

UNITED STATES OF AMERICA

v.

Ahmed Mohammed Ahmed Haza Al Darbi

Defense Motion
to Dismiss the Charges and Specifications for
Unlawful Influence

July 2008

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Defendant Al Darbi moves to dismiss the charges and specifications with prejudice due to the unlawful influence of the Office of the Chief Prosecutor by the Legal Advisor to the Convening Authority. In the alternative, Defendant moves to disqualify the Legal Advisor to the Convening Authority from further participation in this case.
3. **Overview:** The Military Commissions Act (MCA) prohibits the unlawful influence of trial or defense counsel. 10 U.S.C. § 949b (2006). The former Chief Prosecutor and his subordinates were subjected to unlawful influence by the Legal Advisor to the Convening Authority in that the Legal Advisor took over the function of the Chief Prosecutor by deciding who was going to be charged, when the cases would be preferred, who was going to try the cases and otherwise usurped the role of the Chief Prosecutor. The Legal Advisor “nanomanaged and directed” the prosecution and so closely aligned himself with the prosecutorial function that he cannot continue to provide the requisite impartial advice to the Convening Authority.
4. **Burden and Standard of Proof:** Under U.S. military law, the defense bears the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The defense meets this burden by showing facts, “which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* Once the issue of unlawful command influence has been raised, the burden

shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Dismissal may be an appropriate remedy to cure the appearance of unlawful influence. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). These same rules should apply to military commissions where Congress has afforded detainees greater protections against unlawful influence than those found in the Uniform Code of Military Justice (UCMJ).

5. Facts:

- i. On April 15, 2004, the General Counsel for the Department of Defense promulgated Military Commission Instruction No. 6. (Attachment A.) Instruction No. 6 established reporting requirements for personnel involved in the military commission process. The Appointing Authority reported to the Secretary of Defense; the Legal Advisor to the Appointing Authority reported to the Appointing Authority; and the Chief Prosecutor reported to the Legal Advisor to the Appointing Authority.
- ii. Before Colonel Morris Davis was detailed to the position of Chief Prosecutor, he was interviewed by Department of Defense General Counsel William J. Haynes. During their conversation, Colonel Davis reminded Mr. Haynes that there had been acquittals at the Nuremberg tribunals. Mr. Haynes responded by saying, “acquittals, we can’t hold these men for six years and have acquittals. We have to have convictions.”
- iii. On September 29, 2006, Colonel Davis attended a meeting of the Special Detainee Follow-Up Group. The meeting was held in Deputy Secretary of Defense Gordon England’s office and was attended by Mr. England and Mr. Haynes. During the meeting, Mr. England raised the issue of charging so-called high value detainees: “We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the election.”
- iv. The Special Detainee Follow-Up Group met three times every week. Stephen Cambone, then the Under-Secretary of Defense for Intelligence, also attended these meetings. Mr. Cambone repeatedly advocated for the Department of Justice to have a greater role in the military commission process. He stated that military attorneys did not have the sophistication to deal with the cases before the commissions and that, if they had skill, they would be in the private sector. Colonel Davis resisted involvement in the military commission process by the Department of Justice.
- v. While these meetings were taking place, Congress was drafting the MCA. During that process, Colonel Davis met with Senators Lindsey Graham and John McCain. They asked him what he needed to accomplish the mission of the Chief Prosecutor. Colonel Davis advised them that both the Chief Prosecutor and Chief Defense

- Counsel should be uniformed officers. And he told them that these positions must be insulated from influence outside of their office. He drafted the language found in 10 U.S.C. § 949b that prohibits interference with the Chief Prosecutor.
- vi. On January 9, 2007, Mr. Haynes called Colonel Davis and asked him how quickly he could charge David Hicks. Colonel Davis replied that the Secretary of Defense had not yet promulgated the Rules for Military Commissions or the Regulation for Military Commissions and that he could not charge Mr. Hicks before the Secretary of Defense had issued the Manual for Military Commissions.
 - vii. Ten days later, the Pentagon announced the issuance of the Rules for Military Commissions and the Regulation for Military Commissions. That same day, Mr. Haynes called Colonel Davis. He told Colonel Davis that he now had the Manual for Military Commissions and again asked how quickly he could charge David Hicks. He also asked Colonel Davis to charge a few additional detainees along with Mr. Hicks.
 - viii. On February 2, 2007, Colonel Davis had charges sworn against David Hicks, Omar Khadr, and Salim Hamdan. He was unable to forward the charges to the Convening Authority because there was no Convening Authority until February 7, 2007, when Mrs. Susan Crawford was appointed to her current position.
 - ix. On March 26, 2007, David Hicks pleaded guilty to one charge of material support for terrorism. Colonel Davis was not informed of the pre-trial agreement until he arrived at Guantanamo Bay to attend the scheduled arraignment of Mr. Hicks. After Colonel Davis spoke publicly about not being included on pretrial negotiations, the Convening Authority privately counseled Colonel Davis on publicly breaking ranks with the Office of the Convening Authority.
 - x. On July 1, 2007, General Thomas Hartmann became the Legal Advisor to the Convening Authority. He immediately began what Colonel Davis describes as “nanomangement” of the Office of the Chief Prosecutor. He wanted to know the status of every case being worked up within the Office of the Chief Prosecutor. He wanted to review the evidence against each detainee and even the three main points each attorney intended to make during closing arguments. He wanted to know who was making the decisions on each case. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel. He wanted Colonel Davis to charge cases that were “sexy” or cases that had “blood on them.” He specifically liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter.
 - xi. Colonel Davis had a policy against using evidence obtained through torture. General Hartmann took the position that prosecutors should not make the decision about whether evidence was reliable. He insisted that such decisions be left to military judges. During testimony before the Senate Judiciary Committee, General Hartmann reiterated his position that the military judge—not the prosecutor—would be the gatekeeper for such evidence. When Senator Feinstein asked him, “So in other

words, if you believe you can prove something from evidence derived from waterboarding, it will be used?," General Hartmann replied, "If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow." (Attachment B)

- xii. In September 2007, Colonel Davis delivered a formal complaint regarding the interference of General Hartmann in his office to the Convening Authority. When he called the Convening Authority a week later to inquire as to the status of his complaint, she informed him that General Hartmann did not work for her and that the complaint had been forwarded to General Hartmann's boss, Mr. William Haynes.
- xiii. Colonel Davis' complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA, which concluded that there had been no unlawful influence on the Chief Prosecutor by the Legal Advisor because the Legal Advisor was authorized by regulation to influence the Chief Prosecutor. The Tate Report, dated Sept. 17, 2007 (Attachment G).
- xiv. However, during the Tate Investigation, several witnesses testified under oath regarding the excessive involvement of BG Hartmann in the selection of cases and overall micromanagement of the prosecution. LCDR Stone stated that: "some of the tasking that have been thrown to the office would be used only for what I would consider usurping the role of the Chief Prosecutor." He also understood that the Legal Advisor wanted cases that appealed to the American people: "Here's what we want. You know, give me the pizzazz..."
- xv. In addition, Lt Col Britt stated that BG Hartman, almost immediately upon arrival: "asked for a complete report on everything A to Z that had to do with our prosecutorial operation and immediately he requested a series of written documents that in the past we had been advised and our research had indicated should not be provided to the Legal Advisor." Moreover, he stated that the decision on which cases were going to be prosecuted was made by BG Hartman. He stated that each prosecutor was told: "That case isn't going to go to trial...but that case will and the reason why that case won't and that case will is because that is going to seize the imagination of the American public and that case won't".
- xvi. Moreover, Mr. Michael Chapman, Deputy Legal Advisor to the Convening Authority, further testified that: "General Hemingway was not as actively as involved into the everyday operation of the prosecution as General Hartman has been."
- xvii. On October 3, 2007, Mr. England issued a memorandum establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007 (Attachment C). Colonel Davis reported to the Legal Advisor to the Convening Authority. The Legal Advisor reported to the Deputy General Counsel who in turn reported to Mr. Haynes. Colonel Davis resigned the next day.

- xviii. Charges against Mohammed Jawad were sworn five days later on October 9, 2007. Charges against Al Darbi were sworn on 20 Dec 2007.

6. Law and Argument:

I. THE MILITARY COMMISSIONS ACT CREATED THE OFFICE OF CHIEF PROSECUTOR, DID NOT CREATE THE OFFICE OF LEGAL ADVISOR, AND SPECIFICALLY PROHIBITED ANY PERSON FROM COERCING OR UNLAWFULLY INFLUENCING THE EXERCISE OF THE CHIEF PROSECUTOR'S PROFESSIONAL JUDGEMENT; HENCE, THE REGULATIONS REQUIRING THE CHIEF PROSECUTOR TO REPORT TO OR BE DIRECTLY SUPERVISED BY THE LEGAL ADVISOR ARE ULTRA VIRES AND, BY DOING SO IN THIS CASE, THE CHARGES HAVE BEEN IMPROPERLY PREFERRED AND REFERRED AND SHOULD BE DISMISSED

The congressional prohibition against unlawful command influence found in the UCMJ was codified in the MCA. However, Congress did not simply transplant the prohibition against unlawful influence found in Article 37, UCMJ, into § 949b of the MCA. Section 949b of the MCA is broader in scope and prohibits *any person* from coercing or unlawfully influencing “the exercise of professional judgment by trial counsel or defense counsel.” 10 U.S.C. § 949b (2006). Colonel Davis has testified that Senators John McCain and Lindsey Graham inserted these provisions into the MCA at his request to secure the independence of the Chief Prosecutor from interference external to his office. Senator Graham later commented on Colonel Davis’ service as Chief Prosecutor from the Senate floor: “There is no finer officer in the military than Colonel

Davis. He is committed to render justice.” 152 CONG. REC. S10394 (Sep. 28, 2006) (statement of Sen. Graham).

While Congress sought to create an independent Office of the Chief Prosecutor, and even recognized Colonel Davis by name from the floor of the Senate, it made no mention of the Legal Advisor to the Convening Authority. The Legal Advisor to the Convening Authority is solely a creation of the Secretary of Defense. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (Regulation) 8-6.

The secretarial creation of this position is particularly surprising given the fact that Congress appears to have deliberately omitted the position of Legal Advisor when it codified the MCA. While Article 6 of the UCMJ addresses the function and role of staff judge advocates and legal officers, the MCA does not contain a single reference to either position. Congress could have inserted Article 6 into the MCA, as it did with many other provisions of the UCMJ; however, it elected not to do so. Instead, Congress created the position of Chief Prosecutor, retained the office of the Convening Authority and eliminated the Legal Advisor entirely.

Despite the congressional declination to provide for a Legal Advisor, the Secretary of Defense has attempted to reinsert the Legal Advisor into the military commission process. Section 8-6 of the Regulation states that the Chief Prosecutor shall report to the Legal Advisor to the Convening Authority. While the Secretary of Defense can create an office of Legal Advisor to the Convening Authority, he cannot go beyond the statute and, by administrative fiat, take the congressionally created independent office of the Chief Prosecutor and place it under the direct

supervision, command and control of the Legal Advisor to the Convening Authority and, ultimately, to the Convening Authority herself. This chain of command violates MCA § 949b.

Despite finding facts directly related to the nanomanagement of the prosecutor by the legal advisor, the Tate Report concluded that General Hartmann did not unlawfully coerce or influence the Chief Prosecutor because the regulation permits this conduct. This result is exactly what the MCA was designed to prevent. Nothing in the plain language of § 949b or in the legislative history of the MCA suggests that Congress intended to subordinate the independent role and function of the Chief Prosecutor to functionaries later to be created by the Secretary of Defense. The creation of a Chief Prosecutor was itself a radical departure from the Uniform Code of Military Justice. And the congressional command that “no person” shall coerce or, without authorization, influence the Chief Prosecutor could not be plainer. The Secretary of Defense cannot simply authorize coercion or influence of the Chief Prosecutor by regulation.

The attempt by the Secretary of Defense to authorize coercion and influence on the Chief Prosecutor is void *ab initio*. In cases of conflict, Manual provisions must yield to the statute. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000). Federal statutes prevail over provisions of the Manual unless the Manual provision provides the accused with greater rights than the statute. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). The C.A.A.F. has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the statutory language of the UCMJ. *See e.g., United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). In this case, the Secretary of Defense cannot disregard the congressional command that “no person” coerce or, without authorization, influence the Chief Prosecutor by simply authorizing

the statutorily prohibited conduct.

II. A LEGAL ADVISOR TO A CONVENING AUTHORITY IS NOT THE CHIEF PROSECUTOR AND MUST REMAIN NEUTRAL IF HE IS TO PROVIDE IMPARTIAL ADVICE ON THE STATUTORY FUNCTIONS OF THE CONVENING AUTHORITY

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

The Legal Advisor to the Convening Authority provides advice to the Convening Authority on whether or not to grant clemency, on the selection of members, and on whether charges should be referred for trial at all. 10 U.S.C. §§ 948h; 948i; 950b (2006). “A fair and impartial court-martial is the most fundamental protection that an accused service member has

from unfounded or unprovable charges.” *United States v. Dowty*, 60 M.J. 163, 170 (C.A.A.F. 2004). A fair and impartial military commission is no less an equally fundamental protection for Mr. Al Darbi. Like the selection of members for courts-martial, the selection of members for service on military commissions “is not the convening authority’s solitary endeavor.” *Id.* at 169. She must “necessarily rely on” her staff, including her Legal Advisor. *Id.*; *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999).

Military courts have consistently disqualified staff judge advocates and convening authorities from further participation in cases when their actions have called into question their impartiality. *United States v. Clisson*, 5 U.S.C.M.A. 277, 280 (C.M.A. 1954) (“[W]e do not doubt the personal integrity of trial counsel, but we cannot overlook the fact that his previous antagonistic role prevents his exercising that degree of impartiality required by the Code.”); *United States v. Coulter*, 3 U.S.C.M.A. 657, 659 (C.M.A. 1954) (“[H]uman behavior is such, that when a person, interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter.”); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); *United States v. Howard*, U.S.C.M.A. 187 (C.M.A. 1974); *United States v. Lacey*, 23 U.S.C.M.A. 334 (C.M.A. 1975).

Perhaps with these cases in mind, the Tate Investigation warned the Legal Advisor in this case to “avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as trial counsel.” The Tate Report, dated Sep. 17, 2007,

(Attachment G). General Hartmann appears to have disregarded this admonition.

In a February 22, 2008, interview with National Public Radio's Madeleine Brand, General Hartmann denied that there was political interference in the commission process. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008) (Attachment D). He compared himself with Colonel Davis: "I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months—and in the last four months since Colonel Davis has been gone we have moved 10 cases." *Id.* He then explained the recent surge in prosecutorial activity: "It's from me insisting that we move the process." *Id.* In a letter published in the *Los Angeles Times*, General Hartmann stated that he "directed [Colonel Davis] to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office." Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007 (Attachment E).

General Hartmann made similar statements while testifying before the senate judiciary committee in December 2007. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann) (Attachment B). "If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trial process, it has been my effort, and no one has directed me in that regard." *Id.* In response to a question from Senator Sessions, General Hartmann elaborated on his role in driving additional prosecutions:

Senator, the focus—my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material evidence, the most important evidence, the most significant evidence among the roughly 80-90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need—we needed to focus on the most material cases and bring those forward as rapidly as possible.

He testified that his focus “is on the 80 to 90 people we intend to try for war crimes trials with the military commissions process.” *Id.* “The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record.” *Id.*

If there was any doubt that General Hartmann was aligning himself too closely with the prosecutorial function when the Tate Investigation issued its findings on September 17, 2007, there can be none now. General Hartmann openly compares his achievements during his tenure as *Legal Advisor* with those of the former *Chief Prosecutor*, Colonel Davis. And he claims to have single handedly energized the prosecutorial effort. He has done all of this while serving in an office requiring objectivity and neutrality. As he noted when testifying before the Senate Judiciary Committee, an accused “will also have the right to have his findings, if he’s found guilty, and his sentence reviewed by the convening authority, impartially, impartially.” *The Legal Rights of Guantanamo Detainees*, 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann) (Attachment B). But the Legal Advisor who continues to advise her in this case on issues such as the selection of members, is no longer impartial. His conduct has been reported and commented on:

Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in the media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008

(Attachment F). The taint of unlawful influence cannot be removed. The Charges should be dismissed.

7. **Request for Oral Argument:** The Defense requests oral argument.
8. **Request for Witnesses:** None.
9. **Conference with Opposing Counsel:** The Government is basically aware of the nature of this motion and it is the Defense belief that the Government remains opposed to the relief requested. Attempts were made to contact the Government on 15 Jul 08 but no contact was made.
10. **Attachments:**
 - A. Military Commission Instruction No. 6.
 - B. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann).
 - C. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007.
 - D. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008).
 - E. Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007.

- F. Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008.
- G. The Tate Report, dated Sep. 17, 2007.

Respectfully submitted,

By: _____
LTC BRYAN BROYLES, JAGC, USA
Detailed Defense Counsel
LTC THOMAS PYLE, JAGC, USAFR
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions



MILITARY COMMISSION

UNITED STATES OF AMERICA)	
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)	D-011
)	Government's Response to Defense Motion
)	to Dismiss the Charges and Specifications
)	for Unlawful Influence
v.)	
)	
AHMED MOHAMMED AHMED HAZA)	22 July 2008
AL DARBI)	

1. **Timeliness**: This Response to the Defense Motion to Dismiss to Dismiss the Charges and Specifications for Unlawful Influence is timely filed.
2. **Relief Requested**: The Government respectfully submits that this Commission should deny the Defense's motion to dismiss the charges and specifications.
3. **Overview**: There is no unlawful influence in this case and the defense makes not a single allegation regarding the charges against the accused, Mr. al Darbi. The Legal Advisor occupies a lawfully constituted position, which includes appropriate supervisory responsibilities over the Office of the Chief Prosecutor. The incumbent, Brigadier General Hartmann, has conducted himself in a lawful and appropriate manner. The criticisms of BG Hartmann's demeanor or leadership methods are either inaccurate or irrelevant (the defense cites no conduct specific to the case against al Darbi). Even if the defense allegations were accepted, they would not constitute unlawful influence or any other basis for disqualifying the Legal Advisor or providing relief for the accused, certainly not the radical measure of dismissing charges. Accordingly, this Commission should deny the Motion to Dismiss.
4. **Burden and Persuasion**: The defense bears the burden of raising the issue of unlawful command influence. *See United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F.

2008). Moreover, the defense must produce sufficient evidence to show facts that, if true, would constitute unlawful influence – and establish a logical connection from which to conclude that the unlawful influence resulted in some cognizable unfairness to the proceedings involving Mr. al Darbi. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 2001). *See also 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 sufficient to create a justiciable issue.’).¹ *See also United States v. Johnston*, 39 M.J. 242, 244 (1994).

5. **Facts in Defense Motion – government concurrence:**

The following subparagraphs correspond to the defense numbering system in its paragraph 5.

- i. Correct.
- ii. Correct in part. There was such a meeting in October 2006, but Mr. Haynes does not recall the exchange as described. Regardless, Mr. Haynes hired Colonel Davis for the position of Chief Prosecutor after this discussion.
- iii. Correct as to the fact of the meeting, though it was not of the Special Detainee Follow-Up Group. To the extent that Secretary England made any comments, they immediately were followed by a statement by Mr. Haynes that cautioned all present that charging decisions were exclusively those of the Chief Prosecutor.
- iv. Special Detainee Follow-Up Group meetings were not regularly scheduled and generally not as frequent as three times a week. Government has no information regarding any statements by Dr. Cambone.

¹Military law is expressly made not binding on military commissions, 10 USC sec 948b(c), but the Government recognizes that military law is instructive on this issue, given the uniquely military nature of unlawful influence.

vi. Correct as to Mr. Haynes's phone call, except that Colonel Davis did not say he "could not charge Mr. Hicks" before the Manual was issued but that he preferred not to charge until that point; Colonel Davis acknowledges that he legally and ethically could have done so.

vii. Correct except that Mr. Haynes never "asked Colonel Davis to charge a few additional detainees along with Mr. Hicks;" he never asked Colonel Davis to charge any individual.

viii. Correct.

x. Correct that BG Hartmann assumed duties on 2 July 2007, and that he requested information about the preparation status of potential prosecutions. BG Hartmann did ask about the Jawad case from time to time, along with many others, but it is misleading to say he "specifically liked the case."

xii. Correct, except that the conversation with the Convening Authority occurred on the next business day.

xiii. Correct as to the publication of the report; the government disputes the characterization of the report but will leave the conclusive interpretation to the military commission.

xiv. Correct as to the excerpts, though the government disputes the defense's characterization and urges the commission to read the entire statement and entire report.

xv. Correct as to the accuracy of the excerpt; again, the Government urges the commission to read the entire testimony by LTC Britt both at the commission and at the Jawad hearing.

xvi. Correct.

xvii. Correct except as to Colonel Davis's "resignation," as military officers generally may not resign from positions to which they are appointed. Colonel Davis did ask to be relieved of duties on October 4 and that request was granted on October 5.

xviii. Correct.

6. **Facts in Defense Motion – government disagreement.** Additional treatment of the facts in the defense motion, with which the government disagrees or disagrees in part. These subparagraphs correspond to the defense numbering system in its paragraph 5.

ii. There was such a meeting in October 2006, but Mr. Haynes does not recall the exchange as described. Regardless, Mr. Haynes hired Colonel Davis for the position of Chief Prosecutor after this discussion.

iii. Correct as to the fact of the meeting, though it was not of the Special Detainee Follow-Up Group. To the extent that Secretary England made any comments, they immediately were followed by a statement by Mr. Haynes, which cautioned all present that charging decisions were exclusively those of the Chief Prosecutor.

iv. Government denies the statement that Colonel Davis "resisted involvement in the military commission process by the Department of Justice." He welcomed, incorporated, and led members of the Department of Justice as part of the military commissions team.

v. Government has no basis for knowledge regarding any meeting between Colonel Davis and the senators.

vii. Correct except that Mr. Haynes never "asked Colonel Davis to charge a few additional detainees along with Mr. Hicks;" he never asked Colonel Davis to charge any individual.

ix. Inaccurate in these respects:

(a) Colonel Davis knew of the pretrial agreement in advance.

(b) Judge Crawford, the Convening Authority, did not privately counsel Colonel Davis “on publicly breaking ranks.” Colonel Davis told Judge Crawford that his public disapproval/disassociation was “healthy” for the system, and she did not respond.

x. Correct as noted in paragraph 4 above, incorrect in other respects. The nonspecific undefined term “nanomanagement” is meaningless. BG Hartmann did not ask for cases with “blood on them,” and did not use the term “sexy,” though Colonel Davis did.

xi. Incorrect.. Whether Colonel Davis had such policy was irrelevant, as it is controlled by law. The quotation of General Hartmann is accurate but the interpretation is not.

7. Discussion:

Law and Argument.

A. **The burden has not shifted.** The defense has failed to produce sufficient evidence to show facts that, if true, would constitute unlawful influence – and therefore has no logical basis from which to conclude that the unlawful influence resulted in some cognizable unfairness to these proceedings involving Mr. al Darbi. The defense fails to meet the well-established test in *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994), which requires the defense to "show 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." The defense is required to present "some evidence" of unlawful command influence. *See United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995). Only if the defense has shown the first two steps does the burden shift to the Government to: (1) disprove "the predicate facts on which the allegation of unlawful command influence is based"; (2) persuade the military judge "that the facts do not constitute unlawful command influence"; or (3) prove at trial "that the unlawful command influence will not affect the proceedings." *Biagase*, 50M.J. at 151. *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 sufficient to create a justiciable issue.').² *See also United States v. Johnston*, 39 M.J. 242, 244 (1994). While the government is prepared to defend against the allegations, and recognizes courts' liberality in construing unlawful influence claims because of their gravity, it also urges the commission not to casually find that the burden has been shifted, as the commission also has the responsibility to guard against baseless allegations.

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

²Military law is expressly made not binding on military commissions, 10 USC sec 948b(c), but the Government recognizes that military law is instructive on this issue, given the uniquely military nature of unlawful influence.

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

(1) The key functions of the Legal Advisor in the military commissions process are nearly identical to those of the staff judge advocate in military practice. See generally, Art. 6(b), UCMJ: “Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice...”; Art. 34, UCMJ, concerning pretrial advice that compares almost exactly to R.M.C. 105 (a); and Art. 50, UCMJ, regarding post-trial advice to a convening authority.

(2) Military practice, as reflected in case law, recognizes that a staff judge advocate may simultaneously advise commanders and supervise prosecutors. In addition, there is no requirement for “neutrality,” a defense assertion supported without citation to such a term being used in case law, statute, or regulation. There is an expectation of impartiality, and the cases the defense cites (*e.g., Gordon, Taylor, and Argo*) are examples of egregious SJA conduct, in which an SJA either had an intense personal interest or a corrupting agenda that clearly clouded his ability to serve as an SJA – irrespective of whether he supervised judge advocates. Case law recognizes that an SJA’s function, especially at the pretrial level, has a prosecutorial component that does not detract from his responsibility to give dispassionate advice to a Convening Authority who has a uniquely quasi-judicial function. See generally *United States v. Hardin*, 7 M.J. 399, 403 (C.M.A. 1979) (the SJA is not held “to a state of absolute impartiality required

in the strict sense for a trial judge, reviewing authority or appellate court”).

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

(4) The role of the legal advisor/SJA is further developed by the regulation’s description of the supervisory JA duties as “generally corresponding to those discharged by TJAG [The Judge Advocate General] with regard to HQDA [Headquarters, Department of the Army].” AR 27-1, para 5-2a. The relevant portions of those responsibilities include: serve as “legal advisor to the Chief of Staff, U.S. Army (CSA)”, para 2-1b; “[b]e the principal legal advisor to the SA [Secretary of the Army] and to the CSA concerning matters pertaining to military justice....and provide legal guidance and staff supervision of the Army’s system of military justice,” para 2-1d(1); “[m]anage the administration of military justice in the Army,” para 2-1d(9); “[m]anage professional

legal training within the Army,” para 2-1t; and “[d]irect the members of the JAGC in the performance of their duties,” para 2-1v(2). Note, finally, that the supervisory SJA is specifically charged with “[r]esolving legal problems regarding...military commissions, provost courts, or other military tribunals.” AR 27-1, para 5-2a(1).

D. Many traditional unlawful influence concerns are inapplicable here. The core concerns of military jurisprudence regarding actual unlawful (command) influence primarily concern: (1) chilling the professional judgment and independence of intermediate commanders who must make independent recommendations regarding potential criminal cases; (2) improperly influencing panel members; (3) witness intimidation. The doctrine of apparent command influence is concerned with respect for and confidence in the military justice system among the rank and file and the public. *See* Manual for Courts-Martial, United States, Mil. R. Evid. 606(b) (2008), and *United States v. Stirewalt*, 60 M.J. 297, 298 (C.A.A.F. 2004). These cases, however, invariably involve gross deviations from the norms of military justice (convening authority misconduct in *Stirewalt*, for example) and are analyzed in light of a member of the rank and file or general public. *See U.S. v. Lewis*, 63 MJ 405, at 414, 2006, CAAF. (“[T]he focus is upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus the appearance of unlawful command influence will exist where an objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings.”).

E. BG Hartmann’s involvement with the al Darbi case has been solely on a professional basis and he has no personal interest in the case whatsoever. Courts view allegations of unlawful influence at different stages of the justice system with a different lens. *See United States v. Weasler*, 43 M.J. 15, 17-18 (C.A.A.F. 1995) (“But this Court has sought to draw a distinction between the accusatorial process and the adjudicative stage, that is, the difference between preferral, forwarding, referral, and the adjudicative process, including interference with witnesses, judges, members, and counsel.”). Furthermore, courts consider whether the legal advisor or convening authority has a personal stake in the ensuing prosecution or whether his or her involvement was on a professional level. *See United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (“Despite General Anderson's misguided zeal, his initial interest in the various prosecutions was official, rather than personal. Unlike the convening authority in *United States v. Gordon*, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952), whose house had been broken into by the accused, General Anderson had not suffered an injury to his person or property. Unlike the convening authority in *United States v. Crossley*, 10 M.J. 376 (C.M.A.1981), and in *United States v. Shepherd*, 9 U.S.C.M.A. 90, 95-100, 25 C.M.R. 352, 357-62 (1958), his ego was not directly assailed by the accused's actions. Unlike the convening authority in *United States v. Corcoran*, 17 M.J. 137 (C.M.A.1984), and in *United States v. Marsh*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953), his authority was not willfully flouted.”) – and of course BG Hartmann was not the convening authority, so regardless of his motivations, he worked for the convening authority, whose independence and judgment the defense has not attacked. Moreover, BG Hartmann’s involvement with the al Darbi case has been purely on a professional level and BG

Hartmann has no personal interests in the al Darbi case whatsoever.

F. The defense makes no case for unlawful influence; it makes a generalized and unpersuasive case for disqualifying the Legal Advisor. The defense makes claims regarding the processing of cases involving individuals charged before the accused was charged. While the government does not believe that such conduct constitutes unlawful influence or is in any sense disqualifying, none of it, by the defense's implicit admission, affects the Darbi case. The defense simply asserts that they do not like the manner in which BG Hartmann supervised the prosecution in these prior cases – and therefore they must taint this case, despite the absence of a link.

The defense also misconstrues some evidence. For example, it quotes BG Hartmann as having said in a February 2008 interview that cases were being charged because, “It's from me insisting that we move the process.” BG Hartmann was not taking credit for a “surge” of prosecutorial activity but defending against a claim that his betters, including political appointees in the Department of Defense or elsewhere, were directing the activity – a sentiment reflected by a fair reading of the extract of BG Hartmann's Senatorial testimony that the defense cites in its next paragraph. The defense's citation to an opinion piece in an opinion magazine is worthy of no more weight than equally available contrary opinion in other periodicals.

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

1. The defense seeks dismissal of charges for unlawful influence, a charge for which it

offers no support. Even if it did establish unlawful influence, the radical remedy of dismissal, rarely invoked in military courts, would not be warranted, as the defense has not addressed the traditional array of lesser remedies – re-swearing charges, advising witnesses of their freedom to testify/barring government cross of potentially intimidated witnesses, disqualifying panel members or ordering new members – perhaps because they cannot point to government conduct that affects any party to the Darbi case. *See generally United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992).

2. The defense seeks to disqualify BG Hartmann from his role as Legal Advisor. Again, if it is improper for the Legal Advisor to supervise the prosecution, then the defense relief should be granted. In light of the fact that the Legal Advisor’s position is legally constituted, appropriately includes supervision of the prosecution, and there is not a whit of evidence regarding the processing of the charges against al Darbi, this remedy also must be rejected.

8. **Defense failed to shift the burden of proof to the government.** The defense’s unsupported assertions, coupled with its plan not to call *witnesses, are insufficient to shift the burden to the Government. See generally, United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002) (“This Court recognized, however, that in some cases, voir dire may not be enough, and that witnesses may be required to testify on the issue of unlawful command influence.”), *United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986) and *United States v. Karlson*, 16 M.J. 469 (C.M.A.1983). It is for good reason that command influence is the mortal enemy of military justice,” *see Thomas, Id.*, but it cannot be casually lodged as it is here, which does not even rise to the level of “command influence in the air.” *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

The defense motion must be dismissed.

9. **Oral Argument**: The government joins the defense request for oral argument.

10. **Witnesses and Evidence**: The government believes the burden has not shifted and therefore would not need to call witnesses, especially in the absence of defense witnesses.

Nevertheless, the government gives notice that it would call BG Hartmann; Mr. George Toscas, Department of Justice; MG (Ret.) John D. Altenburg, Jr..

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

12. **Additional Information**: Attachments include the following: affidavit from Mr. William J. Haynes II, affidavit from Hon. Susan J. Crawford.

Respectfully Submitted,



Lawrence J. Morris, COL, JA, USA
Scott A. Bryant, CPT, JA, USA
Susan Collins, Assistant United States Attorney
Office of Military Commissions
Office of Chief Prosecutor



UNITED STATES OF AMERICA

v.

Ahmed Mohammed Ahmed Hazza Al Darbi

D-011

Defense Reply

to Government Response to Defense Motion
to Dismiss the Charges and Specifications for
Unlawful Influence

July 25, 2008

- 1. Timeliness:** This Reply is timely filed.
- 2. Response paragraph 7F.** First, the burden on the defense may be met by showing that BG Hartmann abandoned (or never assumed) a neutral role consistent with his sole assigned duty as Legal Advisor to the Convening Authority. BG Hartmann's decision to embrace the role of de facto Chief Prosecutor makes him unqualified to subsequently tender legal advice in any other capacity. The facts stated in the defense motion show that BG Hartmann continued to align himself with the prosecution after being directed not to do so. Additionally, the chart found at Attachment A demonstrates his prosecutorial role in the Al Darbi case specifically.
- 3. Response paragraph 7G; 7G(1).** BG Hartmann provided the only advice upon which the Convening Authority relied in referring charges in U.S. v. Al Darbi. A finding that he abandoned the required neutral and detached position required to render such advice and instead openly decided to act as an advocate on behalf of the prosecution renders the advice improper, and therefore the referral improper. Dismissal of the charges is the appropriate remedy and disqualification of the Legal Advisor from any role in any future proceedings is the only remedy available to prevent any further tainting of the proceedings. The United States implicitly acknowledges that the Legal Advisor assumed a prosecutorial role in continuing to refer to his direct "supervision of the prosecution" as being appropriate. The Legal Advisor is not designated as the Staff Judge Advocate for the Office of Military Commissions. One duty he performs is similar, but not the same. R.M.C. 103(15). Additionally, there is no provision in the

statute, the Manual for Military Commissions or the Regulation for Trial By Military Commissions that permits the legal advisor to supervise the prosecution. Rather, the legal advisor serves in a limited supervisory role over the Chief Prosecutor, *not* over the prosecution function.

4. Additional Information: None.

5. Attachments:

A. Legal Advisor Timeline Chart - 1 Nov 07.

B. Deposition of Capt Patrick McCarthy, U.S. v. Hamdan, pages .

Respectfully submitted,

By: _____
LTC BRYAN BROYLES, JAGC, USA
Detailed Defense Counsel
LTC THOMAS PYLE, JAGC, USAFR
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions



United State of America)	D-011
)	
v.)	Ruling on Defense Motion to
)	Dismiss for Unlawful Influence
Ahmed Mohammed Ahmed Haza)	
Al Darbi)	
)	2 October 2008
)	

1. Defense moves to dismiss the charges and specifications based on alleged unlawful influence by the Convening Authority's Legal Advisor, Brigadier General Thomas Hartmann. In the alternative, the defense moves to disqualify Brig Gen Hartmann from further participation in the case.
2. After considering the submissions by both parties and for the reasons discussed below, the defense motion is denied.

FACTS

1. The Military Commissions Act of 2006 (MCA) was enacted into law on 17 October 2006. The Manual for Military Commissions (MMC) was approved by the Secretary of Defense on 18 January 2007.
2. COL Morris Davis assumed duties as Chief Prosecutor for the Office of Military Commissions in September 2005. Brig Gen Hartmann was assigned as Legal Advisor to the Convening Authority on or about 2 July 2007. At the time of Brig Gen Hartmann's assignment, there was no written job description detailing the relationship between the Legal Advisor to the Convening Authority and the Chief Prosecutor, Office of Military Commissions (OMC-P).
3. Brig Gen Hartmann viewed the Legal Advisor serving two separate and distinct functions: (1) supervising the chief prosecutor and prosecution staff, to include setting goals and milestones and developing an advocacy training program for the prosecution office; and (2) providing counsel to the Convening Authority, including informed advice on referral decisions and post trial recommendations regarding action on completed cases. Brig Gen Hartmann understood case selection and whether and when to swear charges in given cases was within the Chief Prosecutor's sole discretion.
4. Soon after assuming his duties as legal advisor, Brig Gen Hartmann became concerned with what he perceived as a lack of urgency by the Chief Prosecutor. He was disappointed with the pace at which cases were being processed by OMC-P. He asked for the status of each pending case. He has an intense management style and attempted to energize an office which he felt was not executing its mission. He became much more involved with OMC-P than his predecessor, Brig Gen Thomas Hemmingway.

5. Brig Gen Hartmann and COL Davis had a strained working relationship from the beginning. COL Davis viewed his role was to be the final decision maker in picking cases to go forward and what evidence to use. As stated earlier, Brig Gen Hartmann had a different view of his role.

6. On 3 October 2007, the Deputy Secretary of Defense issued an appointing letter establishing a chain of command for the Office of Military Commissions-Prosecution. The Chief Prosecutor would now work for the Legal Advisor and the Legal Advisor would now report to the DOD General Counsel. COL Davis learned of this rating scheme on 4 October 2007 and offered his resignation, which was accepted on Friday 5 October 2007.

7. On 12 December 2007, charges in this case were sworn by LTC Joseph V. Treanor. Brig Gen Hartmann did not order the swearing of charges in this or any other case. The decision to swear the charges was an independent decision by LTC Treanor and he was not coerced or influenced by Brig Gen Hartmann to do so.

8. On 29 February 2008, charges were referred. There is no allegation or evidence that the Legal Advisor's advice to the Convening Authority pursuant to Rule for Military Commissions (RMC) 406 was in any way improper or misleading.

9. On 19 September 2008, Brig Gen Hartman was removed as the Legal Advisor to the Convening Authority.

Discussion

1. The position of Legal Advisor to the Convening Authority is not mentioned in the MCA. At 10 USC §949a, Congress permitted the Secretary of Defense to prescribe pretrial, trial and post-trial procedures. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Pursuant to this authority, the Secretary created the position of Legal Advisor to the Convening Authority (RMC 103(a)15).

2. The creation of the Legal Advisor by the Secretary was consistent with and permitted by specific statutory authority. Accordingly, the defense argument that the action of the Secretary in creating the position of Legal Advisor to the Convening Authority was *ultra vires* is rejected by the Commission.

3. The accused asserts that Brig Gen Hartmann violated 10 USC §949b(a)(2)B and RMC 104(a)(2) by attempting to coerce or unlawfully influence the prosecutor's exercise of professional judgment. The Commission disagrees.

4. The Legal Advisor's role is analogous to that of a Staff Judge Advocate (RMC 103(a)15). As such, he provides legal advice and recommendations to the Convening

Authority, similar in nature to that provided by a Staff Judge Advocate, at two distinct stages, pretrial and post trial. *See* RMC 103(a)(15).

5. The responsibility of a Legal Advisor at the pretrial stage is clearly distinct from his post-trial review functions. Brig Gen Hartmann, in preparing the RMC 406 pretrial advice as legal advisor to the convening authority, had a professional interest in the successful prosecution of *United States v. Ahmed Mohammed Ahmed Haza al Darbi*. *See United States v. Caritavito*, 37 M.J. 175 (C.M.A. 1993). Strict impartiality of a judicial nature at this stage would be entirely inconsistent with the regulatory requirement that the Legal Advisor provide a personal and independent recommendation to the convening authority on the disposition of the case. RMC 406(b). In order to make an informed appraisal of the charges, it both appropriate and expected that the Legal Advisor would ask questions about the case to determine its relative strengths and weaknesses, especially in complex, high profile trials. Similarly, there is nothing untoward with a prosecutor's supervisor wanting to increase the chances of a successful prosecution by establishing an advocacy training program. *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979). In other words, a superior can demonstrate an interest in the successful prosecution of a case without exerting improper influence over it.

6. The evidence establishes that Brig Gen Hartmann's pretrial conduct in this case does not constitute unlawful influence over the exercise of the trial counsel's professional judgment. Rather, the Commission finds it is consistent with his supervisory responsibilities as the Legal Advisor to the Convening authority and the Chief Prosecutor's direct supervisor. Brig Gen Hartmann did not induce or sway the otherwise independent and uncoerced decisions of LTC Treanor and Judge Crawford to swear charges against this accused and refer them to trial. The evidence establishes, and the Commission finds, nothing Brig Gen Hartmann has done can reasonably be construed as improper influence of the trial counsel's professional judgment.

7. Since Brig Gen Hartmann is no longer the Legal Advisor, the issue as to possible post-trial disqualification of him is now moot. However, the Commission would add it's concern the Brig Gen Hartmann's op ed pieces and press interviews defending the military commissions' system combined with his active and vocal support of the military commissions process and public statements appearing to align himself with the prosecution team could have compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post-trial recommendation. Public confidence in the process is not enhanced by such activities on the part of this, or any other, Legal Advisor.

So ordered this 2nd day of October, 2008.



JAMES L. POHL
COL, JA
Military Judge