



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS

18 June 2008

Hon. Susan J. Crawford  
Convening Authority for Military Commissions  
Office of the Secretary of Defense  
Office of Military Commissions  
1600 Defense Pentagon  
Washington, D.C. 20301-1600

*Re: Binyam Mohamed (ISN 1458): NOTICE BEFORE ACTION*

Dear Ms. Crawford:

In a letter dated 30 May 2008, we asked that, before deciding whether to refer the charges against Mr. Mohamed for prosecution in a military commission trial, the Convening Authority investigate the evidence that the charges are based in any part on evidence derived from torture. We also requested that, if the investigation shows that the charges are based in any part on torture-derived evidence, the Convening Authority decline to refer the charges for prosecution.

We are now writing to advise you that, unless you inform us by **5:00 pm EST on Friday, June 20**, that you agree to these reasonable requests, we will ask District Judge Sullivan, before whom Mr. Mohamed's habeas action is pending (*Al Habashi v. Bush*, 1:05-00765-EGS (D.D.C.)), to order the Convening Authority to take the requested actions.

As we have previously stated, no branch of the US government has held a proper, and public, investigation into the evidence that Mr. Mohamed has been tortured and is being held based on that torture, and the torture and abuse of others. This, despite the legal requirement that such an investigation take place, and our repeated requests for such an investigation.

As of June 2, 2008, you stated:

I reviewed your letter dated May 30, 2008. I will consider the information you provided before making a decision on the referral of charges in this case.

We responded, on June 4, pointing out your legal obligations both under the Military Commissions Act of 2006 ("MCA") and the Convention Against Torture ("CAT"), and asking for a commitment that you will *investigate* the situation, rather than simply accept a letter from us. Meanwhile, we also wrote on June 3 to ensure that Brig. Gen. Hartmann would be disqualified from involvement in Mr. Mohamed's case.

The only response we had to this was on June 9, from your deputy legal advisor, as follows:

Mrs. Crawford received your correspondence dated 3 and 4 June 2008 and asked me to respond on her behalf. She believes the issues raised in your letters are best resolved through the formal military commission process.

We strongly disagree with this position. We believe that such an approach contravenes the rules under which the Convening Authority is meant to operate, as well as other superior law.

Under the Supreme Court's recent decision in *Boumediene v. Bush*, the District Court has jurisdiction to review what we respectfully believe to be your erroneous interpretation of the legal rules that govern your actions, because "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, slip op. at 50, quoting *INS v. St. Cyr.*, 533 U.S. 289, 302 (2001). Indeed, the Supreme Court emphasized in *Boumediene* that, historically, the "habeas court's role [has been] most extensive in cases of pretrial and noncriminal detention, where there has been little or no previous judicial review of the cause for detention." *Boumediene*, slip op. at 51. Such is obviously the case here.

Under these circumstances, the District Court might be expected to "hear[] oral testimony to determine whether the evidence was sufficient to justify holding him for trial." *Id.*, quoting Oakes, *Legal History of the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1965). In other words, the habeas court's function is to look over your shoulder to see why Mr. Mohamed is being held based on torture evidence and, in that regard, to assess whether you may say that you will take a pass on the issues and leave everything to the military commission.

We respectfully suggest that you are violating the very rules that govern you in at least the following ways:

**1. The Convening Authority cannot ignore the military commission ruling disqualifying Gen. Hartmann.**

Under the rules, the legal advisor plays an integral role in the process. The charges and specifications are forwarded to the legal advisor from the Chief Prosecutor. *Regulation for Trial by Military Commission* ("Reg.") 4-2(a). It is the obligation of the legal advisor to "advise the Secretary of Defense or the convening authority" on a series of matters that you are then required to take into account. *Id.*

We have a ruling from the Military Commission that Gen. Hartmann has been too politically involved in this process to continue to take part. *United States v. Hamdan* (Order of May 9, 2008). It is our position that the same factors apply in Mr. Mohamed's case as applied in Mr. Hamdan's, and that the Convening Authority cannot appoint the military commissions, Reg. 2-3, merely to ignore the rulings issued by the judges.

We therefore respectfully require a commitment that there will be a full evaluation by you on this matter.

**2. The Convening Authority cannot refuse to assess the legality and admissibility of the evidence.**

We previously asked you to assess whether the evidence against Mr. Mohamed was derived from torture. We have offered to provide you with a large quantity of evidence to this effect,<sup>1</sup> but we have also asked that you conduct a full and open evaluation<sup>2</sup> of the evidence, and whether there is *anything* that could be adduced against Mr. Mohamed that is not the bitter fruit of torture. Again, the regulations make it clear that the Convening Authority must assess “whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report). . . .” *Reg. 4-2(a)(2)*.<sup>3</sup> As we have previously detailed to you, this must include at least arguably *admissible* evidence, and both as a matter of the *Regulations* and the CAT, cannot be evidence extorted from someone through coercion and abuse.

The regulations also require that the Convening Authority determine “whether a military commission would have jurisdiction over the accused and the offense. . . .” *Reg. 4-2(a)(3)*. In order to have such jurisdiction, the accused must be properly determined to be an “unlawful enemy combatant.” *MCA § 948(d)(a)* (“JURISDICTION: A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter . . . when committed by an alien unlawful enemy combatant.”). We have put you clearly on notice that the “evidence” used by the CSRT to reach the conclusion that Mr. Mohamed is an “enemy combatant” was derived from torture. Yet you have taken the position that you need make no further inquiry but can pass the case along to the military commissions. We strongly disagree that this conclusion is legal.

**3. The Convening Authority cannot refuse to make a proper assessment of the impact of this trial on national security.**

We have also requested that you provide us with any evidence concerning the supposed impact of this case on national security,<sup>4</sup> and that you take into account the calamitous consequences of prosecuting a British resident in a military commission based on torture evidence.<sup>5</sup> We also put you on notice that some of the ‘evidence’ against Mr. Mohamed was allegedly derived from Khalid Sheikh Mohamed and Abu Zubaydah (after each had been tortured), and we invite you to

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<sup>1</sup> Habeas counsel have created a report at the urging of members of Congress on the torture issues, and on further investigation that would need to be done by any competent authority seeking to assess the legitimacy of the evidence against Mr. Mohamed. We will be glad to forward this to you, upon your request. We see no point in doing so, however, so long as your position is that your function excludes this assessment.

<sup>2</sup> As we have previously stated, we would strongly object to any *ex parte* contact with the prosecution on this matter. Indeed, we request that any documents submitted to you or your legal advisors by the prosecution be shared with the defense, so that we can correct any statements that may need correcting. *See, e.g., Reg. 3-3(a)* (“Trial counsel will forward charges with the accompanying materials or other evidence supporting the charges through the Chief Prosecutor to the legal advisor to the convening authority then to the convening authority or the Secretary of Defense, if serving as the convening authority for the case, with a transmittal letter”)

<sup>3</sup> We note that we have seen no such “report” and would be grateful for the immediate disclosure of any such document so that we can provide you with the evidence that refutes whatever is in it.

<sup>4</sup> Any preliminary evaluation of this material by the defense can be done within the classification rules established for these cases.

<sup>5</sup> We invite you to solicit the opinion of the British government on this matter, given that they are our closest international allies. There is a permanent representative at the British Embassy who can no doubt meet with you at any time, and we understand that British officials will be in Washington this week or next, so that perhaps you could meet with them also.

consider the impact of them being called as witnesses for Mr. Mohamed to describe their suffering.

While you take the position that these issues are for the military commission to decide, this is at odds with the clear language of the Regulations, which mandate that you assess "whether, after consultation with the Office of the Director of National Intelligence (ODNI/OGC phone number: 202/201-1039 (commercial and STE) 984-1039 (secure)) and appropriate intelligence agencies, trial of the charges would be harmful to national security ...." *Reg. 4-2(a)(4)*.


We do not mean to suggest that these are the only violations of law that you would commit by refusing to take into account evidence of torture. We have already detailed other ways in which this course of action would violate the CAT, and we incorporate all those within this letter.

Please let us know at your earliest convenience what steps you are going to take in this respect. We respectfully request written notice by 5pm EST on Friday, June 20, 2008. Absent this, we intend to seek injunctive relief forcing a proper evaluation of this case first thing Monday morning.

We remain,

Yours sincerely,

//signed//  
Clive A. Stafford Smith  
Civilian Counsel

  
Yvonne Bradley, Lt. Col., USAFR  
OMCD Military Counsel

cc. Rt. Hon. Gordon Brown, Prime Minister  
Rt. Hon. David Miliband, Foreign Secretary  
Simon Mustard, British Embassy, Washington DC  
Andrew Tyrie, MP (All Party Parliamentary Group on Renditions)  
Chris Mullin, MP (All Party Parliamentary Group on Renditions)  
Sarah Teather, MP (All Party Parliamentary Group on Guantánamo Bay)  
Karen Buck, MP (MP for Mr. Mohamed)  
Amnesty International, UK & IS  
Redress UK  
Office of Military Commissions – Prosecution  
Mr. Binyam Mohamed