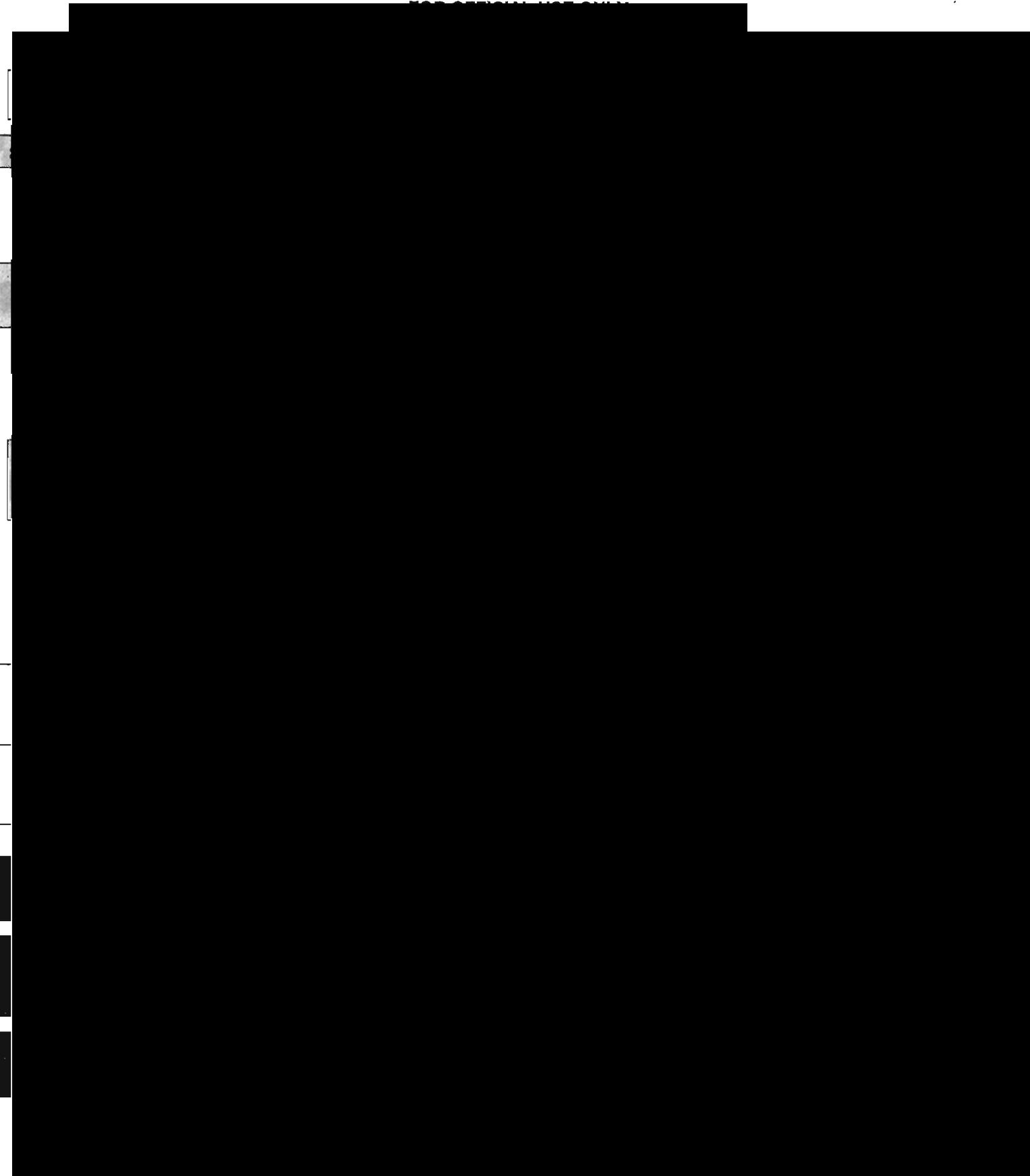
**John D. Altenburg, Jr.
Appointing Authority
for Military Commissions**

1





in



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

I, Brigadier General Thomas W. Hartmann, declare:

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

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

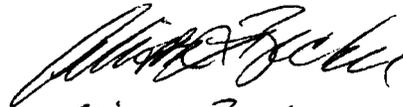
6. I did not seek to share the chart with the Chief Prosecutor, though I did ordinarily keep a copy of it on my office wall. I believe I shared the chart with a group of prosecution leaders shortly after the first chart was prepared in order to help them understand the myriad of planning factors involved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

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



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

Sworn and subscribed before me this 23rd day of July 2008.



Alison L. Becker
LTC, JA
USAR

*Authorized to administer oaths
under 10 USC 936*

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

D-076

GOVERNMENT’S RESPONSE

To the Defense’s Motion to
Dismiss

7 August 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s scheduling order of 19 June 2008.

2. **Relief Requested:** The Government respectfully requests that the Defense’s motion to dismiss be denied in full.

3. **Overview:**

a. The Defense argues that a lawful change of military judge prior to assembling the military commission gives an appearance of unlawful influence. The Defense has failed to meet its initial burden of specifying who influenced whom, and in what way this alleged influence harmed the accused.

b. Even if the Defense meets this threshold burden, the Government has established that change of military judge in this case was completely appropriate and not improperly motivated.

c. The appearance of unlawful influence is not grounds for dismissal. Even if it were, there is no appearance of unlawful influence in this case. Any harm done to the appearance of fairness in the military commissions process has been generated by the Defense through a vigorous media campaign. Moreover, the Defense theory – that the Government had COL Brownback removed because he did not rule in its favor – fails in light of COL Brownback’s rulings.

4. **Burden of Persuasion:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).¹

¹ The decisions of the military courts interpreting the Uniform Code of Military Justice (“UCMJ”) are not binding on this commission. *See* 10 U.S.C. § 948b(c). To the extent the court looks to the UCMJ for guidance, under court-martial practice, the Defense has the initial burden of producing sufficient evidence to show facts which, if true, would constitute unlawful influence, and that the alleged unlawful influence has a logical connection to courts-martial in terms of its potential to cause unfairness in the proceedings. *See Green v. Widdecke*, 19 U.S.C.M.A. 576, 579, 42 C.M.R. 178, 181 (1970) (“Generalized, unsupported claims of ‘command control’ will not suffice to create a justiciable issue.”). The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United*

5. **Facts:** The following facts supplement or clarify assertions contained in the Defense motion:

a. In paragraph 4d. of the Defense brief, several relevant facts are omitted, leaving the impression that the accused was improperly charged. Relying on COL Davis's testimony in *U.S. v. Hamdan*, the Defense argues that "Mr. Khadr (along with detainees Hicks and Hamdan) was charged over the objection of then Chief Prosecutor, COL Morris Davis." (See Def. Mot. at 2, para. 4d.) During his testimony, COL Davis was asked whether the decision to charge Mr. Hamdan – and, as the Defense concludes, also Mr. Khadr – was his own. COL Davis replied without hesitation, "Yes." Attachment A to Def. Motion D-075, at 784. Pressed further, COL Davis was asked whether he "believed in all respects warranted by the evidence and ethical and appropriate decision to charge him?" COL Davis again responded "Yes." In fact, the criticisms that COL Davis expressed about members of the Convening Authority's staff "[did] not apply to Hamdan and Khadr since they were referred to trial prior to the arrival of the current legal advisor." COL Davis letter addressed to Judge Crawford, at 19. (Attachment A)

b. The Defense argues in its facts section that "it was COL Brownback's decision that was responsible for delaying the resumption of military commission proceedings." Def. Mot. at 2, para. 4g. For the purposes of detailing applicable delays and continuances in this case, the Government adopts the facts section of the Government Response to D-068 in its entirety.

c. In summarizing the 4 June 2007 hearing and subsequent delays, the Defense noticeably fails to mention the appellate process to the United States Court of Military Commission Review. On 24 September 2007, the U.S. Court of Military Commission Review (CMCR) reversed the 4 July 2007 order of the Military Judge dismissing the charges.

d. On 8 November 2007, the Military Judge, who had previously dismissed the case on jurisdictional grounds convened a jurisdictional hearing. The Defense, however, elected not to challenge jurisdiction at that time – an election made known to parties on the eve of the hearing.

States v. Thomas, 22 M.J. 388, 396 (CMA 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979). After the burden shifts to the Prosecution, the Prosecution must address two distinct issues: (1) what must be proven? and (2) what is the quantum of proof required? See *United State v. Biagase*, 50 M.J. 143, 151 (1999) ("The [Prosecution] may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial."). Even applying the court-martial burden of persuasion, the Defense clearly has not sustained its burden.

e. Defense allegations of “the prosecution’s frustrations,” *see* Def. Motion at 3, para. i., over not conducting a hearing to rebut the jurisdictional challenge that the accused was not an alien unlawful enemy combatant are directly related to the lack of notice that the Defense gave the Government and the Commission as well as the Commission’s decision to delay taking evidence on the issue until later challenged by the Defense. The Defense and the Commission were both on notice that the Government had made significant logistical arrangements to prepare for the jurisdictional hearing (including displacing witnesses from their jobs and families for a week in order to travel to Guantanamo Bay). Neither alerted the Government that a hearing would not be required until travel by the witnesses to Guantanamo Bay had been completed.

f. The “highly prejudicial factual evidence,” *see* Def. Motion at 3, para. i., the Defense alludes to is a video in which the accused is shown studiously wiring parts together in order to make roadside bombs for the purpose of killing U.S. forces. In the background of this video is the deceased al Qaeda terrorist, Abu Leith al Libbi. Later in the video, the accused is seen smiling at night as he and his terrorist associates dig holes in the earth and plant the roadside bombs intended to kill U.S. forces. The Government concedes that these facts, as well as much of the evidence we intend to present at trial, are not helpful to the accused.

g. In one of the many allegations contained in the Defense motion, the Defense suggests, without a shred of evidence to corroborate it, that the Prosecution may have leaked evidence to the media. These accusations are patently false. The Prosecution has not leaked evidence to the media or anyone else. Accusations like this, that are made without a factual basis, are wholly improper in this and every other forum.

h. The Defense states in footnote 4 that “it would not be surprising if MAJ Groharing’s strenuous effort to “shut down” the defense continuance request was preceded by contact with BG Hartmann or other individuals in the Convening Authority’s office.” *See* Def. Motion at 4 n. 4. The Prosecution rejects this implication in full – at no time did any Government challenge to any Defense continuance request suffer from outside influence.

j. Colonel Kohlmann issued a short comment regarding the change in military judges in this case on 2 June 2008. *See* attachment B to Def. Mot. D-067 (“Chief Judge’s Comment”). The Chief Judge noted that it is generally inappropriate for the Military Commission Trial Judiciary to engage in the public debate about Military Commissions, but felt compelled to as a result of the “discussion” generated about “the independence of the judiciary.” *Id.* This discussion was fueled by the Defense. *See* Kuebler Press Advisory (Attachment B).

k. In his comment, the Chief Judge makes a couple of points that Defense counsel do not include. First, he notes that rules for Military Commissions, mirroring those of courts-martial, do not require a showing of good cause on the record for a change in military judge at the pre-assembly stage. *See* Chief Judge’s Comment. Second, he notes that his decision to change trial judges – made by the Chief Judge alone – was

“completely unrelated to any action that Colonel Brownback has taken in this or any other case.” *Id.* He adds, “Any suggestion that my detailing of another military judge was driven by or prompted by any decisions or rulings made by Colonel Brownback is incorrect.” *Id.*

l. In paragraph 4s the Defense indicates that its request to the Prosecution for information relating to the routine change of military judges went unanswered. This is incorrect. In a telephone conversation with the Defense, the Prosecution clearly indicated that they had found out about the change in judges when the Defense did. Defense assertions to the contrary are incorrect.

m. Most troubling is paragraph 4x of the Defense motion, which states, “COL Brownback’s removal was widely-reported in the news media and has elicited expressions of concern over the perceived fairness of this Military Commission.” Def. Motion at 7 para. 4x. (reference omitted). As the Defense Press Advisory (Attachment B) proves, the concerns relating to the change in judges are mostly contrived by the Defense. *See also* Gov’t Resp. to D-024. The headlines cited by the Defense are authoritative of nothing, as they are headlines that are generated largely by Defense suggestions and allegations. This is a bootstrap argument of the most audacious kind.

6. Discussion:

The Defense has failed to demonstrate the existence of any unlawful influence resulting in the removal of Colonel Brownback from this case.

a. The Military Commissions Act (MCA) provides that no person may attempt to coerce or by *any unauthorized* means influence the “the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case.” 10 U.S.C. §949b(a)(2)(A). Moreover, 10 U.S.C. § 949 b(a)(1) provides:

No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge...with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

b. As stated above in footnote 1, decisions of courts-martial are not binding on this Military Commission. To the extent the Military Judge wishes to incorporate unlawful command influence analysis under Article 37 UCMJ caselaw, the starting point for any claim is to weigh the Defense allegations and determine whether these allegations, if true, would amount to unlawful command influence.² In making this determination “[p]rejudice is not presumed. The issue of unlawful command influence must be alleged

² The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979).

with particularity and substantiation.” *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994)

c. The Defense must prove a nexus between the actions of “the Army” or some Government official and some legally cognizable harm to the accused. *See Id.* Based solely on the Defense Motion it is unclear who allegedly caused harm to the accused. Was it the prosecution in its reasonable requests to set a trial date? Def. Motion at 4, paras. 4i.-m. Was it someone in the Convening Authority’s office? The Trial Judiciary? Someone in the Army? Or was it someone at the Department of Defense, based on its reasonable efforts to increase the staffing levels of OMC-P and OMC-D? *See* Def. Motion at 5-6, para. r. There is no nexus between an act committed by an unnamed “influencer” and the alleged harm to the accused. As such the Defense has failed to meet its initial burden.

d. In the present case, the facts alleged by the Defense, even if presumed true, do not amount to unlawful influence. The acts taken to ensure the uninterrupted progress of the Military Commission in light of a change in military judges, does not amount to any cognizable influence and certainly resulted in no harm to the Defense. As stated by Colonel Kohlmann, “My detailing of another judge was completely unrelated to any actions that Colonel Brownback has taken in this or any other case.” *See* Chief Judge’s Comment.

e. The Defense acknowledges in its brief that there is no actual harm at issue. It states:

[A]ny decision a subsequent military judge makes in favor of the prosecution...may be *perceived* as being influenced by the example set by the government’s termination of COL Brownback. This is not to suggest that any decision would be *actually* so influenced, only that the appearance of unlawful influence necessarily creates doubt for a reasonable observer as to the motivation behind any ruling (even if completely correct and justified) for the prosecution.

Def. Motion at 11, para. 5b(2) (emphasis in original). The Defense motion, far from establishing harm to the accused, concedes that there has been no actual influence in this case. Instead, the Defense relies on a theory of apparent unlawful influence.

f. The Defense has failed to demonstrate how they have been harmed by any actions of Government personnel – unidentified as they are. Having failed to meet the initial threshold requirement alleging unlawful influence, no further analysis is necessary to deny this motion.

**The change in military judges was authorized by law
and requires no further explanation.**

g. In the event the Military Judge believes the Defense has met its threshold burden of production, the existence of unlawful influence over these proceedings is easily disproved.

h. Rule for Military Commission 505 provides: “Before the military commission is assembled, the military judge may be changed by the Chief Trial Judge, without cause shown on the record.” It is not unreasonable, nor unauthorized for the Chief Trial Judge to change the military judge prior to the seating of the members.

i. Similarly, it is not unreasonable, and quite frankly expected, for a detailed trial counsel to ask a military judge to set a trial date.³ Since the inception of this case, it appears that the Defense has attempted to avoid trial by spending their time lobbying Canadian government officials and conducting an extensive media campaign in an attempt to affect a political resolution of this case.⁴ The absence of a trial schedule only emboldened the Defense to continue with this strategy. Contrary to Defense suggestion, there is certainly nothing improper with a prosecutor “vigorously” demanding a trial date from a military judge, particularly under the circumstances of this case.

j. All of the actions taken by Prosecutors assigned to the Office of the Chief Prosecutor, the Military Commission Trial Judiciary, the U.S. Army, and the Department of Defense were authorized by and consistent with the MCA, the Manual for Military Commissions (MMC), and well established principles of military jurisprudence. None of the actions amounted to unlawful influence over the proceedings of this Commission and/or the professional judgment of the military judge. The facts in this case overwhelmingly establish that there was no unlawful influence exerted over any member of this military commission; therefore, the Defense motion should be denied.

There is not an appearance of unlawful influence.

k. Having failed to prove actual unlawful influence, the Defense has no basis for asserting apparent unlawful influence. The concept of apparent unlawful influence does not exist in the MCA, the MMC, or any of the regulations promulgated by the Secretary of Defense. To the extent “apparent unlawful influence” exists under UCMJ case law, the Military Commission Act expressly states that such decisions are not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the concerns upon which unlawful command influence are based have little applicability to the context of military commissions being used to prosecute our Nation’s enemies. Whereas it may be appropriate to find apparent unlawful command influence even in the absence of prejudice to a member of our Armed Forces, such a broad and undefined concept is out of

³ See RMC 707 (a)(2).

⁴ See Prosecution response to D024.

place when it can be used or easily manufactured by those at war with the United States.⁵

l. The Defense goes to great lengths to explain that the harm in this case is not to the accused, rather to the “public perception” of the fairness of military commissions. Def. Motion at 11, para. 5b(3).

m. The Defense argument is quite ironic. No one disputes the Defense’s efforts to influence the news media. They should simply not be allowed to benefit from media characterizations they have helped shape.

o. Similarly, the Defense claim regarding the removal of Colonel Brownback collapses under the weight of the facts. The theory – ie. that COL Brownback always ruled against the Government, therefore the Government had him removed – is untenable. Prior to the RMC 803 session on 8 May 2008, the Military Judge recognized that the Government had taken the appropriate steps in the discovery process and the Commission was ready to move to the next phase. At the hearing the Judge stated, “I’ve gone through--what is this, the fourth session on discovery or the third? Fourth session on discovery. And so I’m directing that the evidentiary motions be filed on the 28th of May. We went all--over all this all last night too; and you all will get a chance to stand up and say whatever you want to.” *U.S. v. Khadr*, RMC 803 Transcript, 8 May 2008 at 367-68 (“Transcript”). When COL Brownback mentioned that the parties had been over this “last night too,” he is referring to an RMC 802 conference. Most significant about this conference was COL Brownback’s explicit statement that the Government had made significant progress on discovery and he could therefore set deadlines for the next phase of trial, evidentiary motions. Rather than “failing to yield to the prosecution’s will” as the Defense suggests, the Military Judge recognized the diligent efforts made by the Prosecution and was prepared to move the case forward over Defense objections. Prior to his departure, COL Brownback was ruling in favor of the Government. Colonel Brownback was also aware of the repeated requests for delay and had seen first hand the Defense attempts to avoid going to trial. Perhaps recognizing the Defense delays for what they were, COL Brownback directed the Defense to file evidentiary motions in expectation that trial was on the not too distant horizon.

p. On 8 May 2008, COL Brownback added:

Before you stand up, Commander Kuebler, which I'm going to let you do in just a second; I don't think you can point at any time where the commission has failed to give you an opportunity to present reasons why you cannot or should not be required to do things and when I set this 28 May evidentiary the motion due, that's a date. If at a later time, you find more motions, that's fine.

Id. at 368. Here the Military Judge anticipated that the Defense would be upset that the case was moving forward with a set evidentiary motion date. This is a

⁵ We note that even in the court-martial context, the burden for proving apparent unlawful command influence is high to guard against baseless allegations. *See, e.g., United States v. Lewis*, 63 M.J. 405, 415 (2006).

necessary step prior to going to trial.

n. As stated above, the actions of all parties to this Military Commission were consistent with the MCA and MMC. There is no factual basis to suggest that anyone else associated with the assignment of Colonel Brownback acted improperly. Even if “apparent unlawful influence” were an appropriate basis for recovery, none exists in this case and any reasonable observer with full knowledge of the facts would agree. The defense arguments to suggest otherwise are not supported by the facts.

There is no basis for dismissing the charges or suppressing evidence in this case.

o. Even if the facts were as represented by the Defense, they reflect an appropriate and lawful measure taken by the Chief Trial Judge to ensure continuity in this case in spite of a change in military judges.

The remedy requested by the Defense offends notions of justice.

p. The accused is charged with conspiring with an international terrorist organization and murdering a United States soldier and attempting to murder many others. Defense counsel claim that the proper remedy for the alleged inappropriate influence is to dismiss the charges with prejudice in hopes of ensuring that the accused is never tried by the United States for his actions. Were there any cause for relief, it would not warrant such a disproportionate remedy.

7. **Oral Argument:** This motion is wholly without merit and should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

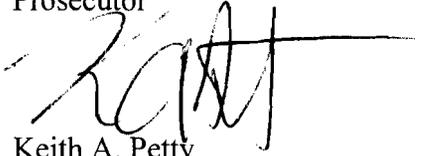
8. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

9. **Certificate of Conference:** Not applicable.

10. **Additional Information:** None.

11. **Submitted by:**

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

A handwritten signature in black ink, appearing to read 'K. Petty', with a long horizontal stroke extending to the right.

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

Judge Crawford

“Eyes Only”

Dear Judge Crawford,

1. I respectfully request your assistance to resolve the issues addressed herein concerning your legal advisor, Brigadier General (BG) Thomas W. Hartmann, and his relationship with the Office of the Chief Prosecutor (OCP). If this cannot be resolved informally then I respectfully request you forward this memorandum to the appropriate Inspector General as a formal complaint submitted under the authority of Title 10, U.S. Code, § 949b(a)(2)(C) [The Military Commissions Act of 2006]; Rule for Military Commission 104(a)(2) [Manual for Military Commissions]; Regulation for Trial by Military Commissions, Paragraph 1-4; Department of Defense Directive 5106.01 [Inspector General of the Department of Defense], and Air Force Instruction 90-301 [Inspector General Complaints Resolution]. AFI 90-301, paragraph 1.43.2, states that a complainant should attempt to resolve a complaint at the lowest level possible. That is what I seek to do here. An Air Force Form 102, Inspector General Complaint Registration, is attached in the event this matter is forwarded to the Air Force Inspector General. [Atch. 1].

Background

2. I was asked in July 2005 if I was interested in becoming the chief prosecutor for the military commissions. I flew to Washington the latter part of July and had a face-to-face interview with the DoD General Counsel and Principal Deputy General Counsel. I received a telephone call a few days later informing me I was selected for the job and I had about 30 days to relocate my family from Wyoming to the Washington area. The appointment process was consistent with DoD Military Commission Instruction (MCI) Number 3, paragraph 3.B.(1), which said the DoD General Counsel had the authority to designate the chief prosecutor. To this day I have never seen any official document signed by the General Counsel or the Secretary of Defense or his designee designating me as the chief prosecutor, although I have had several discussions with the Office of the General Counsel about the appointment and the chain of command.

3. I became the chief prosecutor in early September 2005. According to MCI No. 3, paragraph 3.B.(2), I reported to the Legal Advisor and then to the Convening Authority. MCI No. 3 also said the chief prosecutor "shall direct the overall prosecution effort."

4. For the first several months of my tenure, the OCP and the Appointing Authority (AA) and his staff were located in adjacent offices in Crystal Mall 3. Offices for most of the prosecutors were separated by an unlocked door from the offices of the legal advisor and most of the AA's staff, and personnel from both passed back and forth between the two offices freely throughout the day. There was concern on the part of some members of the AA's staff about the appearance that the AA's staff and the prosecution staff had too close a relationship, so the AA's staff arranged to have the doorway separating our respective offices alarmed. An alarm system was installed shortly before the AA and his staff

moved from this building to your present location, a move that took place last October. [As a side note, we have tried unsuccessfully every since to get the alarm removed so we do not have to go out one cipher locked door, out into a common hallway, and in through another cipher locked door to get from one end of our office to the other.]

5. The concern of the AA's staff about maintaining the appearance of neutrality and independence from the prosecution was not without merit. A few months after I became the chief prosecutor MAJ Dan Mori, defense counsel for David Hicks, filed motions seeking to compel Mr. Altenberg (Appointing Authority) and BG Hemingway (Legal Advisor) to appear as witnesses at trial in Guantanamo Bay in support of MAJ Mori's claim that the AA and his staff were biased. MAJ Mori also alleged AA bias as part of the basis for a motion to stay Hicks' military commission. Judge Koller-Kotelly from the U.S. District Court of the District of Columbia granted the motion for a stay, which mooted the issue of whether Mr. Altenberg and BG Hemingway would have to testify in a military commission about their alleged bias.

6. The Supreme Court's Hamdan v. Rumsfeld decision in June 2006 led to significant changes.

(a) The primary source of authority for military commissions is the statute, the Military Commissions Act of 2006 (MCA), which Congress enacted and the President signed into law in October 2006. The MCA specifically refers to the convening authority, military judges, court members, the chief prosecutor, and the chief defense counsel. The term "legal advisor" is not found in the statute.

(i) Section 949b(2)(C) of the MCA guarantees counsel for both sides the ability to exercise professional judgment free of unlawful influence or coercion. I met with Senators Lindsey Graham and John McCain, and members of their staffs, on 7 September 2006 during the debate over the MCA and, at their request, provided written comments after reviewing a draft of the MCA in circulation at the time. In a reply dated 9 September 2006, I wrote:

I recommend amending the language in your section 949b, "Unlawfully influencing action of military commission," by modifying section (a)(2) to read:

No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case; the convening, approving, or reviewing authority with respect to their judicial acts; or the exercise of

professional legal judgment by trial counsel or defense counsel. (emphasis added)

The second part of the proposed section 949b provides defense counsel some protections from adverse performance reviews and assignments based upon zealously defending an accused, but the section does not offer a prosecutor any protection at all. If, for instance, I determine the prosecution will not offer any statement obtained as a result of water boarding I shouldn't be subject to reprisal if someone above me believes water boarding is an acceptable way to extract evidence. [This part of my proposal did not make it into the MCA.]

(ii) Note that the language eventually included in Section 949b(2)(C) is almost word for word the language I proposed. I explained to Senators Graham and McCain, and their staff members, that I was concerned the prosecution would be subjected to pressures and influences from outside the prosecution team, and we needed statutory protection to permit us to exercise independent professional legal judgment free of political or other motivations. The OCP had gone through what many viewed as a very public scandal as a result of some former prosecutors feeling they were pressured to do certain things and that the entire process was tainted by unlawful influence. To ensure that never happened again we needed a statutory guarantee of the sanctity of our prosecutorial independence. Senators Graham and McCain agreed and they included my proposal in what became the MCA.

(iii) Three weeks after proposing the language for the statutory protection against outside coercion and influence I was a guest in a meeting that proved the importance of this protection. In a late afternoon meeting on 28 September 2006, less than six weeks prior to the 2006 elections, Deputy Secretary of Defense England said the attendees needed to think about who to charge, what to charge them with, and when to charge them because there was "strategic political value" in charging terrorists prior to the election. I was relieved when DoD General Counsel Jim Haynes corrected the DEPSECDEF saying the only person empowered to make those decision was the chief prosecutor (pointing at me) and for anyone to try to influences those decisions would violate the statutory ban on coercion and unlawful influence. The provision worked here to stop exactly what it was intended to stop.

(b) The second level of legal authority is the Manual for Military Commissions (MMC), which the Secretary of Defense approved in January 2007.

(i) The term "legal advisor" is defined in RMC 103(a)(15), saying: "Legal advisor" is an official appointed by authority of the Secretary of Defense who fulfills the responsibilities of that position, as delineated in this Manual, and otherwise provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the Code." The same as in the MCA, there is no language in the MMC giving the legal advisor command authority over the day-to-day operations of the OCP. For the legal advisor to be actively engaged in the OCP runs counter to his or her duty to provide independent advice to the CA on military commission matters. For example, RMC 406 requires the legal advisor to give the CA written pretrial advice before she decides to refer a case to trial. The discussion to RMC 406 states:

The legal advisor is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the legal advisor is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member. (emphasis added)

(ii) If the legal advisor is routinely engaged with the OCP in crafting charges, mustering evidence, developing trial strategy, honing prosecutors' skills, and sequencing cases before charges are sworn and forwarded to the CA's office for the legal advisor's "independent appraisal," then he has, in my view, relinquished his independence and should be disqualified from any involvement in the pretrial advice or other legal matters related to the case.

(iii) RMC 104(a)(2) includes the MCA § 949b(2)(C) prohibition on unlawful influence or coercion, although due to a typographical error the MMC refers to counsels' exercise of "profession judgment" rather than "professional judgment."

(iv) Finally, RMC 503(c) says the chief prosecutor and chief defense counsel are "selected and assigned by the Secretary of Defense or his designee." The MMC does not delegate to the legal advisor the authority to hire, fire, or exercise command authority over the chief prosecutor or the OCP.

(c) The third tier of legal authority is the Regulation for Trial by Military Commission (the Reg), which the Secretary of Defense released in April 2007.

(i) Paragraph 1-3, entitled "Responsibilities," says the SECDEF is responsible for the "overall supervision and administration" of military commissions, the chief trial judge has the same responsibility for the military commissions trial judiciary, and the DoD Deputy General Counsel for Personnel and Health Policy is "responsible for oversight of defense counsel services." Paragraph 1-3 does not assign anyone responsibility for supervision, administration, or oversight of the OCP. Responsibility for supervising and directing the OCP is addressed in Chapter 8, entitled "Trial Counsel." Paragraph 8-1 states:

Pursuant to 10 U.S.C. § 948k(a) and (d)(1) and R.M.C. 503(c), there shall be a Chief Prosecutor appointed by the Secretary of Defense or his or her designee. 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.

(ii) Chapter 2 of the Reg is entitled "Convening Authority," and it defines the roles and responsibilities of the CA and her staff. It does not give the CA or anyone on the CA's staff responsibility for supervising or directing the OCP, except the CA is expressly authorized to approve or disapprove a prosecution request to communicate with the news media (see 2-3.a.7).

(iii) The only reference to the legal advisor having any direct role with respect to the OCP anywhere in the MCA, MMC, or the Reg is a single sentence in paragraph 8-6 of the Reg where it says the chief prosecutor "shall report to the legal advisor to the convening authority." A similar reporting relationship is created in paragraph 9-3 between the Deputy General Counsel for Personnel and Health Policy and the chief defense counsel. Likewise, paragraph 2-3.b.1 says the convening authority "reports directly to the Secretary of Defense or his designee." In other words, the relationship between the legal advisor and the chief prosecutor rests on the same foundation as the relationship between the SECDEF and the CA. If it would be improper for the SECDEF to direct you to do or not to do something that was within your responsibilities as the convening authority (i.e., unlawful influence or coercion), then the same is true for the legal advisor and the chief prosecutor.

(iv) I would note that the Appointing Authority attempted to have the appropriate service TJAGs rate the chief prosecutor and the chief defense counsel, but when he encountered some resistance he abandoned the effort. I am certain Mr. Altenberg would be willing to discuss that with you if necessary. The appearance created by having the legal advisor to the CA rate the performance of the chief prosecutor has been the topic of

discussion a number of times during my tenure, but no action to change it has occurred that I am aware of.

7. The process that evolved from the time of the Supreme Court's decision in June 2006 and the Secretary's approval of the Regulation for Trial by Military Commission in April 2007 did not significantly alter the roles of the principals in the military commission process. When we resumed with charges against Hicks, Hamdan, and Khadr, to an observer the process was virtually indistinguishable from the earlier process. In my view, the fact your staff and my staff had some disagreements over the form of the charges, and the fact I was less than enthusiastic about the Hicks pretrial agreement, showed military commissions are not a sham process where the fix is in, as many have claimed. It showed, in my opinion, that we each discharged our duties conscientiously and independently, and this was truly a robust, independent judicial process.

8. Since BG Hartmann and I are both Air Force, many people asked me about him prior to this arrival. I believe if you check people will tell you I said I did not know him well, but he had an excellent reputation in the JAG Corps and seemed to be very personable the times I had met him. BG Hartmann reported for duty on Monday, 2 July 2007. I met with him for about an hour on either Monday or Tuesday of that week and discussed general military commission matters. My impression from that brief initial meeting confirmed my earlier description of him; sharp and personable. We were off for a federal holiday on July 4th and I had surgery the following day. I was released from the hospital on 6 July and I was authorized 30-day of convalescent leave. I did not anticipate taking the full 30 days and I expected to end my leave at the end of July.

9. On Monday, 9 July, while I was on convalescent leave, BG Hartmann came to the OCP and met with the members of the OCP staff present in the Crystal City office. He told the non-HVD deputy to arrange case briefings to educate him on the facts and issues involved in each case, and those began shortly thereafter. In a group meeting, BG Hartmann explained that he works 24/7, he expected everyone to be excited about their work, he would accept no excuses and no delays, it was his mission to get the trials back on track, and said "I would consider it a personal failure if we're unable to successfully prosecute these cases," (or words to that effect).

10. On 10 July, day 4 of my convalescent leave, BG Hartmann sent me an email, along with the deputy chief prosecutor for non-HVD (non-HVD deputy) cases and the deputy chief prosecutor for HVD (HVD deputy) cases, asking what type of trial advocacy training program we had in place, how we prepared trial notebooks, and how we conducted pretrial "murder boards." He also asked for a list of the trial experience (not guilty pleas only) of all prosecutors. I responded from home saying we did not have a formal process and outlined in general how we prepared for trial. I received an email from the non-HVD deputy late that day saying BG Hartmann expressed great displeasure with our lack of a structured training program and his opinion that the prosecutor in Hicks simply read his

sentencing argument to the members. BG Hartmann mandated that we prepare a trial advocacy training plan and present it to him.

11. On 11 July BG Hartmann ordered the non-HVD deputy to have the prosecutors prepare a list of all their cases and all of the problems associated with each of their cases. During this same period he was getting oral briefings on the cases from the prosecutors. Several of the prosecutors, including ones from both DoD and DOJ, expressed concern about preparing a roadmap of the weaknesses in their cases and providing them to the legal advisor to the convening authority since we are required to provide the defense with all documents the convening authority considered in deciding to refer a case to trial. While it is not clear whether these documents would have to be provided to the defense, in the view of the prosecution the risks outweighed any potential benefits.

12. On 13 July BG Hartmann sent an email to me and my deputies concerning advocacy training. It stated, in pertinent part:

As we move from a preparatory and investigative stage in the cases to seeing the doors of the courtroom, our focus must turn to heightening the litigation skills of the attorneys who will present the cases. . . The key for us will be regular and repeated in-house attention to the presentation of various parts of the trial -- opening, closing, sentencing, voir dire, direct, cross, motions -- in front of people who will give honest, concrete feedback. . . . I would like to see a draft of this by 25 July 07. (emphasis added)

He followed that up with an email on 19 July stating, in pertinent part:

When I was briefing the TJAGs yesterday, I let them know that we are putting together an advocacy training program. . . Please consider this as we set up the program. (emphasis added)

These emails seemed to validate concerns being expressed to me that BG Hartmann was not concerned about the CA and the OCP staffs staying in their lanes, he was taking charge of the entire interstate. That was apparent from the "we, us, and our" language in his emails on his view of the way ahead.

13. Also on 13 July, I instructed the non-HVD deputy to provide BG Hartmann the written case summaries he wanted, but to include a general list of the types of common issues we face preparing for trial rather than case-specific defects that may offer the defense roadmaps of our weaknesses. I told him I thought a general list would give BG Hartmann the background information he needed to educate himself as the legal advisor while avoiding the potential problems that concerned some of the prosecutors about highlighting the faults in each of their cases, which may be discoverable.

14. On Monday, 16 July, the 10th day of my 30 days of convalescent leave, BG Hartmann called me at home and said he had concerns that the non-HVD deputy misrepresented some information. The primary example he cited was based on a DOJ representative telling him that DOJ recommended we "supplement" the brief we filed in the Khadr case on 4 July, but the non-HVD deputy told him DOJ recommended "substituting" an entirely new brief. I told him I had the utmost confidence in my deputy and his honesty. In the back of my mind I thought DOJ had sent me an email describing their position so I searched my Blackberry and found it. The DOJ representative BG Hartmann spoke with had sent an email dated 11 July with a recommendation that was exactly as my deputy had described it to BG Hartmann. I sent a portion of that email to BG Hartmann late in the day on 16 July and I told him I had full confidence in my deputy's honesty. BG Hartmann email me that evening and asked for my home phone number so he could call me. We spoke three times over the course of about an hour. BG Hartmann had left the office and called me from his cell phone. BG Hartmann said he never had any doubt about my deputy's honesty and he could not believe I would tell my deputy what the General had said about him. I told the General that the only way I could get to the bottom of what happened, since I was at home on convalescent leave, and address his concern was to get the facts. He then started punctuating his sentences with "Colonel!" For example, he would explain why he was right and I was wrong and end it with "Is that clear ... Colonel!" When it was apparent I was not coming around to his point of view he switched to his concern over my lack of leadership. One of the examples he cited was the fact the prosecutor in Hicks read his sentencing argument to the members, which showed I did not have him properly prepared for trial. I responded that because of the deal the defense reached with the former legal advisor and the convening authority prior to trial it would have made no difference if the prosecutor had waived argument, and I noted that based on the argument he gave the members sentenced Hicks to maximum sentence allowed under the terms of the PTA. Then he said the poor preparation of my deputy to fill in during my absence was a prime example of my poor leadership. I said my deputy had volunteered for what was a thankless job and in my view was doing an exceptionally well. I told him that as difficult as it had been at times and all the criticism we faced, the one thing the prosecutors could always count on was the support of BG Hemingway when he was legal advisor and we really did not need another enemy. He said he was going to be more hands-on than BG Hemingway and was "not going to spend 80 percent of my time out giving speeches" (or words to that effect). He said, "we're going to focus on getting back into court, presenting evidence, getting convictions and good sentences ... that's how you change public opinion, not by giving speeches" (or words to that effect). Also, he said he and Mike Chapman had 60 years of combined service and they had never seen a Colonel direct a subordinate to disobey an order from a General Officer, referring to me telling the deputy to give BG Hartmann the general nature of the types of problems we encounter preparing cases rather than a roadmap of case-specific problems. He said people get fired for that kind of thing and it will not happen again (which he punctuated with "Is that clear ... Colonel!"). I told him I was sorry he found my leadership so lacking and I would make it easy for everyone; my request for

reassignment would be on his desk first thing in the morning. BG Hartmann called back a few minutes later (he was on a cell phone and we had gotten disconnected) and said my experience was important to the success of this process and we could work through our issues when I came back off of convalescent leave. I was rattled by the whole exchange. Attached are my latest performance report signed by BG Hemingway on 30 April [Atch. 2] and a promotion recommendation form signed by DoD General Counsel Jim Haynes in early July [Atch 3], both commending my leadership abilities. I could not see how I had changed so drastically in the two weeks since BG Hartmann arrived, particularly since I had been on convalescent leave almost the entire time. I walked outside for a few minutes to reflect on what had transpired. When I returned, my wife said BG Hartmann had called a third time and wanted me to call him back. The final call was brief and consisted mainly of him wanting to make sure I was not going to resign and assuring me we could resolve this and make it work. [The progression from discussion, to disagreement, to emphasizing my inferiority in rank, to an attack on me personally has since proven to be a predictable pattern when BG Hartmann and I reach a disagreement.]

15. On 18 July the non-HVD deputy called me at home and said BG Hartmann announced he was going to pick the next cases to go forward and he wanted ones that would generate public interest. He found none of the current cases to be "sexy" (our term, not his) enough to capture the public's interest. I sent an email to the Deputy General Counsel (Legal Counsel) explaining part of the problem that was developing with BG Hartmann taking over my job and I described the legal hierarchy I referenced above. I told him that one of the problems (which he and I had discussed several times before) was the lack of a clear chain of command. I asked him again for assistance in defining who had hiring and firing authority over me (what I would call "command authority"). He responded that he would speak with BG Hartmann and also see what he could do to clarify roles and responsibilities.

16. On 19 July BG Hartmann visited the "war room" where the HVD cases are being prepared by DoD, DOJ, FBI, CIA, and CITF personnel assigned to the Prosecution Task Force (PTF). Under the wiring diagram approved by mutual agreement of DoD and DOJ last fall, I am in charge of the PTF and the day-to-day operations are managed by a DoD HVD deputy who is responsible for DoD assets (including CITF) and a DOJ deputy responsible for DOJ assets (including the FBI) with liaisons from the CIA, NSA, and other agencies. BG Hartmann toured the facility and received a briefing on the cases. In a meeting with the PTF members present at the war room (approximately 15-20 people from the various agencies referenced above) BG Hartmann said: "I wear two hats. In one I'm responsible for providing legal advice to the convening authority and in the other I'm responsible for the prosecution," (or words to that effect). There were already persistent problems over who is really in charge of the PTF, and it has taken constant attention to get all of the participants from other agencies to accept me as the one who is in the command billet. BG Hartmann's comments blurred the

lines even further and made that even more difficult. Also, he sent an email to the HVD deputy afterwards praising his efforts and saying he had complete confidence in the HVD deputy, the DOJ deputy (George), and our CIA liaison (John). The HVD deputy responded back to him: "John, George, Moe and Tom Swanton deserve all the credit for assembling the team and having the fire in the belly to keep this process moving forward." This in isolation would appear insignificant, but as is noted later it is part of a pattern.

17. BG Hartmann has an official biography posted on the Air Force homepage. Note that he makes no mention of any OCP responsibilities. He describes his duties and responsibilities as follows:

Brig. Gen. Thomas W. Hartmann is the Legal Adviser to the Convening Authority in the Department of Defense Office of Military Commissions, Washington, D.C. He is responsible for providing legal advice to the Convening Authority regarding referral of charges, questions that arise during trial and other legal matters concerning military commissions. His duties also include supervising the Convening Authority legal staff. (Available at: <http://www.af.mil/bios/bio.asp?bioID=10078>).

18. I returned to duty on 24 July, eighteen days after I was released from the hospital and a week earlier than I originally anticipated. I did so because of concerns expressed to me by several people, military and civilian, about BG Hartmann's interference with the prosecution. I sent an email to you and BG Hartmann that day asking for written performance feedback explaining that I wanted to resolve any confusion over lines of authority and expectations of me.

19. On 25 July I met face-to-face with BG Hartmann for the second time since his arrival on 2 July. We talked for about two hours and forty-five minutes and in my view it was a very frank and productive discussion. He asked me to begin, and I explained my concerns about prosecutorial discretion, the neutrality of the legal advisor and the convening authority, and unlawful influence or coercion. We eventually got around to the dispute we had over the phone on 16 July. He agreed that, after talking it over with his staff, we had valid concerns about listing case-specific defects, although they thought we had a very cautious view. He said what he needed was information on cases in order to plan for all the things that will be necessary to get these cases tried. I agreed that he needs and deserves that information. I brought up my concern over our lack of a coherent public diplomacy strategy. BG Hartmann indicated he was not a proponent of speeches, interviews, and writing articles (I had mentioned my pending article in the Yale Law Journal Pocket Part). He said "getting into court and getting convictions is the best way to tell our story" (or words to that effect). He said "we need to pick cases that will get public attention." He mentioned a case he liked, "the guy who threw the grenade" (Jawad), and one he did not (al Qosi) because the one was "sexy" and the other was bland (he noted "sexy" is the term we use). That led into a discussion on trial advocacy training. He was concerned the prosecutors were

not well prepared and wanted a formal training plan to get them ready for trial. I told him that the non-HVD deputy was working on it at that moment and we were hoping to arrange training by Professor Steve Saltzburg from George Washington University, and we would need his support to secure funding. We eventually secured \$12k and will hold a 3-day advocacy training program for all of the DoD prosecutors 28-30 August. He said he would support us and he said he would appreciate it if we could use his friend and mentor, John Odom (USAFR retired), who was a talented advocate and former member of the TRIALS team (a USAFR advocacy training program that Col Odom and BG Hartmann were on together) to assist with our training, although he made it clear that was only a request and not a requirement. I left the meeting with a positive feeling. It was fully discussed and appeared clear that I was responsible for the prosecution and all he wanted was to be kept informed, to assist where he could, and not to interfere.

20. On 26 July two prosecutors briefed BG Hartmann (with Mr. Chapman present as had been the routine) on two cases. The non-HVD deputy and I sat in. This was the first time for me in these case briefings and they were uneventful. Several times in the briefings BG Hartmann interjected "that's for Colonel Davis to decide" or "that's your call, not mine." Afterwards, the non-HVD deputy asked me, "Who was that man? That's not the same General Hartmann that's been here before." On 27 July BG Hartmann and Mr. Chapman came over and sat in on a secure VTC we conduct every week or so with the CITF-GTMO staff for an update on the cases they are working. Again, it was uneventful.

21. Arrangements were made for BG Hartmann and I to travel together to GTMO for an orientation visit. We left on 1 August and returned on 5 August. We spent a considerable amount of time together aside from the briefings and tours. I thought it was a very pleasant and productive trip. We talked about official business, discussed personal things about our careers and our families, and laughed quite a bit. Based upon my interaction with BG Hartmann since our meeting on 25 July through the trip to GTMO, I believed the earlier turbulence had been an initial hiccup that was behind us. I was impressed by his enthusiasm and I was optimistic we could work together (in our own lanes) to make military commissions a success and something the public would look back on with pride.

22. While there were no significant events between 25 July and 6 August, there were some lesser matters relevant to this complaint.

(a) First, BG Hartmann expressed repeatedly his displeasure with classified documents. He has told me and others "I can't use it if it's classified" and "it's of no use to me if it's classified." For better or worse, classified information is at the heart and soul of our cases. That is why our office is alarmed and designated as an open storage area. It is why we have a SCIF here and it is why we recently spent hundreds of thousands of dollars on SCIFs to support our operations at GTMO. To expect to be involved in these cases at the legal advisor level without having to handle classified information is a like being a

surgeon and expecting to do surgery without coming into contact with blood; it is impossible. He has asked several times, "can't you make this unclassified" or "can't you take something off of this so it's not classified?" The short answer is no. We are users of classified information, but we are not an original classification authority (OCA). In other words, we do not own the information and do not have the authority to declassify it. That is why we have a DoD declassification board working out at the war room site where the OCAs can review our requests to declassify information for use at trial. It puts my personnel in an untenable position to have a General Officer encouraging them to do what they are not authorized to do or to make judgment calls that could lead to an accidental compromise of classified information. To be clear, however, his problem with classified information is primarily because your current offices are not approved for open storage and it makes it difficult to work with classified. I appreciate the difficulty it presents when we give him classified information, but in my view the answer is to get the offices approved for open storage rather than asking subordinates to dumb down documents to an unclassified level.

(b) My staff has provided BG Hartmann information on cases in various formats. They initially tried formats already in use to avoid duplication of effort, but that did not suit his requirements. We, including me when I returned to duty from convalescent leave, worked on customizing reports to provide him what he demanded. I understand the need for information, but in my view we spent a significant amount of time trying to put case information into a format he liked when the time could have been used to work on cases.

23. I met with BG Hartmann and Mr. Chapman the morning of 7 August to discuss the potential sequencing of cases. Since your office is responsible for the bulk of the logistical end of military commissions, I fully understand and appreciate that your staff needs planning information if this is all going to work properly. We met again that afternoon and two members of my staff briefed him on two of their cases. During one of those BG Hartmann asked if there were any issues with the declassification of evidence. The briefer explained that there were certain classified items, which he described, that had been identified to the declassification board and we were awaiting their decision. I noticed during this discussion that BG Hartmann was writing in the notebook he carries, so I said the information being discussed was classified. He acknowledged my comment, put his notebook down, and stopped writing.

24. BG Hartmann directed that the principal leaders of the prosecution team meet with him once a week and tasked me to make the arrangements. The first such meeting was held on 8 August in the OGC Conference Room at the Pentagon. The attendees included BG Hartmann, Mr. Chapman, myself, my chief appellate counsel, the non-HVD deputy, the HVD deputy, the DOJ deputy, the CIA liaison, an FBI liaison, and the CITF Commander and Deputy Commander. MR. Chapman did most of the talking and it was mainly about personnel requirements as we move forward. I believe all agreed the meeting was useful and productive.

25. On 14 August I met with BG Hartmann and Mr. Chapman in BG Hartmann's office. BG Hartmann instructed me that he wanted a one-page case update on each of the non-HVD cases. He provided me a one-page typed outline format with headings as follows (verbatim):

Counsel and Paralegals on case, Prosecution and Defense

Case Fact Summary: 5 lines

Classified Issues: What essential evidence is classified and has a final classification determination been made? This will have implications for the closed or open nature of the trial.

Witnesses: Who are they; where are they; have they been contacted for availability?

Experts: are they required? Who are they? How they to be retained?

Anticipated Motions

Unique Logistical Issues

He also said he had heard various people say the United States would prosecute 60, 70, 75, or 80 detainees, and no one knew for sure the true number. He said he wanted to put together a group of 3 or 4 reservists to assess all of the cases and determine the actual number of cases that will eventually be prosecuted. BG Hartmann got a message during the meeting that Mr. Haynes wanted to see him ASAP, so he left for the Pentagon. He said later that one of the civilian counsel for Hamdan had called Mr. Haynes and was interested in a plea deal. [BG Hartmann plans to travel to GTMO soon with civilian defense counsel to negotiate a plea deal in Hamdan.] Finally, 14 August was COL Dwight Sullivan's last day as chief defense counsel. That night Dwight sent me a farewell email. He said the past two years had been interested and he had learned a lot, and he added: "One thing I have absolutely learned is that you are a gentleman -- and few compliments are greater than that." Dwight and I fought hard, so his note meant a lot to me. I hope and believe Dwight's statement is an accurate reflection of my character.

26. The second meeting with the principal leaders of the prosecution and BG Hartmann and Mr. Chapman took place in the OGC Conference Room on 15 August. All attendees received a copy of the one-page case outline referenced in the preceding paragraph and we were instructed to do one on each case. BG Hartmann said the oral argument before the CMCR was set for 24 August and he expected a favorable decision soon thereafter. He said we had to be ready to go the day the CMCR decision comes down and he directed "we will have three cases ready to go that day." Several of us looked at each other surprised that the legal advisor to the convening authority was ordering us to swear charges on a set

number of cases on a date certain. We had several earlier discussions about the problems getting evidence declassified [as of today we still do not have a single case where all declassification issues are resolved]. I asked, "Sir, where are those cases going to come from?" He pointed at me, with a look of displeasure on his face, and said, "They are going to come from you." The non-HVD deputy tried to explain that it was almost certain the evidence declassification process would not be completed that quickly. BG Hartmann eventually cut him off and, using a tone and facial expressions that clearly reflected his irritation, said: "You guys have had five years to get these cases to trial. I said we are going to have at least three cases ready. Does everyone understand me?!" After the meeting ended one of the civilian attendees told the non-HVD deputy he was disappointed to see a senior officer behave like BG Hartmann. Some of us discussed that lack of prosecution preparation had not been the problem the past five years; the problems were all with the trial process. To imply that we were responsible for not getting cases to trial for five years was not particularly motivational.

27. On 16 August I met with BG Hartmann and Mr. Chapman in your conference room, and we later added the HVD deputy by phone on an unsecured line, to discuss an anticipated time line and all of the associated events required to get the HVD and non-HVD cases tried. Your summer legal intern was in and out of the room and on a computer in the room off and on during what was a lengthy discussion. BG Hartmann made notes in his notebook and on a white board and Mr. Chapman made notes on a notepad. There was no classified information discussed that I am aware of, but there was discussion of how many terrorist plots were associated with the HVDs, how many accused would fit into each plot (including some by name), how we plan to charge the cases by plot, when the PTF wanted to swear charges in the various plots (which was an optimistic and aggressive estimate), when the logistics and personnel were realistically going to be in place to permit HVD charging to begin (a more practical estimate), and other HVD-related matters. It occurred to me during this meeting, as we were talking in some detail about the HVDs, how much more relaxed our information security had become between September 2006 when the President announced the transfer of the 14 HVDs to GTMO and the present where we are discussing the HVDs on an unsecure telephone line, making unclassified notes, and all with an intern present who had no need to know any HVD information.

28. At the end of the 16 August meeting BG Hartmann provided me the written performance feedback I requested when I returned to duty. He prepared and signed the form more than two weeks earlier on 30 July. I was surprised by, but appreciated, most of his comments: "excellent grasp" of the job; leadership skill "seems outstanding;" "have fostered evident teamwork/subordinates respect you;" "unmatched knowledge of OMC-P issues," "excellent writer/speaker/advocate for military commissions;" "patient with subordinates/calm leader." I did not, however, agree with his comment, "After initial issues, Col Davis has been open to various additional ideas and approaches," which refers to the flare-up over my refusal for the prosecutors to prepare case-specific problem lists. I do not believe it was appropriate to ding me

for instructing my staff not to give him information that he agreed when we met on 25 July he should not receive. This indicated to me that he was not letting this go entirely and it was still in his mind as a marker of a shortcoming on my part.

29. When I got back to my office I thought more about how we had relaxed our information security posture and the incident the day before where BG Hartmann was making notes in a personal notebook while in a discussion about classified information. I asked the non-HVD deputy if in the case briefings I missed while on convalescent leave they talked about anything that was classified. He said he could not cite a specific example, but he suspected they had. I asked if BG Hartmann was taking notes during the briefings and he said yes. That caused me to suspect there was a possibility BG Hartmann may have inadvertently made classified notes in a notebook that was not properly marked, transported, or stored as required by DoD Publication 5200.1-R.

30. The morning of 17 August I sent an email to BG Hartmann that began "I hope this is received in the spirit it is intended. My desire is to prevent a problem, not to create a problem." I then explained my concern about what I perceive as a relaxed information security posture in general and my concern that he may have inadvertently made personal notes that contain classified information. I received a telephone call from BG Hartmann shortly thereafter and it was clear from the start that he was angry. He said if he had classified notes it was my fault because I was present and did not warn him. He said if he wrote down anything classified in the briefings that took place while I was on convalescent leave then someone should have warned him and their failure to do so was another example of my lack of leadership. When he eventually paused in what I believe qualifies as a tirade I said, "Sir, I started my email by saying I hoped it was received in the spirit in which it was intended and I take it that has gone out the window." BG Hartmann responded, "You are being sarcastic and disrespectfully, and I will not tolerate that. Do you understand ... Colonel!" I said "Yes, Sir." He gave me until the end of the day to figure out how to get his notes reviewed and he said he was locking them in the safe in the interim.

31. I asked the non-HVD deputy to contact the person from USD(I) who supervises the declassification team and see if the team could review the General's notes to see if anything was classified. If there was anything classified in his notes it was derived from classified information that belonged to one of the declassification board members agencies (i.e., the OCAs), so that seemed to make the most logical sense. The person from USD(I) was doing reserve duty, but I was able to speak with her later in the day. She understood the issue, agreed it made sense for the declassification team to review the notes, and said she would call the person in her office at USD(I) who could see about making the necessary arrangements. I did not hear anything back from anyone at USD(I) by late afternoon.

32. BG Hartmann called near the end of the day and asked if I had a plan to get his notebook reviewed. I told him about my discussion with the leader of the

declassification team and that I was awaiting a call from her or another person at USD(I) who could make the necessary arrangements. He reiterated that this was my fault and it was basic officership he learned as a second lieutenant that if anything is being discussed that is classified it is announced up front. He punctuated each of his sentences with "Colonel!" For example, "That's basic officership ... Colonel!" I pointed out that given the nature of what we are doing and what we are working with on a daily basis, we presume information is classified and this had never been an issue in the nearly two years I had been here. He said that was not standard Air Force practice at any MAJCOM he knew of and said someone with my years of experience should know that. I noted that when we were in the SCIF at JTF-GTMO during our recent visit and we were discussing classified information no one made any upfront security announcements. He continued with what I would describe as a tirade and I responded "Yes, Sir" or "No, Sir" at points where he paused for a response. At some point he became dissatisfied with the way I said "Yes, Sir" or "No, Sir" and accused me again of being sarcastic and disrespectful because of my intonation. He ordered me to see him personally if issues like this arose again and he asked why I chose to put my concerns in an email. I responded, "Sir, I can't answer that." He asked why and I said "because you'll accuse me of being disrespectful again." He said, "No, I'm giving you permission. I want to know why you sent me an email." I said, "Sir, it's because I don't trust you as far as I can throw you." He said I should focus on doing my job, which is to get the prosecutors ready for trial, and not be spending my time writing law review articles or searching the internet for news articles and blog comments about Gitmo. I said "Yes, Sir," and he hung up.

33. On Monday, 20 August, I had a note from the person at USD(I) who was making arrangements saying the declassification team would review BG Hartmann's notes and we could work on how to transport them out to the war room. I notified BG Hartmann and he responded that he had already turned things over to the OMC security manager and she was going to undertake the review. I notified the USD(I) person to disregard the earlier exchanges and I thanked her for the time and effort she expended setting up the classification review.

34. I was unable to attend the 22 August meeting of the principal members of the prosecution and BG Hartmann and Mr. Chapman because of a medical appointment. I was informed that one of the civilian attendees asked BG Hartmann if anyone was in charge of the defense the same way he was in charge of the prosecution. BG Hartmann said the defense was under Mr. Koffsky, but no, no one was in charge of them like he was over the prosecution. He did, however, say he was not telling the prosecution how to try cases and he had Mr. Chapman confirm his statement. I heard from several people that BG Hartmann heaped lavish praise on the HVD deputy and the PTF for "leaning forward in the foxhole" and working aggressively to prepare the HVD cases. Those I spoke with took his remarks as both a compliment and a backhand slap at the non-HVD deputy. One of the civilian attendees commented to Mr. Chapman later in the

afternoon that BG Hartmann's slap was uncalled for and he should have a talk with the General about it. Mr. Chapman responded, "Yeah, I know." That same person observed that there is already somewhat of a wedge between the HVD prosecutors (who some view as the "A" players) and the non-HVD prosecutors (who some view as the "B" players), and perceived slights by BG Hartmann exacerbate the division.

35. I am extremely proud of both the non-HVD deputy and the HVD deputy and the way they have conducted the day-to-day management of their offices and their missions. I am glad BG Hartmann recognizes and publicly acknowledges the hard work the HVD team is doing on some of the most important cases imaginable and the quality of the HVD deputy's leadership. I am disappointed, however, that he does so at the expense of the non-HVD team and the leadership of the non-HVD deputy. The HVD deputy hand-picked prosecutors to work on the most infamous terrorism cases and his attorneys have an average of more than three years of experience as a military commission prosecutor. The non-HVD deputy has the attorneys the military services provided our office minus the ones hand-picked from that group to support the HVD effort. His attorneys average less than nine months of experience and four of them arrived after BG Hartmann's arrival. The HVD team includes extraordinarily qualified and experienced prosecutors from U.S. Attorney offices from across the country, FBI agents who have been assigned solely to one or more of the HVD plots for many years, a group of CITF agents and analysts that were hand-picked by their commander as the best in his organization, and the full support of a number of federal agencies. [For example, DoD created the Special Detainee Follow-up Group (SDFG) solely to support the HVD program.] The non-HVD team does not have the luxury of these in-house resources. The HVDs are, for the most part, well known and you can go to the internet and find information on who they are and what they are alleged to have done. In the case of the non-HVDs, in many instances it is difficult to determine who they are and what they did, and then try to assemble evidence to build a case to take to trial. In short, for BG Hartmann or anyone else to hold the HVD and non-HVD teams side by side for comparison will never produce a valid result. Both sides are, in my view, doing exceptional work under tremendous pressure and getting very little appreciation for their efforts.

36. The overall atmosphere BG Hartmann has created is, in my view, unhealthy. On one hand he complains people did not speak up about classified information but on the other he is prone to publicly shoot the messenger. He complains that people are not solely focused on case preparation, but then he wants them to stop work and give him briefings, prepare multiple versions of case summaries, attend training programs and a newly created meeting, in addition to their normal duties. He creates divisiveness among the prosecution teams that undercuts morale and effectiveness. These are not, I respectfully contend, attributes that will lead us to success.

37. To put this into clearer context, other events have occurred in the 53 days since BG Hartmann took over as the legal advisor that merit consideration in the evaluation of this complaint.

(a) At the time BG Hartmann arrived in July there were 9 attorneys working under the non-HVD deputy and 7 working under the HVD deputy on their respective cases. Since then, two from the non-HVD side have moved to new assignments and one from the HVD side has accepted a job offer and will depart soon. Those three losses represented a total of nine years of military commission prosecution experience. We have added five new attorneys during the same period, but they cannot replicate nine years of experience.

(b) In late July the HVD team asked for help from the non-HVD team to review approximately 162,000 documents (note that is the number of documents, not the number of pages) to assess whether each document has any relevance to the HVD cases. Members of the non-HVD team are doing that in addition to working on the preparation of their own cases, conducting briefings and compiling information for BG Hartmann, and attending the training he has mandated.

(c) In mid-August we received a short-notice tasker from DoD to review all information on six specified cases and provide a report on each in response to a recent order issued by a federal court. Members of the non-HVD team completed the tasker, which was unanticipated and in addition to the time and effort devoted to the matters referenced above.

(d) We have filed a variety of briefs and other documents in connection with our motions for reconsideration in the Hamdan and Khadr cases, and our subsequent appeal in the Khadr case. Additionally, we prepared for oral argument to take place tomorrow. This has taken a considerable amount of time and effort as well.

Issues

38. The roles and responsibilities of the legal advisor and of the chief prosecutor are defined in the MCA, the MMC, and the Regulation. As noted earlier, the legal advisor is responsible for providing legal advice and recommendations to the convening authority, similar to that provided by a staff judge advocate. (RMC 103(a)(15)). Reading the MMC and the Regulation in total, it is apparent that the legal advisor's role begins after the chief prosecutor forwards sworn charges (See RMC 406 and Paragraphs 3-2.g, 3-3, and 4-2 of the Reg) and post-trial. There is no legal basis for the legal advisor to exercise any pre-charging authority and his actions in that regard are ultra vires. If the Secretary of Defense or his designee issued a change to my duties and responsibilities or assigned the current legal advisor duties and responsibilities that differ significantly from the former legal advisor I am unaware. If that is the case, it was a disservice to both BG Hartmann and I that this change was not disclosed.

39. Section 949b(2)(C) of the MCA and RCM 104(a)(2) prohibit any attempt to unlawfully influence or coerce trial counsel in the exercise of professional judgment. Paragraph 1-4 of the Reg goes even further and warns "convening authorities, legal advisors, trial counsel and others" to avoid "the appearance" of unlawful influence. (emphasis added). In this case, for the legal advisor to spend hour after hour with the prosecutors reviewing undercharged cases in detail, discussing evidence and trial strategy, mandating trial advocacy training for all prosecutors, injecting himself into the selection of cases and the timing of charging, mandating a certain number of case must be charged at a certain point in time -- all of the factors discussed earlier -- constituted, in my view, actual coercion and unlawful influence and the appearance of such at an absolute minimum. Additionally, paragraph 3-2 of the Reg is entitled "Prosecutorial discretion" and lists factors to guide the prosecution in making charging decisions. The desires of the legal advisor are not listed among those factors. From time to time in the past others came close to exerting what I would consider influence or coercion, but I ignored them and proceeded to do what I, in consultation with the prosecution team, thought was right. Of one thing I am certain: There would be consequences attached to ignoring the current legal advisor.

40. As noted earlier in paragraph 6(b)(i), the legal advisor is required to provide the convening authority written pretrial advice prior to the referral of charges, which includes an "independent and informed appraisal of the charges and evidence" and a person is disqualified from preparing the pretrial advice if he or she previously acted as trial counsel in the case. (See discussion to RMC 406). As noted in detail earlier, many of the actions of the current legal advisor and deputy legal advisor were prosecutorial in nature. In my opinion, they are disqualified and cannot make an independent appraisal of the charges and evidence. This does not apply to Hamdan and Khadr since they were referred to trial prior to the arrival of the current legal advisor.

Conclusion

41. I would be pleased to discuss potential remedies with you. It is my sincere desire to resolve this informally and without generating adverse reactions. I do not undertake this course of action lightly and I assure you that I remain totally invested in making the military commissions a success. The bottom line is that I cannot in good conscience permit what has happened over the past 53 days to continue. I respectfully request your assistance to resolve this matter and, if not, to forward it to the appropriate Inspector General.

23 August 2007



MORRIS D. DAVIS, Colonel, USAF
Chief Prosecutor
Office of Military Commissions

From: [REDACTED]
To: K [REDACTED]
Sent: Thu May 29 18:01:57 2008
Subject: Khadr -- Press Advisory -- 29 May 2008 -- Judge dismissed

KHADR JUDGE RELIEVED AFTER THREATENING SUSPENSION OF MILITARY COMMISSION PROCEEDINGS

Colonel Peter Brownback, the military judge presiding over the Guantanamo Bay trial of Canadian citizen, Omar Khadr, has been relieved of further duties in the case. In a brief e-mail message released late this afternoon, military commissions chief judge, Colonel Ralph Kohlmann, announced that Brownback is to be replaced by Colonel Patrick Parrish.

The change comes in the wake of a Guantanamo Bay military commission hearing in which Brownback threatened to suspend proceedings in the case of Omar Khadr if prosecutors continued to withhold key evidence from Omar's lawyers, and in which he noted that he had been "badgered and beaten and bruised by Major Groharing since the 7th of November, to set a trial date" in the case. Despite superficial consideration of key legal issues such as whether military commissions can lawfully prosecute a former child soldier, Brownback had rejected extreme prosecution arguments on several disclosure issues and directed prosecutors to provide Omar's lawyers with evidence critical to his defense. As recently as yesterday, prosecutors continued to harass Brownback, stating in an e-mail that Brownback should reject a series of defense requests for disclosure and set a trial date. Apparently rejecting Groharing's charge of undue delay, Brownback accepted the motions and required prosecutors to respond. His termination followed, today.

The text of Col. Kohlmann's and Major Groharing's e-mails are provided below --

LTC [REDACTED]

1. Colonel Patrick Parrish, USA, is hereby detailed as Military Judge in the case of U.S. v. Khadr.
2. Please advise the appropriate persons regarding this change.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge, MCTJ

[REDACTED] ss to Colonel Brownback.

1. In the past week the Defense has filed five additional motions to compel discovery. The motions filed by the Defense have not been assigned filing designations.

2. In the Military Judge's ruling on D-056, he noted that the commission would consider the timeliness of these additional motions in due course.

3. With the exception of the Defense Motion to Compel Production of ICRC Documents, each of the Defense motions is based on a discovery request filed during May 2008, over a year after this case was referred for trial and over seven months after the Court of Military Commission Review decision. The Motion to Compel ICRC Documents is based on a 3 March 2008 discovery request. The Defense has provided little, if any, explanation regarding the delay in making these requests.

4. The subject discovery motions could have, and should have, been filed many months ago. It is time for this case to proceed to trial. The Prosecution has provided all discovery required by the Military Commissions Act and Manual for Military Commissions. Absent compelling justification for submitting additional discovery requests or motions to compel discovery, the Military Judge should reject the Defense filings as untimely.

V/R,
Jeff Groharing
Major, U.S. Marine Corps
Prosecutor, Office of Military Commissions

KHADR DEFENSE LAWYERS SEEK DISMISSAL OF CHARGES BASED ON POLITICAL INTERFERENCE

Lawyers for young Canadian, Omar Khadr, have filed three motions with Omar's Guantanamo Bay military commission, seeking dismissal of charges based on the exertion of "unlawful influence" over the military commission process. Due to draconian military commission secrecy rules, they are prohibited from releasing the text of the motions themselves.

The first motion is based on interference by lawyers in the Department of Defense General Counsel's office in the military commission disclosure process. In June, Omar's military lawyer, Lt. Cmdr. Bill Kuebler, released an affidavit to be filed with the U.S. Supreme Court, in which he disclosed the contents of a Guantanamo Bay interrogation manual encouraging interrogators to destroy notes containing "interrogation information." Shortly thereafter, lawyers from the General Counsel's office directed prosecutors to claw back the documents, preventing their use as evidence in the military commission. Based on statements by prosecutors about the existence of a "gentleman's agreement" between the prosecution and other agencies, this appears to be part of a practice of systematic interference by outside agencies in the military commission discovery process. It may explain why prosecutors have fought so hard not to disclose evidence of Omar's interrogations at Bagram and Guantanamo Bay. Approximately six weeks after clawing back the documents, prosecutors have re-produced some, but not all, of them.

The second motion is based on excessive interference by Brigadier General Thomas Hartmann (the Legal Advisor to Convening Authority Susan Crawford) in the prosecution of commission cases. Based largely on the testimony of former Chief Prosecutor, Colonel Morris Davis, the motion is similar to one successfully brought in the military commission case of United States v. Hamdan, resulting in Hartmann's disqualification from further participation in that case.

The third motion seeks dismissal in light of the sudden and unpersuasively-explained removal of Colonel Peter Brownback as military judge in May. Brownback was replaced by Colonel Patrick Parrish following a series of heated sessions in which Brownback sparred with commission prosecutor, Major Jeffrey Groharing, over the government's failure to turn over evidence in discovery, threatened to suspend proceedings, and rejected repeated, vociferous demands to set a trial date. A DoD spokesman initially described Brownback's removal as the result of a "mutual decision" between Brownback and the Army. Days later, DoD changed its story when Chief Judge, Colonel Ralph Kohlmann, issued a statement indicating that Brownback's departure was involuntary.

These and other motions will be heard at the next session of Omar's military commission, currently scheduled for 13 August 2008.

on, please contact Lt. Cmdr. Bill Kuebler at



UNITED STATES OF AMERICA)
)
)
v.)
)
)
OMAR AHMED KHADR)
a/k/a "Akhbar Farhad")
a/k/a "Akhbar Farnad")
a/k/a "Ahmed Muhammed Khali")

RULING

**Defense Motion
To Dismiss
D076**

(Unlawful Influence – Removal of)
Military Judge)

1. The Defense requests the Commission to dismiss all charges and specifications based on unlawful influence.
2. COL Brownback retired from active duty in 1999 after 30 years of active duty service. COL Brownback was recalled to active duty from his retirement status from 13 July 2004 for 365 days to serve as a military judge for the military commissions. His retirement recall orders were subsequently amended several times to extend his retirement recall until 29 June 2008. COL Brownback's retiree recall orders were not extended beyond 29 June 2008. The Commission is not aware of any right a military retiree has to be recalled to active duty or to have his recall orders extended.
3. COL Brownback was detailed as the military judge in this case on 24 April 2007. The current military judge was detailed as the military judge in this case on 2 June 2008. The Defense alleges that COL Brownback was improperly removed from this commission as the military judge.
4. Rule for Military Commissions (RMC) 505(e)(1) allows the Chief Trial Judge to change the military judge without cause prior to assembly of the military commission. The military commission in this case has not yet been assembled.
5. Even though no cause was required, the change in the military judge in this case did not happen without cause. COL Brownback was no longer on active duty after 29 June 2008. Therefore, he was not going to be available to continue to serve as the military judge to the conclusion of this military commission. The decision that COL Brownback was not going to be extended in his retiree recall status was made no later than sometime in February of 2008. There is no evidence which reasonably supports a conclusion that decision was in any way related to any ruling he made in this case. There is no evidence which in any way suggests that COL Brownback returned to a full time retired status for any nefarious reason. Mere speculation, innuendo, and an implausible conspiracy theory do not, individually or collectively, support this motion. The Commission is convinced beyond a reasonable doubt that no unlawful influence on the changing of a military judge exists in this case.
6. Accordingly, the motion to dismiss all charges and specifications is denied.

So Ordered this 15th day of August 2008.


Patrick J. Parrish
COL, JA
Military Judge