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From: COL Steven David, Chief Defense Counsel, Office of  
Military Commissions  
To: Susan Crawford, Convening Authority, Office of  
Military Commissions

Subj: REQUEST FOR FAIRNESS PROCESS IN DEATH PENALTY REVIEW FOR  
KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN  
'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL HAWSAWI

1. The following letter is submitted on behalf of the above referenced detainees against whom capital charges have been preferred. I make this request as the Chief Defense Counsel prior to detailing counsel. I request that they receive the same consideration and process given to other defendants facing the imposition of the death penalty by the U.S. government.

2. The U.S. Attorneys' Manual (hereinafter, "the Manual" delineates the procedure for determining whether the death penalty should be sought in individual cases. See U.S.A.M. 9-10. Under the Manual, the defense must be permitted the opportunity to submit materials and meet with the reviewing committee, before any final decision is made about whether to pursue the death penalty. See U.S.A.M. 9-10.120 ("No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.")

The U.S Attorneys' Manual also emphasizes that:

[e]ach such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.



One may not successfully assert that the United States Attorney's Manual is not binding on proceedings before the Military Commissions and that the guidance contained therein may thus be ignored with impunity. The Manual was enacted by Congress after consideration and input from the three co-equal branches of the United States Government and represents the best judgment of the United States as to the proper administration of justice. This wisdom was acquired as the result of innumerable proceedings before many different forums. Such judgment may not be easily dismissed and it certainly can not be ignored in a capital proceeding where the audience is not only the people of the United States, but literally the entire world.

The Convening Authority entertains demanding the death penalty against Mr. Khalid Sheikh Mohammed, Mr. Walid Muhammad Salih Mubarak Bin 'Attash, Mr. Ramzi Binalshibh, Mr. Ali Abdul Aziz Ali, and Mr. Mustafa Ahmed Adam al Hawsawi. Justice demands that they be accorded the same opportunity for even handed consideration of their cases as would be required of the United States government in any other capital proceeding.

3. These individuals are denied the rights to submit extenuating and mitigating evidence provided to those who are before military courts-martial.

Unlike members of the military who are accused of serious offenses, these individuals are denied the right to a hearing before an impartial officer prior to the referral of charges to a general court martial. See Manual for Courts Martial, Rule 405. At such a hearing, a military member would be entitled not only to cross-examine witnesses who would provide testimony against him, but also to compel the production of evidence, produce witnesses, and to present anything in defense, extenuation, or mitigation for consideration by the investigating officer. *Id.*

The right of a military accused to submit evidence by means of the Article 32 hearing prior to the referral of charges provides an analog in the military justice system to the requirement in the U.S. Attorneys' Manual that a defendant be permitted to meet, through counsel, with the reviewing committee prior to any final decision to seek the death penalty. The failure of the Military Commissions Act to specifically include such a provision highlights the need for the Convening Authority to follow the recommendations of the Manual as discussed above.

4. U.S. Law Recognizes Mitigating Factors Relevant in this Case.

Under Federal law as articulated by the Manual, the government must consider various extenuating circumstances about a defendant before determining whether to seek the death penalty. Notably, each of these individuals has been held prisoner for anywhere from four to six years, under extraordinarily punishing conditions. Furthermore, until February of this year, none of these prisoners knew when, or if, they would be brought to trial. The full ramifications of these conditions, from the impact on these individuals to the international diplomatic effect, are appropriate issues to be considered in determining whether the death penalty ought to be sought for each of these individuals.

5. Victims' Families Opposing Death.

The U.S. Attorneys' Manual, in outlining the process for determining whether to seek the death penalty, specifies:

The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department.

See U.S.A.M. 9-10.070.

A number of families affected by the attacks of September 11, 2001, have asserted their opposition to the imposition of the death penalty in prosecutions related to these attacks, including the present cases. Some express the beliefs of the loved ones they have lost who opposed the death penalty; others express grave concern over the use of the death penalty for revenge.

The strong opposition by some of these families must be given great consideration notwithstanding the fact that there will also be many families who support capital punishment. The lack of unanimity on this issue militates against the ultimate penalty. Pursuing capital cases, in a system that even many of our own citizens severely challenge, furthers neither the credibility of the United States nor the international reputation that our nation has traditionally enjoyed as the leading advocate of the Rule of Law.

6. Honoring United States Commitments.

In *Hamdan v. Rumsfeld*, 548 U.S. \_\_\_, 126 S.Ct. 2749 (2006), the Supreme Court found that Common Article 3 of the Geneva Convention applied to the detention of Mr. Hamdan and proceedings initiated against him. See *Id.*, at 2796. To conform to Common Article 3, these six prisoners must be tried before a regularly constituted court which affords them "at least the barest of those trial protections that have been recognized by customary international law." *Id.* at 2979.

Customary international law, including United States commitments under existing international treaties, specifies what these trial protections include. The International Covenant on Civil and Political Rights, which the United States ratified in 1992, enumerates the due process rights that must apply in criminal cases. See ICCPR, Art. 14. These rights include:

1. the right to a fair and public hearing by a competent, independent and impartial tribunal;
2. the right to be presumed innocent until proved guilty according to law;
3. the right to be informed promptly and in detail of the nature of the charge;
4. the right to have adequate time and facilities to prepare his defense and communicate with counsel of his own choosing;
5. the right to be tried without undue delay;
6. the right to be present at trial;
7. the right to examine witnesses against him and obtain attendance of witnesses
8. the right not to be compelled to testify against himself or to confess guilt.

The ICCPR further provides that the death penalty may only be imposed when the rights the Convention affords are respected. See ICCPR, Art. 6. Article 6 further states that the death penalty may be imposed only in accordance with the law in force at the time of the commission of the alleged offense. The Military Commissions Act as well as its predecessor, the Detainee Treatment Act (the statute in force when *Hamdan* was decided) were both enacted after the commission of the offenses under which these individuals are charged.

The General Assembly of the United Nations has specifically

noted that its members must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases". G.A. Res. 35/172, Dec. 15, 1980. A review of the history of the present cases, the Military Commissions Act and the rules implementing Military Commissions process demonstrate how the Commissions contravene the international commitments this country has made.

While the propriety of the Commissions process itself may be litigated at a later date, it is immediately apparent that system is open to challenge. Pursuit of the death penalty in these cases will vastly exacerbate these institutional deficits. Some of the more striking of these institutional challenges are outlined below.

First, the right to be tried without undue delay was lost years ago. These individuals have all been imprisoned under extreme conditions for years. During most of this period, they were denied the right to counsel. They now face the significant likelihood of further violations of their internationally recognized human rights in that their counsel will almost certainly be pressured to schedule hearings as soon as possible. Any such imposed expeditiousness will jeopardize their right to have adequate time and facilities to prepare their respective defenses.

These individuals' internationally recognized right to the presumption of innocence has similarly been abridged. The President of the United States has personally referred to these individuals as "the worst of the worst." Most recently, the Attorney General referred to them as "poster children for the death penalty". Significantly, the Attorney General further noted that they should not receive the death penalty because "they want to be martyrs." Associated Press, 14 March 2008. Regardless how one interprets the Attorney General's statements, public figures making very public statements have sealed the outcome of the pending proceedings and foreclosed the possibility of a fair trial: the presumption of innocence has been vitiated. Commission members will be improperly predisposed to vote for guilt and for imposition of the death penalty should the government so request.

One must also note that the rules of evidence permit the admission of hearsay evidence, something that is not allowed in the court-martial system. The rule against hearsay evidence is

not a mere evidentiary nicety, but the evidentiary foundation that ensures the accused's right to confront his accusers. Under the Commissions system, a government agent could be called to testify and recount what supposed eyewitnesses told him, rather than having the eyewitnesses themselves testify at trial. With the obliteration of the long-standing rule against hearsay evidence, these individuals will effectively be denied their internationally recognized right to a public trial, where they confront their accusers. Under the Commissions rules, the right to examine witnesses, sacred in the U.S. Constitution, installed in the military justice system, and recognized under the ICCPR, is lost.

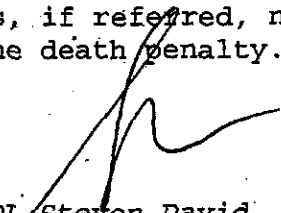
The use of hearsay evidence is especially troubling given that it is likely that the evidence the government will offer was obtained in violation of another international treaty obligation, the Convention Against Torture (CAT), which the United States ratified in 1994. This international obligation requires the government to prevent acts of cruel, inhuman or degrading treatment or punishment. Despite this commitment, the government has acknowledged using "harsh interrogation techniques" on individuals it has held at secret detention facilities located overseas, and at Guantanamo. The techniques the government has admitted using include water-boarding, sleep and light deprivation, and social isolation for extended periods. Putting aside the question of whether the use of these procedures contravened existing U.S. law, the use of evidence, obtained under such conditions would be reprehensible, particularly without affording one the right to confront the individual witnesses providing this evidence and to question them about the circumstances under which they were interrogated. To allow this procedural posture in a death penalty case should be unthinkable. Yet, this is exactly what is proposed if these cases are referred as capital cases.

The unfortunate reality is that these individuals do not face a fair trial. Each has already been tried and convicted in the media and by government officials, up to and including the President of the United States. This is a patent violation of the rights afforded under international law, as well as those rights that our forefathers contended were such basic human rights that they were included in the Constitution of the United States of America, the document which we are sworn to protect and defend.

## 7. Conclusion.

Viewed under international law, and long-standing principles of the U.S. Constitution, our government's actions in the historical progression of the Commissions thus far have made it such that our government does not have clean hands as it continues into these proceedings. It is inescapable that seeking to impose the death penalty on these individuals under these circumstances, and through the gravely flawed process that is Military Commissions system, will further fuel criticism of United States policies, as regards these individuals, and more generally as regards United States prosecution of this war. Pursuing the death penalty in these cases will expose the United States to the opprobrium of the world in a manner that could not be countenanced, even with an invocation of the attacks of September 2001.

Accordingly, on behalf of Mr. Khalid Sheikh Mohammed, Mr. Walid Muhammad Salih Mubarak Bin 'Attash, Mr. Ramzi Binalshibh, Mr. Ali Abdul Aziz Ali, and Mr. Mustafa Ahmed Adam al Hawsawi, I respectfully request that these cases, if referred, not be referred with a recommendation for the death penalty.



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