UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D-026** **RULING ON MOTION** TO DISMISS (UNLAWFUL INFLUENCE) 9 May 2008

The Defense has moved the Commission to dismiss all charges and specifications with prejudice, or in the alternative, to disqualify the Convening Authority and the Legal Advisor to the Convening Authority from any further participation in the case as a result of Command Influence on the Chief Prosecutor and other Prosecutors in the case. The Government opposes the motion, arguing that the conflict between General Thomas Hartmann (Legal Advisor to the Convening Authority) and Colonel Morris Davis (formerly the Chief Prosecutor of the Office of Military Commissions) and his staff did not amount to unlawful influence. The Commission heard the testimony of Colonel Morris Davis, USAF, former Chief Prosecutor; Major General John Altenberg, US Army (Ret) and former Appointing Authority; Major (Ret) Michael Berrigan, Deputy Senior Defense Counsel, Office of Military Commissions (OMC), and received various items of documentary evidence in open court at Guantanamo Bay, Cuba on 28-29 April 2008.

FINDINGS OF FACT: In connection with this motion, I find the following facts to be true:

WITH RESPECT TO COLONEL MORRIS DAVIS AND GENERAL THOMAS HARTMANN

1. Colonel Morris Davis traveled to Washington DC in August of 2005 to interview with DoD General Counsel Mr. Jim Haynes for the position of Chief Prosecutor, Office of Military Commissions.

2. During the interview, Colonel Davis observed that the reputation of the commissions for fair treatment might be enhanced if there were some acquittals, as there had been in Nuremburg. Mr. Haynes responded "We can't have acquittals. We've got to have convictions. We can't hold these men for five years and then have acquittals," or words to that effect. Colonel Davis was surprised that Mr. Haynes did not appear to have considered the possibility of acquittals. Colonel Davis also opined that OMC needed to be more engaged with the media, and Mr. Haynes was happy to hear that. Notwithstanding the exchange about acquittals, or perhaps because of it, Colonel Davis was offered the job. Colonel Morris affirmatively denies that this statement had any impact on any of the decisions he made in Mr. Hamdan's case.

3. Colonel Davis reported for duty as Chief Prosecutor in September of 2005. At that time Mr. Haynes was not in his supervisory chain, and so Colonel Davis did not consider the remark about acquittals to be from someone who would have authority over him. Military Commission Instruction (MCI) #3 required Davis to report to the Legal Advisor, who reported to the Appointing Authority. MCI #3 also indicated that the "chief prosecutor shall direct the overall prosecution effort."

4. Soon after reporting for duty, Colonel Davis learned about some dissension in the office prior to his arrival, as a result of the "Preston Carr" memo, written by an Air Force officer previously assigned there. He was eager to settle the prosecutors down and assure them of his policies, apparently in light of the disturbance Carr had occasioned. He met with them individually, and, among other things, told them that they would not be pushed to use any evidence that had been gained by the use of torture, waterboarding, or anything else they considered inappropriate. He invited his prosecutors to come and speak to him if they had any questions about their cases or their evidence. Colonel Davis got very little supervision from anyone during the first eighteen months or so of his tour as Chief Prosecutor. Indeed, he sometimes felt that nobody cared how he did his job. During this period, Colonel Davis was rated by the Appointing Authority and Mr. Haynes, both of whom described his performance in glowing terms.

5. About 28 September of 2006, he attended a meeting of the Senior Oversight Group, held in the office of Deputy Secretary of Defense Gordon England. During one of these meetings, Mr. England said "there could be strategic political value in getting some of these cases going before the [November 2006] elections. We need to think about who could be tried" or words to that effect. The commission takes judicial notice that the Supreme Court issued Hamdan v. Rumsfeld in June 2006 and that the Military Commissions Act was not signed until late October 2006. Consequently, there was no possible way in which any military commissions case could be referred, much less brought to trial, before the November 2006 elections.

6. Mr. Haynes immediately jumped into the conversation and corrected Mr. England by saying "There is only one person in this room who can make those decisions, and that is Colonel Davis. Charging decisions are his alone" or words to that effect. Everyone present seemed to agree, and Colonel Davis viewed the remark as an opinion, rather than a command. Colonel Davis affirmatively denies that this statement had any effect on any decision he made with respect to Mr. Hamdan's case.

7. During the same meeting, then-Under Secretary of Defense for Intelligence Mr. Steve Cambone opined that Department of Defense (DoD) attorneys were not sufficiently experienced to handle these cases, and that they needed to get some Department of Justice (DOJ) attorneys involved. Although no DOJ attorney had made an appearance in a military commission hearing before that date, they have since been assigned to military commission trial teams. Colonel Davis affirmatively denies that this statement had any impact on any decision he made in the Hamdan case.

8. While at the time certain "High-Value Detainees" were in the custody of the CIA, Colonel Davis believed they would ultimately come into DOD hands, and that their trials would be assigned to his prosecutors. In September of 2006 the HVD's were transferred to DOD custody, and at that point many people became interested in the OMC Prosecutors and how they performed their duties.

9. On 7 September 2006, as the MCA was being drafted, Colonel Davis was invited to the office of an old Air Force friend, now Senator Lindsey Graham, to discuss the pending legislation. He met for about two hours with Senate Staffers, and more briefly with Senators Graham and McCain. During this meeting, Senator McCain asked Colonel Davis what he needed to do the

job right, and he replied that he needed protection for the independent exercise of judgment by both prosecutors and defense counsel. Colonel Davis had in mind, as he made this observation, the comments of Mr. Haynes and perhaps others he had heard during the course of his many meetings. He was invited to draft some language, and he proposed the language that now appears at MCA §949b(a)(2)(C) "No person may attempt to coerce or, by any unauthorized means, influence—the exercise of professional judgment by trial counsel or defense counsel." The Military Commissions Act was passed on October 17, 2006, and signed into law soon thereafter.

10. On January 9, 2007, Mr. Haynes' nomination for a seat on the Fourth Circuit Court of Appeals was withdrawn, apparently in large part because of a memo he had written regarding the use of torture on detainees. Later that day, Mr. Haynes called Colonel Davis and asked how soon charges could be prepared against David Hicks. Colonel Davis reported that there were still many steps to be put in place before anyone could be charged. These included the issuance of the Manual for Military Commissions (MMC) and the DOD Trial Regulations, which would include the elements of the offenses, and the appointment of a Convening Authority. Mr. Haynes pressed Colonel Davis for an answer, and he finally opined that he might be able to have charges ready within two weeks after receiving the MMC.

11. Within thirty minutes of this call, Mr. Dell'Orto, the Principal Deputy General Counsel, called to assure Colonel Davis that Mr. Haynes had been out of line, and to disregard everything Mr. Haynes had said.

12. Two weeks after the MMC was issued, Mr. Haynes called again to inquire about charges for David Hicks, and asked if others could also be charged. Colonel Davis responded that there were others who could also be charged. These included Hamdan and Khadr. All three had previously been charged before military commissions.

13. Colonel Davis considered this insistence on speedy processing to be premature. There was still not a complete process for the trial of detainees, and there was still no Convening Authority in place who could refer charges even after they were prepared and sworn.

14. Mr. Hamdan's case had first been referred to trial on 13 July of 2004. The Supreme Court issued its decision in Hamdan v. Rumsfeld on 29 June 2006. The Military Commissions Act was signed and became effective in October, 2006, and charges were sworn again on 2 February 2007, and referred for trial on 10 May 2007. This Commission dismissed the charges on 4 June, and the Prosecution filed a Motion for Reconsideration on 8 June. Brigadier General Hartman reported for duty as Legal Advisor to the convening Authority on 2 July 2007. On 17 August 2007, this Commission agreed to reconsider the evidence of jurisdiction over Hamdan.

15. Brigadier General Hartmann first met Colonel Davis on 2 July, 2007, while Colonel Davis was about to undergo surgery, followed by a month's convalescent leave. During his absence, General Hartmann began visiting the Prosecutor's Office, asking counsel about their cases, and requiring detailed reports regarding the evidence, witnesses, and level of counsel preparation to try the cases. In Colonel Davis's opinion, General Hartmann took micro management to the level of "nano-management" which amounted to "cruel and unusual punishment."

16. During Colonel Davis's nearly month-long absence for convalescence, LTC Britt called him at home nearly daily to discuss office business. Either LTC Britt or Colonel Davis described General Hartmann's conduct and demands as "cruelty and maltreatment." During the same period of convalescence, General Hartmann called Colonel Davis at home, questioning his leadership, his Deputy's integrity, the general quality of the prosecution shop's work, and giving him specific direction about needed improvements. He punctuated his demands with statements such as "Am I making myself clear, Colonel?" Colonel Davis was shaken, and offered to resign the next day. General Hartmann backed off and assured Colonel Davis that there was no need for that.

17. On 18 July General Hartmann announced that *he* was going to select the next cases to go forward. He wanted cases that would be "sexy" enough to capture the public interest, or cases in which an accused might have blood on his hands, rather than cases involving low level actors transporting documents, etc. "Sexy" was a term then in use in Colonel Davis's office that General Hartmann had adopted. In a meeting in the Prosecution war room on 19 July, General Hartmann announced to all in attendance that he wore two hats: one as Legal Advisor to the Convening Authority, and one in charge of the prosecution.

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

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

20. On a number of occasions between July and September of 2007 General Hartmann accentuated his position of authority over Colonel Davis by explicit reference to the difference in rank, with phrases such as "Do you understand me, Colonel?" and "Am I making myself clear, Colonel?" On other occasions during the same period of time, the two often had productive, collegial and mutually satisfying discussions about the best way forward in trying these cases. They sometimes laughed together, enjoyed sharing personal, professional and family discussions, and seemed (to Colonel Davis) to be working well together on Commissions matters.

21. General Hartmann had no active involvement in the Hamdan case because it had already been referred for trial and was in the hands of this military judge before General Hartmann reported for duty as the Legal Advisor. Sometime in August of 2007, General Hartmann received a call from Mr. Haynes, who reported that Hamdan's civilian counsel was interested in a pretrial agreement. Mr. Haynes apparently directed General Hartmann to personally conduct the negotiations. When Colonel Davis offered to have the Hamdan counsel brief him on the case and help prepare him for the negotiations, he declined the offer.

22. Before General Hartmann arrived, his predecessor had reached a pretrial agreement in the case of David Hicks without any consultation with or advice from Colonel Davis, who did not learn of the agreement until he arrived in Guantanamo Bay for what he expected to be an arraignment. On that occasion Colonel Davis objected publicly to having been bypassed in the negotiations, and was later counseled privately by the Convening Authority for having done so.

23. The tensions between Colonel Davis and General Hartmann continued to increase, with General Hartmann becoming, in Colonel Davis' opinion, much too deeply involved in the operations of the Chief Prosecutor's Office. General Hartmann wanted a training program to enhance the prosecutors' trial skills, detailed briefs on the witnesses and evidence in each case, including its weaknesses, who they were, and what they would say, and he wanted to know the details of the prosecutors' closing arguments.

24. After General Hartmann's arrival, he and Colonel Davis had numerous discussions about the trial of these cases. In one discussion about the use of testimony obtained by coercive techniques, General Hartmann questioned Colonel Davis's authority to make decisions about the use of such evidence. General Hartmann considered all such evidence potentially admissible, and wanted the judges to determine the matter. Colonel Davis was ethically opposed to using such evidence in nearly every case. Colonel Davis's standard was "reliable and in the interests of justice."

25. In August of 2007, Colonel Davis and General Hartmann traveled together, and General Hartmann expressed his disappointment with the speed at which the trials were moving. General Hartmann wanted the trials to get moving, even if it meant using closed sessions to admit classified evidence, while Colonel Davis preferred the lengthy process of classification review and inter-agency coordination, so that the cases could be tried using declassified evidence.

26. LCDR Stone, the Assistant Trial Counsel in this case, was also bothered by General Hartmann's demands, and specifically by his expressed intent to negotiate single-handedly with the defense. He sought an ethics opinion from the Ethics Division of the Judge Advocate General of the Navy over this issue, and offered to meet with General Hartmann to explain how the General was causing himself an ethical conundrum. LCDR Stone also drafted a letter to the editor of the Wall Street Journal as an expression of this frustration.

27. At length, Colonel Davis responded to this pressure from General Hartmann by writing a complaint, and leaving it on the desk of Judge Crawford, the Convening Authority. She forwarded it to General Hartmann's supervisor, Mr. Haynes, and the complaint resulted in a formal investigation by a three-officer panel headed by Brigadier General Tate.

28. Between 6 and 7 September 2007, the "Tate Commission" interviewed a number of people with knowledge of the dispute between General Hartmann and Colonel Davis, and examined various documents and authorities. The Tate Commission concluded that General Hartmann's supervision of Colonel Davis was authorized by regulation, that the SECDEF was authorized by statute to publish that regulation, and that General Hartmann's efforts to influence Colonel Davis were therefore "authorized."

29. In early October 2007, Colonel Davis was invited to Mr. Haynes' office to discuss the complaint and its resolution, and was there given an appointing letter for the first time since he had entered upon his duties. Mr. Haynes excused himself from the meeting, and Mr. Dell'Orto delivered the letter and the news. The appointing letter indicated that he was to work for the Legal Advisor, and that the Legal Advisor was to work for the DoD General Counsel. Mr. Dell'Orto informed Colonel Davis that this decision had been discussed among, and agreed to by, the Judge Advocates General of all the Services, and by Senator Graham. Because Mr. Haynes, in Colonel Davis's mind at least, advocated both the use of torture and the use of evidence obtained by torture, Colonel Davis found it impossible to continue working with Mr. Haynes as a supervisor.

30. The next day, Colonel Davis resigned from his assignment as Chief Prosecutor. He later spoke to the Judge Advocate General of the Air Force and to Senator Graham, and learned that they had not concurred in the solution described above, but that they had merely been informed of the decision and offered a chance to comment. Major General Rivas had affirmatively objected to the solution and taken Colonel Davis' side.

31. On September 11, 2007, Colonel Davis filed a 42 page complaint with the Department of Defense Inspector General (IG) in which he repeated many of the assertions he had previously made to the Convening Authority. The ID relayed the case to the DOD General Counsel because it dealt with "legal" issues. When Mr. Haynes reported to the IG that the matter had been resolved, the IG's investigation was also closed.

32. In an article published in February of 2008, Colonel Davis wrote that he had resigned because he concluded that "full, fair and open trials were not possible under the current system." This conclusion apparently referred to a system in which the Chief Prosecutor reported to and was supervised by a demanding legal advisor, whose own boss was a political appointee who supported torture and the use of evidence gained by torture.

33. In the months since September of 2007, both General Hartmann and Colonel Davis have written and spoken publicly about the conflict between them over the control of the prosecutor's office. The have written op-ed pieces, appeared on radio talk shows and otherwise publicly aired their disagreement now raised again in the motion before the Commission.

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

35. General John D. Altenburg, Jr. (MG, USA, Ret.), a Government witness, served as the Appointing Authority for Military Commissions (a predecessor office to the current Convening Authority for Military Commission) from March 2004 thru November 2006. He described the intent of the MCA drafters to have military commissions mirror the well-understood and familiar military justice model that all the players would be familiar with. He described the role of the SJA in supervising trial counsel, setting goals, establishing standards and procedures for

prosecutors, supervising and sometimes conducting pretrial negotiations in military law. At the same time he acknowledged that the SJA cannot "supervise the trial counsel too actively" or he will risk disqualification as the SJA.

WITH RESPECT TO THE CONVENING AUTHORITY, MRS SUSAN CRAWFORD

36. Judge Susan Crawford, formerly a Judge of the Court of Appeals for the Armed Forces, became the Convening Authority on February 4, 2007. She was appointed by the Secretary of Defense, and reports to the Deputy Secretary of Defense. She does not supervise any personnel within the OMC. Colonel Davis was already in place when she assumed duties as the CA.

37. Judge Crawford has never received input, orders, instructions or suggestions from the Secretary of Defense, his Deputy, or any other person having to do with the trial of detainees by military commissions. Her conversations with the Deputy Secretary have never addressed individual cases being tried or being considered for trial by military commission.

38. Judge Crawford became aware of Colonel Davis's complaint about interference from General Hartmann sometime after July of 2007. Because General Hartmann did not work for her, she forwarded the complaint to the DOD General Counsel for his consideration. This resulted in the Tate Commission described above.

39. Judge Crawford has had very few conversations with Mr. Haynes about the commissions process and no conversations about individual cases, types of cases, charging decisions or outcomes. She has never met Stephen Cambone or had any communications with him. She has never spoken to the Vice President or anyone in his office about military commissions

THE LAW OF UNLAWFUL INFLUENCE UNDER THE MCA

Relevant Portions of the MCA include:

§949a authorizes the Secretary of Defense to establish pretrial, trial and post-trial procedures for cases triable by military commission, and requires that "pre-trial, trial, and post-trial procedures, including elements and modes of proof . . ." To the extent the Secretary considers practicable, these procedures "shall apply the principles of law and rules of evidence in trial by general court-martial."

§949b as noted above, prevents "any person" from coercing, or, by unauthorized means, influencing the exercise of professional judgment by the trial counsel or defense counsel.

§948k(d) establishes the offices of Chief Prosecutor and Chief Defense Counsel" and requires them to be fully-qualified military judge advocates.

The Regulations for trial by Military commissions were issued on April 27, 2007. The Regulations contain these relevant provisions:

1-4: 10USC §949b prohibits unlawful influence in military commissions proceedings. 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 and otherwise ensure that the military commission is free of unlawful influence.

2-1: The Office of the Convening Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense. The Office of the Convening Authority shall consist of the Director of the Office of the Convening Authority, the convening authority, the legal advisor to the convening authority, and such other subordinate officials and organizational elements as are within the resources of the Secretary of Defense.

8-6a: The Chief Prosecutor shall supervise all trial counsel and other personnel assigned to the Office of the Chief Prosecutor, including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

8-6b: Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance to the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom a person "reports" as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the functions of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

1. Chief Prosecutor: The Chief Prosecutor shall report to the legal advisor to the Convening Authority.

RMC 406 requires the legal advisor to the convening authority to provide consideration and advice to the convening authority before any case may be referred to trial by military commission, and specifies the contents of that advice. This section repeats nearly verbatim the corresponding section of the Manual for Courts Martial, i.e. RCM 406.

RMC 705 authorizes the "accused, defense counsel, the legal advisor, convening authority, or their duly authorized representatives" to initiate pretrial agreement discussions.

RMC 1106 requires the legal advisor to provide a recommendation prior to action by the convening authority on a case. No one can serve as the legal advisor under this rule who has acted as a trial counsel on the case. There must be a specific recommendation by the legal advisor as to the action to be taken by the convening authority on the sentence.

UNLAWFUL COMMAND INFLUENCE UNDER THE UCMJ

Congress and the military courts have demonstrated concern not only with eliminating actual command influence, but also with "eliminating even the appearance of unlawful command influence from courts-martial." *United States v. Rosser,* 6 M.J. 267, 271 (C.M.A. 1979) "Once unlawful command influence is raised, 'we believe it incumbent on the military judge to act in

the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.'" *United States v. Stoneman,* 57 M.J. 35, 42 (C.A.A.F. 2002). "[D]isposition of an issue of unlawful command influence falls short if it fails to take into consideration . . . the appearance of unlawful command influence at courts-martial." *Id.* Even if there is no actual command influence, "there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Id* at 42-43.

The threshold for raising the issue at trial is low, but more than mere allegation or speculation. *United States v. Johnston*, 39 M.J. 242, 244 (CMA 1994). The issue can be raised at trial by "some evidence " of facts which, if true, would constitute unlawful command influence, and that the unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. *United States v. Ayala*, 43 M.J. at 300 (C.A.A.F. 1995); *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). 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. Cruz*, 25 M.J. 326 (CMA 1987). But "proof of command influence in the air" will not do. *United States v. Thomas*, 22 M.J. 388, 396 (CMA 1986), cert denied 479 U.S. 1085 (1987).

Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not affect the proceedings. *United States v. Gerlich,* 45 M.J. 309, 310 (1996). Once the issue is raised by some evidence, there is a rebuttable presumption of prejudice and a judge must be 'persuaded beyond a reasonable doubt that the findings and sentence have not been [or will not be] affected by the command influence.' After the burden shifts to the Government, the Government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or 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. *United States v. Stombaugh,* 40 M.J. 208, 214 (CMA 1994); *United States v. Argo,* 46 M.J. at 457 (C.A.A.F 1997); *United States v. Biagase,* 50 M.J. 143, 150-151 (C.A.A.F. 1999).

ANALYSIS

The Commission notes that decision of military courts implementing the UCMJ are not binding on it as it interprets the Military Commissions Act (10 USC §948b(c)). But since there is no established body of case law construing the provisions of §949b(a)(2)(C), this Commission properly looks to military law for guidance. The Commission finds that Congress had the intent to protect military commission participants from unlawful influence, and specifically from political influence, and that its purpose in doing so was to protect the integrity of the proceedings and enhance their reputation in the public view. The Commission generally accepts the military law of command influence as an appropriate model for decisions under the comparable provision of the MCA. But because Congress took special steps in the MCA to protect the prosecutors from unlawful influence, the general military model, in which the SJA properly supervises and

directs the prosecution, military law's general acceptance of SJA supervision of trial counsel must be moderated somewhat to prevent that supervision from becoming not merely intrusive, but coercive or unauthorized. With these considerations in mind, the Commission concludes that:

With respect to the motion to dismiss the charges and specifications:

1. The Defense has not raised the issue of unlawful influence with respect to the decision to swear and refer charges against Mr. Hamdan, who has always been among the first military commission defendants to be charged. He was originally charged in 2004, and charged again in 2007 before General Hartmann arrived for duty. This case was shielded from General Hartmann's influence because this Military Judge already had control of the case before his arrival. If an appellate court should determine that the Defense has raised the issue with respect to the referral of this case to trial, the Commission is satisfied that the Government has shown beyond a reasonable doubt that the influence has not affected these proceedings.

2. While pressure from Mr. Haynes may have resulted in the case's referral earlier than might otherwise have occurred, it did not cause to be referred for trial a case that would not otherwise have been referred. Hamdan was first charged in 2004, and clearly would have been charged again, with or without Mr. Haynes's prodding. Colonel Davis also expressly denies that his decision to refer this case to trial was influenced by any pressure, and asserts that he was personally convinced that this case should have been referred to trial. The Commission agrees with this declaration and finds it to be true.

The motion to dismiss all charges and specifications is DENIED.

With respect to the motion to disqualify the Convening Authority:

The Defense has not raised the issue of unlawful influence with respect to any actions of the Convening Authority. Judge Crawford was never subject to, nor did she subject any Prosecutor to, unlawful influence with respect to any decision in this case. Her decisions to deny expert assistance requested by the defense reflect a careful adherence to the requirements of military law, and invite resubmission and continued debate. There is no evidence that any of these decisions reflect unlawful influence by General Hartmann. The Motion to disqualify the Convening Authority is DENIED.

With respect to the motion to disqualify the Legal Advisor:

1. The Defense has offered substantial evidence that the Legal Advisor to the Convening Authority was closely associated or identified with the Prosecution. General Hartmann's efforts to energize, educate, and professionalize the Prosecutors were clearly within the scope of his proper duties as Legal Advisor, as were his efforts to familiarize himself with the cases being prepared for trial. Robust sentencing and training programs in trial advocacy seem entirely appropriate for the Legal Advisor to institute and insist upon.

2. The Legal Advisor is specifically authorized to *initiate* pretrial agreement negotiations

by RMC 705(d)(1), and General Hemingway's involvement in *conducting* negotiations personally in the Hicks cases certainly created a precedent upon which General Hartmann may have relied. But the pretrial negotiations in this case were initiated by the Defense, via a phone call to Mr. Haynes. If General Hartmann personally participated in negotiations (it is not clear whether the planned negotiations actually took place), he would have done so at the peril of compromising his continued objectivity as the Legal Advisor.

3. Although the duties of the Legal Advisor are largely comparable with those of the Staff Judge Advocate in military practice, Congress has inserted in the MCA specific provisions (1) establishing a Chief Prosecutor, and (2) protecting Prosecutors against coerced or unauthorized influence in the exercise of their professional judgment. This language is not found in the UCMJ, and must be construed to reflect a Congressional determination that Prosecutors in military commissions require greater protection from political pressure than trial counsel in a court-martial require.

4. The Commission is troubled by the following actions of the Legal Advisor that reflect too close an involvement in the prosecution of commission cases:

(a) While RMC 705 authorizes the Legal Advisor to *initiate* pretrial agreement negotiations, General Hartmann intended to *personally conduct* them without any consultation with or the company of the trial counsel. This worked successfully when an agreement was reached in Hicks, but may compromise the Legal Authority's objective position under other circumstances.

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

(c) Appearing to direct, or attempting to direct, the Chief Prosecutor to use evidence that the Chief Prosecutor considered tainted and unreliable, or perhaps obtained as the result of torture or coercion, was clearly an effort to influence the professional judgment of the Chief Prosecutor. While it is true that the trial judge is ultimately the gatekeeper for each item of evidence, each Prosecutor also has an ethical duty not to present evidence he considers unreliable.

(d) Challenging the Chief Prosecutor's decision to take to trial first the cases he considered most serious suggests an improper influence on the Chief Prosecutor's discretion.

(e) Making public statements in which he aligned himself with the prosecution, took credit for their success and indicated that he is their leader.

(f) "Nanomanagement" of the Prosecutors' office to such an extent that it could be considered "cruelty and maltreatment" suggests a greater level of involvement than a Legal Advisor can properly engage in without becoming identified as part of the prosecution.

(g) The Legal Advisor's intimate involvement in the details of prosecutorial decision making have led one prosecutor to resign, another to seek ethical guidance from the Navy JAG ethics office, and has led both prosecutors in this case, and their former supervisor, to believe they were being "nano-managed" in both the performance of his duties and the exercise of their discretion.

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

DECISION AND ORDER

The Commission is not persuaded, beyond a reasonable doubt, that the Legal Advisor to the Convening Authority retains the required independence from the prosecution function to provide fair and objective legal advice to the Convening Authority. These are substantial doubts about that ability based on the length and intensity of the Legal Advisor's involvement with the Prosecution in general, as well as the impact his actions have had on the prosecutors in this case. To ensure that the accused receives the fair and objective advice to which he is entitled during the balance of this case, the motion to disqualify the Legal Advisor to the Convening Authority from further participation in the case of United States vs. Hamdan is GRANTED.

The following additional measures are ordered to ensure the trial is not influenced by unlawful influence and to enhance public confidence in the proceedings:

1. The General Counsel, Department of Defense, is directed to use such means as are at his disposal to ensure that no person who testified before the Tate Commission, or was involved in the litigation of this motion, suffers any adverse consequence, professional embarrassment, unfavorable performance rating, or other disadvantage as a result of such participation. LTC Britt and LCDR Stone are of particular interest to this Commission.

2. The General Counsel, Department of Defense shall appoint a substitute Legal Advisor for the case of United States v. Hamdan. The substitute shall not be a Deputy to, or any other subordinate of, the current Legal Advisor.

3. The Commission here notes that, with the consent of both parties, it received a handwritten note at the conclusion of the litigation of this motion in Guantanamo Bay. The note requested that the transcripts of the testimony of LTC Britt and LCDR Stone be made public, because the Commission indicated in open session that it would consider their recorded testimony before the Tate Commission "as if it had been given in open court." The note was signed by several members of distinguished national newspapers. To ensure that these Trial Counsel are not compromised in their ability to continue to perform their duties as trial counsel in this case, the Commission orders the transcripts of their testimony redacted from public release until the trial is complete. After that point, each Prosecutor may balance all the

competing interests in this matter, and determine whether his testimony before the Tate Commission may or should be released to the public, in accordance with the normal procedure for the release of documents relating to military commission proceedings.

4. The Commission retains control over this matter, and will be alert for evidence of unlawful influence, including retribution of any kind, until authentication of the record of trial. Additional corrective and preventative measures remain within the Commission's discretion until that time, if necessary.

So Ordered.

Keith J. Allred
Captain, JAGC, USN
Military Judge