UNITED STATES OF AMERICA, Appellant	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	APPELLEE'S MOTION TO ABATE PROCEEDINGS
	)	CASE No. 07-001
v.	)	Hearing Held[1] at Guantanamo Bay, Cuba on 4 June 2007 Before a Military Commission
OMAR AHMED KHADR, Appellee	)	Convened by MCCO # 07-02 Presiding Military Judge Colonel Peter E. Brownback III

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

Omar Khadr ("Appellee") respectfully requests that this Court abate its proceedings in this case because the three judges assigned to this panel were not validly appointed to this Court and because the official who purportedly assigned the judges to this panel and who assigned this case to this panel had no authority to do so.

Introduction

Like the military commission below, this is "a court of special and limited jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 62 (1902). This Court's "authority is statutory, and the statute under which [it] proceeds must be followed throughout." *Id.* at 63. But the process by which this panel's judges were purportedly appointed and by which the position of "Acting Chief Judge" was purportedly created was highly irregular, complying with neither the statute nor regulations governing the military commissions system. The three judges detailed to this panel

[1] Mr. Khadr has yet to be arraigned.

were appointed to this Court in violation of the controlling statute and regulations, which reserve to the Secretary of Defense the authority to appoint this Court's judges. The three members of this panel, therefore, may not sit on this appeal. Additionally, the official who purported to assign the judges to this panel and assign this case to this panel had no authority to do so because the positions of "Deputy Chief Judge" and "Acting Chief Judge" have not been validly created.

The judges assigned to this panel have no jurisdiction to act on this case and any attempt to do so would be *ultra vires* and void. This Court should recognize these flaws and abate the proceedings in this case, thereby allowing this case to be heard instead by properly appointed judges assigned to this panel by a properly authorized official. If this Court does not do so, then surely the United States Court of Appeals for the District of Columbia Circuit will.

Facts

On 17 October 2006, the President signed the Military Commissions Act into law. Pub. L. No. 109-366, 120 Stat. 2600. One section of that law provided that the "Secretary of Defense shall establish a Court of Military Commission Review," and that "[t]he Secretary shall assign appellate military judges to a Court of Military Commission Review." 10 U.S.C. § 950f(a), (b). On 1 December 2006, Secretary of Defense Donald Rumsfeld appointed four members to this Court: the Honorable Griffin Bell, the Honorable William T. Coleman, Jr., the Honorable Frank J. Williams, and the Honorable Edward G. Biester, Jr. Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Court of Military Commission Review Appellate Military Judges (Nov. 21, 2006) [hereinafter Civilian Judge Appointment Memo] (Attachment A). On 18 January 2007, Secretary of Defense Gates promulgated the Manual for Military Commissions. One provision in that Manual specified that "[t]he Secretary shall appoint appellate military judges to the Court of Military Commission Review pursuant to 10 U.S.C. § 950f." Rule for

Military Commissions (R.M.C.) 1201(b)(1). The Manual also provided that the "Secretary of Defense shall appoint, from those nominated by the Judge Advocates General or from among other qualified appellate military judges, a Chief Judge of the Court of Military Commission Review." R.M.C. 1201(b)(2). Finally, the Manual provided that the "Chief Judge shall assign the appellate military judges of the Court of Military Commission Review to panels of three appellate military judges each." R.M.C. 1201(b)(3).

On 4 May 2007, the General Counsel of the Department of Defense forwarded to the Secretary of Defense an Action Memo entitled, "Court of Military Commission Review Appellate Military Judges." Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Court of Military Commission Review Appellate Military Judges (May 4, 2007) [hereinafter Military Judge Appointment Memo] (Attachment B). In this memo, the General Counsel advised the Secretary of Defense that "Section 950f(b) of the MCA requires you to assign appellate military judges to the CMCR." *Id.* Nevertheless, in an undated handwritten note accompanied by a handwritten notation that appears to read "RE," the word "Deputy" is written in the "FOR" line before "SECRETARY OF DEFENSE." The Action Memo recommends appointment of twelve military judges as Court of Military Commission Review judges. Those nominees include each of the three judges assigned to this panel: Captain John W. Rolph, JAGC, USN; Colonel Paul Holden, JA, USA; and Colonel David R. Francis, USAF. *See* Case Assignment, *United States v. Khadr*, CMCR Case No. 07-001 (Ct. Mil. Comm'n Rev. July 11, 2007) [hereinafter *Khadr* Case Assignment] (Attachment C). A stamp on the first page of the Action Memo reads, "DEPSECDEF HAS SEEN," with "GE APPROVES" handwritten in above the date "MAY 8 2007." *See* Military Judge Appointment Memo (Attachment B). On the second page, initials apparently those of Deputy Secretary of Defense

Gordon England appear in the approval block under the recommendation, "Assign each of the above-named officers as appellate military judges of the CMCR." *Id.* The handwritten date "5-8" appears below the initials. *Id.*

On 11 June 2007, the General Counsel of the Department of Defense forwarded another Action Memo to the Secretary of Defense, this one concerning the "Chief Judge of the Court of Military Commission Review." Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Chief Judge of Court of Military Commission Review (June 11, 2007) [hereinafter Chief Judge Appointment Memo (Attachment D). In this memo, the General Counsel advised the Secretary of Defense that "Rule for Military Commission 1210(b)(2) provides that the Secretary of Defense shall appoint a Chief Judge of the CMCR." *Id.* The memo also recommended that the Secretary of Defense "create the position of Deputy Chief Judge of the CMCR and appoint a Deputy Chief Judge, from among the 16 appellate military judges currently serving on the CMCR, to provide continuity of operations." *Id.* According to the Action Memo, "The Deputy Chief Judge would have full discretion to exercise all the authority vested in the Chief Judge, except as otherwise directed by the Chief Judge." *Id.* The Action Memo proposed appointing CAPT Rolph to this position. *Id.*

Again, the handwritten word "Deputy" appears before the typed "SECRETARY OF DEFENSE" in the "FOR" line. *Id.* A stamped block on the first page of the memo states, "DEPSECDEF HAS SEEN," with "GE APPROVES" handwritten above the date "JUN 15, 2007." *Id.* Initials apparently those of Deputy Secretary England appear on the "Approve" line below each of three recommendations: (1) "Appoint Judge Bell, from among the 16 previously appointed appellate military judges currently serving on the CMCR, as Chief Judge of the CMCR"; (2) "Establish the position of Deputy Chief Judge of the CMCR"; and (3) "Appoint

Judge Rolph, from among the 16 previously appointed appellate military judges currently serving on the CMCR, as Deputy Chief Judge of the CMCR." *Id.* The handwritten date "6-15" appears below the initials following the third recommendation. *Id.*

On 11 July 2007, this Court issued a Case Assignment notice, which provided, "By direction of the Acting Chief Judge, the above-captioned case is assigned to Panel 1 (Rolph, Francis, and Holden) for decision." *Khadr* Case Assignment (Attachment C). Upon information and belief, CAPT Rolph was the individual whom the Case Assignment notice characterized as "the Acting Chief Judge."

Burden and Standard

Because this is a jurisdictional challenge to the authority of this Court, the burden is on the party asserting this Court's jurisdiction, which is the prosecution. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). These claims, which arise from this appeal, are subject to *de novo* review.

Argument

I

Assuming that the Secretary of Defense did not delegate to the Deputy Secretary of Defense his power to assign judges to this Court, the Deputy Secretary of Defense's action purporting to appoint the three judges on this panel was *ultra vires* and void.

The Military Commissions Act specifically provides that the Secretary of Defense will assign judges to this Court. 10 U.S.C. § 950f(b). Additionally, in the Manual for Military Commissions, the Secretary of Defense specifically reserved the power to appoint this Court's judges to himself. R.M.C. 1201(b)(1). The Deputy Secretary of Defense, in a regulation he promulgated in April 2007, also recognized that the "Secretary of Defense shall appoint military

judges to the CMCR." Regulation for Trial by Military Commissions para. 25-2.c (April 27, 2007).

Acting in accordance with these statutory and regulatory provisions, the General Counsel of the Department of Defense advised the Secretary of Defense that "Section 950f(b) of the MCA requires you to assign appellate military judges to the CMCR" and recommended that the Secretary assign sixteen military judges, including the three judges on this panel, to this Court. Military Judge Appointment Memo (Attachment B). Yet without any explanation, the General Counsel's Action Memo was rerouted to the Deputy Secretary of Defense by a handwritten insertion of the word "Deputy" in the "FOR" line. *See id.* Following this irregular rerouting, the Deputy Secretary of Defense, not the Secretary, purported to appoint the three judges who are on this panel.

The Action Memo that purports to make this appointment recites no actual delegation of the authority to appoint this Court's judges to the Deputy Secretary of Defense. While Appellee is aware that the Secretary of Defense delegated authority to *prescribe regulations* to the Deputy Secretary, *see* Regulation for Military Commissions at Foreword (Apr 26, 2007) ("Pursuant to 10 U.S.C. Section 959a(c), the Secretary of Defense delegated to me the authority to prescribe regulations for military commissions."), Appellee is unaware of any similar delegation of the Secretary of Defense's power to appoint this Court's judges.

For the reasons discussed in Section II, below, any such delegation of the Secretary's power to appoint this Court's judges would be impermissible. But there is no need to reach that issue in the absence of an *actual* delegation of appointment authority from the Secretary of Defense to the Deputy Secretary of Defense. Absent any such actual delegation, the Deputy Secretary of Defense's action purporting to assign judges to this Court is *ultra vires*. An action

that exceeds the scope of a public official's authority is "ultra vires and void." *Fieldston Clothes v. United States*, 19 C.I.T. 1181 (Ct. Int'l Trade 1995); *see also Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C. Cir. 1977); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (observing that an "action that is ultra vires and beyond the scope of the delegated authority will be set aside" (quoting DICKINSON, ADMINISTRATIVE JUSTICE AND SUPREMACY OF LAW 41 (1927)). The appointment of each of the three judges sitting on this panel is, therefore, void. Those three judges are not on the Court of Military Commission Review. This Court must abate its proceedings in this case until a panel of properly appointed judges is assigned to this case.

II

Under the Military Commissions Act, the power to appoint this Court's judges is a non-delegable function that must be exercised by the Secretary of Defense.

Even if there has been an actual delegation of the Secretary's power to appoint this Court's judges, any such delegation would be an invalid violation of the Military Commissions Act.

In the Military Commissions Act of 2006, Congress expressly provided that "[t]he Secretary of Defense shall establish a Court of Military Commission Review" and "[t]he Secretary shall assign appellate military judges to a Court of Military Commission Review." 10 U.S.C. § 950f(a), (b). Congress established this assignment authority as a non-delegable power of the Secretary of Defense. Elsewhere in the Military Commissions Act, Congress authorized the Secretary of Defense to delegate his rulemaking power under 10 U.S.C. § 949a. 10 U.S.C. § 949a(c) ("Delegation of Authority to Prescribe Regulations – The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter."). Yet

nowhere does the MCA authorize the Secretary to delegate his power to appoint this Court's judges. "*Expressio unius unius est exclusio alterius.*" *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The Military Commission Act's specific provision of authority to delegate rulemaking power creates a negative inference that Congress did not intend the Secretary of Defense to delegate other statutory powers that the Military Commissions Act gave to him without an accompanying authorization to delegate, such as the power to assign judges to this Court.

The Supreme Court relied on precisely such reasoning in holding that Congress had not authorized the Department of Labor's Administrator of the Wage and Hour Division to delegate his statutory power to sign and issue subpoenas duces tecum. *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358 (1942). The Administrator argued that he was empowered to subdelegate his subpoena power under a statutory section providing, "The principal office of the Administrator shall be in the District of Columbia, but *he or his duly authorized representative may exercise any or all of his powers* in any place." *See id.* at 360 (emphasis added). The Administrator also attempted to rely on another provision in the same Act authorizing the Administrator to designate representatives to gather data and make investigations. *See id.* at 363. The Supreme Court rejected these arguments and reasoned that the existence of another section in the same Act expressly authorizing subdelegation created a negative inference against such subdelegation authority where the Act did not expressly grant it: "[I]t seems to us fairly inferable that the grant of authority to delegate the power of inspection, and the omission of authority to delegate the subpoena power, show a legislative intention to withhold the latter." *Id.* at 364. The Second Circuit has cited *Cudahy* for the proposition that "specific authority to subdelegate one power

within a given piece of legislation may indicate that Congress did not intend to allow subdelegation of other powers." *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999).

That proposition remains true even in the presence of a statute generally according a Cabinet Secretary with subdelegation authority. *See* 10 U.S.C. § 113(d) ("Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate."). In *United States v. Giordano*, 416 U.S. 505 (1974), the Supreme Court construed the federal wiretap statute, which empowered the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications." *See id.* at 507-08 (quoting 18 U.S.C. § 2516 (1)). Much like 10 U.S.C. § 113(d), 28 U. S. C. § 510 provided: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

In *Giordano*, the Executive Assistant to the Attorney General had authorized the wiretap at issue. As the Supreme Court explained:

> An affidavit of the Executive Assistant to the Attorney General divulged that he, the Executive Assistant, had reviewed the request for authorization to apply for the initial order, had concluded, from his "knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him," and, because the Attorney General was then on a trip away from Washington, D.C., and pursuant to authorization by the Attorney General for him to do so in

> such circumstances, had approved the request and caused the Attorney General's initials to be placed on a memorandum to [Assistant Attorney General Will] Wilson instructing him to authorize [Assistant United States Attorney Francis] Brocato to proceed.

Giordano, 416 U.S. at 513.

Relying on 28 U.S.C. § 510's general grant of delegation authority to the Attorney General, the United States "argued that merely vesting a duty in the Attorney General, as it is said Congress did in § 2516 (1), evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice, including those on the Attorney General's own staff." *Id.* The Supreme Court rejected this argument, applying an *expressio unius est exclusio alterius* rationale:

> As a general proposition, the argument is unexceptionable. But here the matter of delegation is expressly addressed by § 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to "any Assistant Attorney General specially designated by the Attorney General." Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, "which function of certification may not be delegated." 18 U. S. C. § 245 (a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think § 2516 (1), fairly read, was intended to limit the power to authorize

wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate.

Id. at 514.

Cudahy and *Giordano* demonstrate that under the Military Commissions Act, the Secretary of Defense's authority to assign judges to the Court of Military Commission Review is non-delegable. *Cudahy* holds that where a statute expressly authorizes subdelegation of one power and does not provide for subdelegation of a distinct power, a negative implication arises that the latter power is non-delegable. And *Giordano* holds that a negative inference arising from an *expressio unius est exclusio alterius* rationale will overcome a general grant of subdelegation authority. The Military Commissions Act follows precisely this form.

In one section, the MCA expressly provides the Secretary of Defense with authority to subdelegate. Section 949a(c) is entitled, "Delegation of Authority To Prescribe Regulations." It provides, "The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter." On the other hand, the MCA provides that the "Secretary shall assign appellate military judges to a Court of Military Commission Review," but says nothing about the Secretary's authority to delegate that power. By specifically authorizing the Secretary of Defense to delegate his rulemaking authority, Congress clearly indicated that other Secretarial authority set out in the Act is non-delegable. Indeed, if Congress believed that the Secretary of Defense's powers under the Military Commissions Act were broadly subject to subdelegation pursuant to 10 U.S.C. § 113(d), then § 949a(c)'s express authorization to subdelegate rulemaking authority would be inexplicable. If § 113(d) authorized the Secretary of Defense to subdelegate his CMCR judge assignment power under 10 U.S.C. § 950f, then it necessarily also authorized his subdelegation of rulemaking authority under 10 U.S.C. § 949a. Yet § 949a(c)'s inclusion in

the MCA clearly indicates that Congress did not believe the latter to be true. And if the latter is not true, then neither is the former.

To hold that § 113(d) authorizes subdelegation of all of the Secretary of Defense's authority under the Military Commissions Act would render § 949a(c) superfluous. Such an interpretation would violate "the doctrine that legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997).

"The central inquiry with respect to a subdelegation challenge is whether Congress intended to limit the delegatee's power to subdelegate." *United States v. Touby*, 909 F.2d 759 (3d Cir. 1990). Viewing the MCA as a whole reveals that Congress intended to allow the Secretary of Defense to delegate his rulemaking authority and did not intend to allow him to delegate his authority to assign judges to this Court. It is readily apparent why Congress would have limited the Secretary of Defense's power in this manner. Congress expressly allowed the appointment of civilian judges to this Court, *see* 10 U.S.C. § 950f – and Secretary Rumsfeld, in fact, appointed four civilian judges to this Court. *See* Civilian Judge Appointment Memo (Attachment A). But Congress could not have constitutionally authorized the Deputy Secretary of Defense or any other sub-Cabinet level official to make such appointments. The Appointments Clause provides that "Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. ART. II, § 2, cl. 2. So it would be unconstitutional for Congress to authorize anyone within the Department of Defense other than the Secretary himself to appoint a civilian to the Court of Military Commissions Review. *See generally Ryder v. United States*, 515 U.S. 177 (1995) (invalidating Coast Guard Court of Military Review's ruling where two judges

of that court were appointed by the General Counsel of the Department of Transportation in violation of the Appointments Clause). While that same Appointments Clause rationale would not apply to military officers assigned to this Court, *see Weiss v. United States*, 510 U.S. 163 (1994), the *only* two officials who could be constitutionally imbued with the complete appointment power established by 10 U.S.C. § 950f(b) are the President and the Secretary of Defense. Congress chose the latter. And Congress sensibly chose the latter alone, thereby avoiding the potential for an Appointments Clause violation if any DOD official other than the Secretary were to assign a civilian to duty as a judge on the Court of Military Commission Review.

This is not merely Appellee's conclusion. In his 4 May 2007 Action Memo to the Secretary of Defense, the General Counsel of the Department of Defense correctly advised the Secretary of Defense that "Section 950f(b) of the MCA requires you to assign appellate military judges to the CMCR." Military Judge Appointment Memo (Attachment B). Yet the Secretary of Defense did not assign the three appellate military judges on this panel to the CMCR. Their assignment is, therefore, invalid.

III

No delegation of authority to appoint this Court's judges can take effect until 60 days after such delegation of authority has been reported to the House and Senate Armed Services Committees.

Even if the power to appoint a judge of this Court could be delegated and actually has been delegated to the Deputy Secretary of Defense, the Military Commissions Act precludes the Deputy Secretary from exercising that power until 60 days after that delegation has been reported to the House and Senate Armed Services Committees.

Section 949a of the Military Commissions Act authorizes the Secretary of Defense to prescribe regulations providing the "post-trial procedures" for military commission cases. The Secretary did so by promulgating the Manual for Military Commissions, which includes a provision specifying that "[t]he Secretary shall appoint appellate military judges to the Court of Military Commission Review pursuant to 10 U.S.C. § 950f." R.M.C. 1201(b)(1). Nothing in the Manual for Military Commissions provides that the Secretary may delegate that power.

But Section 949a also includes a limitation on changes to those post-trial procedures once they are promulgated: "Not later than 60 days before the date on which any proposed modification of the procedures in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the modification." 10 U.S.C. § 949a(d).

So if the Secretary of Defense modified R.M.C. 1201(b)(1) by providing that the Secretary *or the Deputy Secretary* shall appoint appellate military judges to the Court of Military Commission Review, that modification cannot take effect until 60 days after it has been reported to the House and Senate Armed Services Committees. Absent such a notification on or before 9 March 2007, therefore, the Deputy Secretary was not empowered to appoint members of this Court when he purported to do so on 8 May 2007. The Regulation for Trial by Military Commissions provides an important clue suggesting that no such delegation occurred before 9 March 2007. The Regulation was promulgated by the Deputy Secretary of Defense under delegated rulemaking authority pursuant to 10 U.S.C. § 959a(c). *See* Regulation for Trial by Military Commissions at Foreword (April 26, 2007). In the Deputy Secretary of Defense's Regulation, he provided that the "Secretary of Defense shall appoint military judges to the

CMCR from among appellate military judges nominated by each Judge Advocate General and from civilians of comparable qualifications designated by the Secretary." *Id.* at para. 25-2.c. If the power to appoint CMCR judges had been delegated to the Deputy Secretary before he promulgated that Regulation in April 2007, surely he would have mentioned his own appointment authority in that paragraph. He did not.

Absent any valid delegation reported to Congress on or before 9 March 2007, the Deputy Secretary's action purporting to appoint the members of this Panel was *ultra vires* and void, leaving this panel with no power to rule on this case.

IV

The "Acting Chief Judge" had no authority to assign the military judges to the panel hearing this case.

For the reasons discussed in Sections I-III, above, CAPT Rolph is not actually a judge on the Court of Military Commissions Review and, therefore, cannot act as the "Acting Chief Judge." But even apart from the reasons discussed above, the creation of the position of "Deputy Chief Judge" with power to serve as "Acting Chief Judge" is invalid.

Under the Manual for Military Commissions, only one official is authorized to assign judges to panels of this Court: "The Chief Judge shall assign the appellate military judges of the Court of Military Commission Review to panels of three appellate military judges each." R.M.C. 1201(b)(3); *see also* Regulation for Trial by Military Commissions 25-2.e ("Judges will be assigned to the panels by the Chief Judge."). The Regulation further provides that "[c]ases will be assigned to the panels by the Chief Judge or his designee." Regulation for Trial by Military Commissions 25-2.e.

Neither the position of "Deputy Chief Judge" nor "Acting Chief Judge" is mentioned in the Military Commissions Act, the Manual for Military Commissions, or the Regulation for Trial

by Military Commissions. The General Counsel's Action Memo of 11 June 2007 forthrightly recommended that the Secretary of Defense "*create* the position of Deputy Chief Judge of the CMCR." Chief Judge Appointment Memo (emphasis added) (Attachment D). The creation of this new position sharing some powers previously entrusted only to a single official is clearly "a modification of the procedures in effect for military commissions." *See* 10 U.S.C. § 949a(d). But such a change requires notification to the relevant congressional committees 60 days before it may go into effect. *Id.*

The creation of this new position demonstrates the congressional intent behind § 949a(d)'s notification requirement. A Member of Congress familiar with the pre-June 15 military commissions regime would know that only a single official—the Chief Judge—appointed by the Secretary of Defense himself could carry out the vitally important and sensitive tasks of assembling each CMCR panel and assigning particular judges to hear particular cases. Yet after June 15, that power could be exercised by two different officials, both of whom were selected by the Deputy Secretary of Defense rather than the Secretary of Defense and one of whom was purportedly put on the Court by the Deputy Secretary. A Member of Congress comfortable with the former regime may be profoundly uncomfortable with the revised system where authority is far more diffuse. The 60-day notification and waiting period would give Members of Congress an opportunity to consult with appropriate Executive Branch officials concerning the change, hold hearings on the change, or even pass legislation preempting the change. Implementing a change to the commission procedures without observing the 60-day notice and waiting period offends Congress's clear legislative intent in adopting § 949a(d), as well as the plain language of that statutory provision.

The Action Memo that the Deputy Secretary signed on 15 June clearly is not in effect today—and it cannot take effect until 60 days after Congress was notified of it. Accordingly, the positions of Deputy Chief Judge and Acting Chief Judge do not exist today. CAPT Rolph, therefore, has no authority to carry out regulatory functions of the Chief Judge. No properly authorized official has assigned judges to this panel or assigned this case to this panel. This Court must abate proceedings in this case until a properly authorized official has done so.

Conclusion

Neither the Military Commissions Act nor its implementing regulations have been complied with in the appointment of this panel. For the foregoing reasons, Appellee respectfully requests the Court to abate proceedings in this case until such time as the applicable statutory and regulatory requirements are satisfied.

Respectfully submitted,

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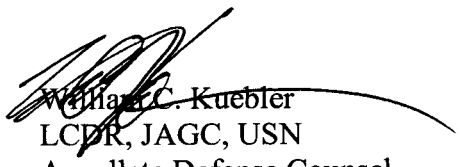

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PANEL No. _____

GRANTED (signature) _____

DENIED (signature) _____

DATE _____

ATTACHMENTS

A. Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Court of Military Commission Review Appellate Military Judges (Nov. 21, 2006)

B. Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Court of Military Commission Review Appellate Military Judges (May 4, 2007)

C. Case Assignment, *United States v. Khadr*, CMCR Case No. 07-001 (Ct. Mil. Comm'n Rev. July 11, 2007)

D. Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Chief Judge of Court of Military Commission Review (June 11, 2007)

Certificate of Service

I certify that a copy of the foregoing was sent via e-mail to Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 19 July 2007.

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