

UNITED STATES OF AMERICA  v.  Mohammed Jawad	<b>Defense Motion to Dismiss</b> for Unlawful Influence May 20, 2008
--	--

**1. Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008 and within the specific deadline established for law motions by COL Brownback on 7 May 2008. The motion is filed pursuant to R.M.C. 905(b)(1), R.M.C. 907 and R.M.C. 104.

**2. Relief Sought:** Defendant Mohammed Jawad moves to dismiss all charges and specifications with prejudice.

**3. Overview:** The Military Commissions Act (MCA) prohibits attempted or actual coercion or unlawful influence of the exercise of professional judgment of trial counsel. 10 U.S.C. § 949b (2006) and R.M.C. 104(a)(2). The former Chief Prosecutor and his subordinates were subjected to actual and attempted unlawful influence by the Legal Advisor to the Convening Authority. Specifically, the Legal Advisor, the highest ranking military officer in the Office of Military Commissions, exercised unlawful influence in the selection and timing of cases to be pursued by the Office of the Chief Prosecutor, and associated himself too closely with the prosecutorial effort. The Legal Advisor unlawfully coerced or influenced the Office of the Chief Prosecutor to swear charges against Mr. Jawad in October 2007. After hand-selecting Mr. Jawad's case for immediate swearing of charges and personally overseeing the charging process, the Legal Advisor then provided legal advice to the Convening Authority recommending that the Charges and Specifications be referred to trial by military commission. Because the

Legal Advisor had so closely aligned himself with the prosecutorial effort in this case as to virtually become the Chief Prosecutor, he was unable to give impartial legal advice to the Convening Authority. His pretrial advice omitted numerous obvious and relevant legal issues and matters in extenuation and mitigation, depriving the Convening Authority of information that may have impacted her decision-making process, and included misleading information. Because the entire swearing of charges and referral process was infected by unlawful influence, the only appropriate remedy is dismissal.

**4. Burden and Standard of Proof:** Under U.S. military law, the defense bears the initial burden of raising the issue of unlawful command influence by a preponderance of the evidence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The defense meets this burden by showing facts, “which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Importantly, “disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.” *Stoneman*, 57 M.J. at 42. Even in the absence of actual command influence, the appearance of unlawful command influence may place an “intolerable strain on public perception of the military justice system.” *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). Dismissal may be an appropriate remedy to cure either actual unlawful influence or the appearance of unlawful influence. *See, e.g., United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), and *U.S. v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). This same remedy should be available for military commissions where Congress has afforded detainees even greater protections against unlawful influence than those that are found in the Uniform Code of Military Justice (UCMJ).

## 5. Facts:

i. On July 1, 2007, Brigadier General Thomas Hartmann became the Legal Advisor to the Convening Authority. At the time, the Chief Prosecutor was Colonel Morris Davis. Brig Gen Hartmann first met Col Davis on 2 July 2007, while Col Davis was about to undergo surgery, followed by a month's convalescent leave. During his absence Brig Gen 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 Col Davis's opinion, Brig Gen Hartman management style was "nano-management" and arguably constituted "cruelty and maltreatment."

ii. During Col Davis' nearly month-long absence for convalescence, Lieutenant Colonel William B. Britt, Col Davis' Deputy, called him at home nearly daily to discuss office business. LTC Britt and Col Davis considered Brig Gen Hartmann's conduct to be very troubling and inappropriately meddlesome. During the same period of convalescence, Brig Gen Hartmann called Col 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?" Col Davis was shaken, and offered to resign the next day. Brig Gen Hartmann backed off and assured Col Davis that there was no need for that.

iii. On 18 July Brig Gen Hartmann announced that *he* was going to select the next cases to go forward, which, in fact, he did. 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 actors transporting documents, etc. In a meeting in the Prosecution war room on 19 July, Brig Gen 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.

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

v. On 15 Aug 2007, a meeting was held between Col Davis, Brig Gen 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, Brig Gen Hartmann, directed that three cases be ready to refer the day that decision was issued.<sup>1</sup> Col Davis objected that three cases could not be ready by that date, and thought it improper that the Legal Advisor should be directing a particular number of cases to be referred on a date certain. Brig Gen Hartmann stopped the discussion by saying “I said we are going to have three cases ready on that day. Does everyone understand me?”

vi. On a number of occasions between July and September of 2007, Brig Gen Hartman accentuated his position of authority over Col 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?”

vii. The tensions between Col Davis and Brig Gen Hartmann continued to increase, with Brig Gen Hartmann becoming in Col Davis’ opinion, much too deeply involved in the operations of the Chief Prosecutor’s Office. In Aug of 2007, Brig Gen Hartmann expressed his disappointment to Col Davis with the speed at which the trials were moving.

viii. The Legal Advisor specifically singled out the case against Mohammed Jawad for prosecution. In the Legal Advisor’s opinion, the Jawad case, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter, was an example of a “sexy” case, a defendant with “blood on his hands” and a case that the “American people could understand.” In August and September 2007, the Legal Advisor, repeatedly referred to the Jawad case in his discussions with the Chief Prosecutor on the sequencing

---

<sup>1</sup> The decision was announced 24 September 2007; charges against Jawad were the next charges to be sworn.

of cases, referring to him as “that guy who threw the grenade.” The Chief Prosecutor indicated that he had other cases which were more fully developed and had had counsel assigned for longer<sup>2</sup> but the Legal Advisor did not think they were as interesting or had as much public appeal as Mr. Jawad because they were facilitator cases.

ix. The Chief Prosecutor did not have any immediate plans to swear charges against Mr. Jawad. Mr. Jawad was approximately twentieth on the list of cases that Col Davis intended to pursue.<sup>3</sup> Col Davis did not believe the case was well enough developed at the time to swear charges immediately, and wanted to wait until more progress had been made in declassifying evidence. Col Davis also considered the age of Mr. Jawad to be a factor, although not a primary factor, in where he was in his queue of cases. Col Davis felt that it would be helpful to know the outcome in Khadr, before revisiting the issue of juvenile offenders. Col Davis wanted to focus on cases that he considered more serious. Col Davis expressed his views about the sequencing of cases to Brig Gen Hartmann. Brig Gen Hartmann challenged the Chief Prosecutor’s decision to take to trial first the cases he considered most serious. Brig Gen Hartmann also disagreed with Col Davis approach to declassifying evidence and felt that prosecutions should press on with classified evidence and let the military judges sort it out. Brig Gen Hartmann also attempted to direct the Chief Prosecutor to use evidence that he considered tainted and unreliable, or perhaps obtained as the result of torture or coercion, a clear effort to influence the professional judgment of the Chief Prosecutor.

x. In late August 2007, Col Davis delivered a formal complaint regarding the interference of Brig Gen Hartmann in his office to the Convening Authority. Colonel Davis’ complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA. In September 2007, Col Davis filed a complaint with the DoD Inspector General’s office.

---

<sup>2</sup> Trial counsel LTC Darrel Vandeveld was assigned to begin preparing the Jawad case in June 2007. He has indicated that he started from scratch on the case at that point. In contrast several other cases, such as the al Bahlul cases, had been in the works for years, and had been charged under previous incarnations of the military commissions.

<sup>3</sup> Since charges were sworn against Jawad, charges have also been sworn against 11 other individuals, nine of which have been referred to military commissions, one dismissed, and one pending disposition.

xi. On October 3, 2007, Mr. England issued an appointing letter establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007. The letter indicated that Colonel Davis was to work for the Legal Advisor and that the Legal Advisor was to work for the DoD General Counsel. Col Davis was summoned on 4 October and given the memo. Unwilling to be placed in a chain of command under these individuals, Col Davis submitted his resignation later that day. He was advised the following day, Friday, 5 October that his resignation had been accepted. Monday, 8 October was Columbus Day, a federal holiday. The next duty day was Tuesday, 9 October. Charges against Mr. Jawad were sworn that day. The maximum authorized punishment for the charged offenses, if convicted, is life imprisonment.

xii. LTC Britt, as Deputy Chief Prosecutor, served as acting Chief Prosecutor until the new Chief Prosecutor was appointed on October 15, 2007.

xiii. On 21 Jan 2008, COL J. Michael Sawyers, detailed defense counsel for Mr. Jawad, sent a memorandum to the Legal Advisor asking him to consider certain “significant legal impediments to jurisdiction” and alleging a “defective preferral.”<sup>4</sup> The memo asked the Legal Advisor to bring several legal issues to the attention of the Convening Authority for her consideration prior to referral of charges against Mr. Jawad. ( Attachment 1) On 27 Jan 08, the Legal Advisor acknowledged the memo by e-mail to COL Sawyers (Attachment 2). COL Sawyers did not receive any acknowledgement from the Convening Authority.

xiv. The Legal Advisor prepared the pretrial advice (Attachment 3) to the Convening Authority as required by R.M.C. 406. The document was signed by him on 28 Jan 2008. The barebones pretrial advice did not include any reference to any potential legal issues in the case, other than a brief discussion of *in personam* jurisdiction. The pretrial advice

---

<sup>4</sup> Although COL Sawyers used the more familiar term “preferral” from military practice rather than the term “Swearing of Charges” used in the R.M.C., his meaning was clear in context.

did not mention the issue of multiplicity or unreasonable multiplication of charges. The pretrial advice did not mention any extenuating or mitigating factors, such as the fact that Jawad's alleged crimes were committed when he was a juvenile, his cooperation with Afghan authorities, or that he was one of only two detainees taken into custody as a juvenile still being held at Guantanamo. The pretrial advice did not mention the fact that Mr. Jawad had no known terrorist affiliation, or that he was not a member of al Qaida or the Taliban. The pretrial advice did not mention that Jawad had already been in US custody for over five years, or that he was facing life imprisonment. The pretrial advice did not mention the nature or seriousness of the injuries suffered by the three victims of the grenade attack, whom Jawad had allegedly attempted to murder, or their current state of health.<sup>5</sup> The pretrial advice recommended the case be referred noncapital, even though the death penalty was not an authorized punishment for the offenses charged. The pretrial advice did not mention the 21 Jan 08 Memorandum submitted to COL Sawyers or the legal arguments contained therein. COL Sawyers' memo was not listed as an attachment to the advice.

xv. The recommendation of the Legal Advisor was followed and Charges were referred, without comment, by the Convening Authority on 30 Jan 08.

xvi. From his appointment until March 2008, Brig Gen Hartmann made numerous public statements aligning himself with the prosecution, took credit for success in moving cases toward trial and indicated that he was the leader of the prosecutorial effort.

xvii. Brig Gen Hartmann's involvement in the details of prosecutorial decision making and management style led one prosecutor to resign, and another to seek ethical guidance from the NAVY JAG ethics office. Brig Gen Hartmann's objectivity has been called into

---

<sup>5</sup> The defense believes that two of the three named victims suffered only minor injuries and have fully recovered, but has been unable to verify this because the government has not responded to the defense request to provide contact information for the victims.

question in a variety of national news publications, including Harper's Magazine, the Nation, and the New York Times.<sup>6</sup> (Attachments 5-7)

## **6. Law and Argument:**

### **THE MILITARY COMMISSIONS ACT PROHIBITS UNLAWFUL INFLUENCE OVER THE PROSECUTION**

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

The congressional prohibition against unlawful command influence found in the UCMJ was also codified in the MCA. But Congress did not simply transplant the prohibition against unlawful influence found in Article 37, UCMJ, into § 949b of the MCA. Article 37, UCMJ, prohibits persons subject to the Code from coercing or unlawfully influencing “the action of a court-martial or any other military tribunal or any member thereof...” 10 U.S.C. § 837 (2006). Section 949b of the MCA is broader in scope and prohibits *any person* from coercing or unlawfully influencing “the exercise of professional judgment

---

<sup>6</sup> See, William Glaberson, *Judge’s Guantánamo Ruling Bodes Ill for System*, NYTimes, May 11, 2008; Scott Horton, *The Great Guantánamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008. Ross Tuttle, *Unlawful Influence at Gitmo*, The Nation, March 28, 2008. (Attachments 5-7)

by trial counsel or defense counsel.” 10 U.S.C. § 949b (2006). Colonel Davis has testified in the Hamdan case that Senators John McCain and Lindsey Graham inserted these provisions into the MCA at his request to secure the independence of the Chief Prosecutor from interference external to his office.

The MCA made no mention of the Legal Advisor to the Convening Authority. The position of Legal Advisor to the Convening Authority was creation of the Secretary of Defense, as part of his statutory authority to create implementing regulations for the MCA. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (RTMC) 8-6. R.M.C. 103a(15) states that the Legal Advisor “provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the [UCMJ].” However, unlike in the military justice system, the MCA created an “Office of the Chief Prosecutor” 10 U.S.C. § 949b to make it clear that the Prosecution was an independent function with the power to exercise prosecutorial discretion. RTMC, paragraph 8-1, further emphasizes this point “The Chief Prosecutor shall supervise the overall prosecution efforts under the M.C.A., the M.M.C. and this regulation. The Chief Prosecutor shall further ensure proper management of personnel and resources.” These duties clearly encompass the selection and sequencing of cases for prosecution, and the assignment of prosecutors, paralegals and other office resources to such cases, functions which the Legal Advisor attempted to and/or actually has usurped.

### **THE LEGAL ADVISOR VIOLATED THE PROHIBITION ON UNLAWFULLY INFLUENCING THE PROSECUTION**

By closely aligning himself with the prosecutorial effort, in public and in private, by usurping the function of the Chief Prosecutor, by substituting and imposing his prosecutorial judgment on the selection and sequencing of cases for prosecution, and by allowing impermissible factors, unrelated to the merits of the case, to intrude into the charging process, the Legal Advisor abandoned his objectivity and neutrality, overstepped his authority and exerted unlawful influence over the Office of the Chief Prosecutor, the military commissions generally, and the Jawad case specifically. The

Legal Advisor not only attempted to influence the professional judgment of the Chief Prosecutor, but coercively overrode it, a clear violation of 10 U.S.C. § 949b, thereby causing charges to be sworn against Mr. Jawad which would not otherwise have been sworn. Col Davis placed Mr. Jawad approximately twentieth in the line-up of cases he intended to prosecute. Despite Brig Gen Hartmann's unlawful efforts to prod the prosecution into filing cases at a more rapid clip, charges have been sworn against only eleven other detainees during his reign. Had Col Davis continued as Chief Prosecutor, it is likely even fewer cases would have been filed by this point in time. While it is impossible to know whether and what charges might have been filed against Mr. Jawad at some point in the future, it is indisputable that Mr. Jawad would not be facing trial by military commission now or in the immediate future were it not for the direct impermissible interference by the Legal Advisor.

After orchestrating the swearing of charges against Mr. Jawad, the Legal Advisor then compounded his unlawful actions by falsely assuming the mantle of the neutral objective Legal Advisor and purporting to provide independent pretrial advice to the Convening Authority.

### **THE LEGAL ADVISOR COULD NOT AND DID NOT PROVIDE OBJECTIVE INDEPENDENT PRETRIAL ADVICE TO THE CONVENING AUTHORITY**

According to the Discussion to R.M.C. 406, "the legal advisor is personally responsible for the pretrial advice and must make an independent appraisal of the charges and evidence in order to render the advice." A legal advisor who has acted as a prosecutor is disqualified from preparing the advice. As Brig Gen Hartman had become the *de facto* Chief Prosecutor, he was legally prohibited from preparing the pretrial advice. The defective pretrial advice prepared by the Legal Advisor illustrates just why such a prohibition is in place.

According to the Discussion, although not required, "the pretrial advice should include, when appropriate, a brief summary of the evidence; and discussion of significant

aggravating, extenuating or mitigating factors.” While “the advice need not set forth the underlying analysis or rationale for its conclusion” it is customary for a legal advisor (or Staff Judge Advocate in the military justice context) to provide at least a minimal discussion of significant issues in the case. The extraordinary facts of this case mandated a more detailed discussion. The discussion to RMC 406 indicates that “information which is...so incomplete as to be misleading may result in a determination that the pretrial advice is defective.” This is a classic case of a defective pretrial advice – the virtual Chief Prosecutor providing partisan, misleading advice and intentionally providing a paucity of information to the Convening Authority to assure a swift referral of the charges.

The inclusion of at least some degree of detail and at least some discussion of important issues in a pretrial advice is particularly critical in light of the fact that there is no pretrial investigation under the M.C.A. When a case is recommended for referral to a General Court-Martial, a copy of the Article 32 Investigating Officer’s Report and recommendations are provided to the Convening Authority along with the SJA’s pretrial advice, thereby partially obviating the need for an extended discussion of the legal issues in the pretrial advice. Unfortunately, the M.C.A., at 10 U.S.C. § 948b(d)(C), specifically rendered inapplicable Article 32 of the Uniform Code of Military Justice, thereby ensuring that there would be no independent investigation or evaluation of the evidence by a neutral officer, as required before a case can be referred to a General Court-Martial. For military commissions, the only theoretically objective advice given to the Convening Authority is provided by the Legal Advisor.<sup>7</sup> The lack of a pretrial investigation also deprives the defense of any formal opportunity to present information bearing on the propriety of referral for the consideration of the Convening Authority. While a defense counsel is free to try to bring information to the attention of the Convening Authority, as COL Sawyers did in this case, there is no guarantee that she will get it or consider it. Thus, it is incumbent upon the Legal Advisor to provide a more extended discussion of factors which the Convening Authority should consider, including matters in extenuation

---

<sup>7</sup> The legal advice refers to a “referral notebook” prepared by the Office of the Chief Prosecutor, but it does not appear to have been presented to the Convening Authority. Even if it were, this partisan document is not a substitute for objective advice.

and mitigation. As indicated in the fact section above, this pretrial advice contained only the barest minimum of discussion, certainly an inadequate basis upon which to make life altering decisions for Mr. Jawad. One would expect that a more objective legal advisor, who had not personally hand-selected the case for prosecution, would have wished to apprise the Convening Authority of some important factors to be taken into consideration in her decision. For example, even if it not directly a legal factor, one might expect the Legal Advisor, as a professional courtesy, to warn the Convening Authority of the public relations firestorm that would likely result from referral of another case against a juvenile. One would have also expected the advice to mention the extraordinary fact that Mr. Jawad had no known affiliation with any terrorist organization, nor had he committed any terrorist acts, given the fact that the entire *raison d'être* of the Military Commissions Act, according to President Bush, is to prosecute terrorists.<sup>8</sup> In this regard, the defense notes that Mr. Jawad is the only person among 15 individuals to have been charged before the military commissions who is *not* alleged to have been involved in terrorism. The pretrial advice also failed to mention the potential issue of multiplicity or unreasonable multiplication of charges in referring six separate specifications for a single act of throwing a hand grenade.<sup>9</sup>

The complete absence of any discussion of the significant mitigating factors present in Mr. Jawad's case is particularly appalling in light of the fact that the Legal Advisor was recommending charges that would potentially expose a juvenile offender to imprisonment for life. In fact, the only reference to potential punishment is misleading; the Legal Advisor recommends that the case "be referred noncapital," although the death penalty is

---

<sup>8</sup> "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror." "The Military Commissions Act will also allow us to prosecute captured terrorists." "The bill I'm about to sign also provides a way to deliver justice to the terrorists we have captured." "When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS Cole, which killed 17 American sailors six years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more." Selected excerpts from President Bush's remarks at MCA signing ceremony, October 17, 2007. (Full text at Attachment 8).

<sup>9</sup> The advice states that the second set of specifications for intentionally causing serious injury were charged "in the alternative" to the attempted murder specifications. The defense expects to file a motion to dismiss addressing multiplicity and unreasonable multiplication of charges that will demonstrate that this was a serious issue deserving of extended discussion.

not an authorized punishment for the charged offenses.<sup>10</sup> This may have led the Convening Authority to falsely believe that she was being lenient by precluding the option of the death penalty.

Another egregious error is the failure to mention Mr. Jawad's juvenile status and age. This omission cannot be dismissed as a mere oversight. The United States recently submitted answers to questions presented by the U.N. Committee on the Rights of the Child. (Attachment 4). This report made several specific references to Mohammed Jawad, and specifically acknowledged that he was a minor at the time his alleged crimes were committed.

Mohammed Jawad, who is approximately 23 now, is being charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Mr. Khadr and Mr. Jawad are currently the only two individuals captured under the age of 18 that the U.S. Government has chosen to prosecute under the Military Commissions Act of 2006. (Answer to 12c, p.15)

In response to the question "how Military Commissions take into account the rights of children" The U.S. assured the U.N. Committee that Mr. Jawad's age would be taken into account: "A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review – the latter two of which will review the findings and the sentence." (Answer to 12g, p. 21) The Legal Advisor appears to have defied official U.S. policy by failing to apprise the Convening Authority of Mr. Jawad's age. No facts concerning Mr. Jawad's background or upbringing were mentioned either.

In short, at the time the Legal Advisor prepared and submitted his pretrial advice, he had become a partisan advocate and was determined to move Mr. Jawad's case forward to trial as quickly as possible. He intentionally omitted pertinent information that might have given the Convening Authority pause before referring the case, including issues which the defense specifically requested be brought to her attention. Not surprisingly,

---

<sup>10</sup> See MMC Part IV, Crimes and Elements, Chapter 4 (Attempts) paragraph c. "*Maximum punishment:* Any person. . .found guilty of an attempt. . . shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged."

given the dearth of information provided to her, the Convening Authority barely hesitated before accepting the Legal Advisor's recommendations in full just two days later.

**DISMISSAL IS AN AUTHORIZED AND APPROPRIATE REMEDY FOR  
EGREGIOUS CASES ON UNLAWFUL INFLUENCE SUCH AS HAS  
OCCURRED IN THIS CASE**

While the MCA prohibits unlawful influence, it does not specify the appropriate remedy for a violation of this provision. As the Commission has noted, since there is no established body of case law on 10 U.S.C. § 949b (2006) and R.M.C. 104(a)(2), the Commission may properly look to military law for guidance. 10 U.S.C. § 949a directs that procedures for military commissions “shall apply the principles of law and rules of evidence in trial by general court-martial” to the extent practicable. The defense notes that R.M.C. 907 does not specifically list unlawful influence as a ground for dismissal nor does R.M.C. 104 identify the proper remedy for a violation of the prohibition of unlawful influence. These provisions are based on and nearly identical to Rules for Courts-Martial 104 and 907, which also do not specify dismissal as a remedy for unlawful command influence. However, the Court of Appeals for the Armed Forces has left no room for doubt that dismissal with prejudice is an appropriate remedy for serious instances of unlawful command influence. In two recent cases, the highest military court has ordered dismissal of all charges and specifications with prejudice to remedy unlawful command influence in courts-martial. According to CAAF, “[D]ismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” *U.S. v. Gore*, 60 M.J. 178, 187 (CAAF 2004) citing, *U.S. v. Green*, 4 M.J. 203, 204 (C.M.A. 1978), and *U.S. v. Gray*, 22 C.M.A. 443, 445, 47 C.M.R. 484, 486 (1973).

The Court further elaborated:

[D]ismissal of charges is permissible when necessary to avoid prejudice against the accused. . .from the egregious error in this case, we conclude the military judge acted within his discretion to dismiss with prejudice the

charges against Appellant. . . . We agree with the military judge when he said that, "the mandate of [Biagase]<sup>11</sup> could not be more clear. Undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated." *Id.*

In *U.S. v. Lewis*, 63 M.J. 405 (CAAF 2006) the actions of the Staff Judge Advocate, the legal advisor to the convening authority, were found to amount to unlawful influence and found to be sufficiently egregious to warrant dismissal of all charges and specifications with prejudice. In *Lewis*, the SJA orchestrated an improper but successful effort to have the detailed military judge recuse herself. The improperly recused military judge was replaced by a well-qualified and neutral military judge who took significant measures in an attempt to ameliorate the prior unlawful command influence, and otherwise conducted a fair trial. The new military judge "directed that the SJA be disqualified, that the SJA be barred from sitting in the courtroom, and that there be a new convening authority for post-trial actions." *Id.* at 415. These steps were not deemed sufficient by CAAF to remove doubts about the impact of unlawful command influence.

According to CAAF:

Our review of the command influence in this case is not limited to actual unlawful influence and its effect on this trial. Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with "eliminating even the appearance of unlawful command influence at courts-martial." *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). "[O]nce 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.'" *Stoneman*, 57 M.J. at 42 (quoting *Rosser*, 6 M.J. at 271). This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *Simpson*, 58 M.J. at 374 (quoting *Stoneman*, 57 M.J. at 42-43). Thus, "disposition 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.*

Whether the conduct of the Government in this case created an appearance of

---

<sup>11</sup> *U.S. v. Biagase*, 50 M.J. 143 (CAAF 1999).

unlawful command influence is determined objectively. *Stoneman*, 57 M.J. at 42. "Even if there was no actual unlawful 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 (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). . . .

We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. Applying this test to the instant case, we believe that a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government's conduct. . . .

To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the Government must convince us that the disinterested public would now believe [the accused] received a trial free from the effects of unlawful command influence. *U.S. v. Lewis*, 63 M.J. at 415.

Concluding that the government had failed to make such a showing, the Court dismissed all charges and specifications with prejudice. The Legal Advisor's well-chronicled unlawful actions in this case go far beyond the isolated improper act of the SJA in *Lewis*, and are far more damaging to both the reality and perception of fairness.

Mr. Jawad has clearly been prejudiced by the actions of the Legal Advisor. It is clear that charges against Mr. Jawad would not have been sworn last October nor at any time soon thereafter were it not for the direct personal unlawful intervention of the Legal Advisor. Most likely, charges would not have been filed until the issues in the Khadr case had been fully resolved, which has yet to occur. Indeed, it is possible that charges would never have been sworn against Mr. Jawad had the Legal Advisor not insinuated himself into the case selection process. Even if charges had eventually been sworn against Mr. Jawad, a more independent and unbiased pretrial advice providing highly pertinent information to the Convening Authority might have resulted in far fewer, if any, charges being referred to trial by military commission.

## CONCLUSION

Brig Gen Hartmann is both the highest ranking officer and the senior military lawyer involved in the military commissions system. Because Brig Gen Hartman is a lawyer and an officer of the court, with a special ethical duty to ensure the fairness of the process, his actions must be given the highest level of scrutiny. Brig Gen Hartmann's actions strike at the very core of the attempt to provide due process and impartial justice to the detainees at Guantanamo, a task already deemed to be impossible by many observers.<sup>12</sup> As the President of the ABA has stated in a letter to President Bush, "the military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice. . . . Under the current system, we believe that detainees will not receive due process or fair trials."<sup>13</sup> Given the widespread public skepticism concerning the fairness of military commissions, even before the Legal Advisor's actions became publicly known, it would not be possible at this point to convince the disinterested public that Mr. Jawad can receive a trial free from the effects of unlawful influence. Any objective observer would harbor significant doubts about the fairness of any future proceedings against Mr. Jawad. The actions of the Legal Advisor have irremediably and irretrievably tainted the process.

---

<sup>12</sup> See, e.g., Statement of Anthony D. Romero, Executive Director, ACLU, available at <http://www.aclu.org/safefree/detention/34773res20080403.html> ("The military commissions set up by the Bush administration for the men imprisoned at Guantánamo Bay – including those it suspects were involved in the September 11 attacks – are not true American justice. . . . The prison at Guantánamo Bay, and the military commission proceedings set to occur there, were set up to evade the American justice system and the rule of law. The proceedings, as proposed under the Military Commissions Act and run by the Department of Defense, are nothing like the trials guaranteed by our Constitution or the long-established military commissions promulgated by the Uniform Code of Military Justice – the finest system of military justice in the world.") Similar statements condemning the military commission system have been issue by Human Rights Watch, Human Rights First, Amnesty International, The National Association of Criminal Defense Lawyers, and Martin Scheinin, Special Rapporteur to the United Nation Human Rights Council, among others. Law Review articles and editorials critical of the military commissions process are legion.

<sup>13</sup> Letter from the ABA President to President Bush dated February 27, 2008, (Attachment 9).

The defense recognizes that dismissal with prejudice is a drastic remedy, but when a case is so thoroughly permeated by the taint of unlawful influence, it is the only appropriate remedy.

**7. Request for Oral Argument:** The Defense requests oral argument at the next scheduled motion hearing to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

**8. Request for Witnesses:** The Defense intends to call Colonel Morris Davis, and Lieutenant Colonel William Britt. However, if the government agrees to stipulate to all the facts in this motion, live witnesses may be unnecessary.

**9. Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, which opposes this motion.

**10. Request for public release:** The defense requests permission to publicly release the government's response to this pleading and the court's ruling as soon as possible.

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR  
Office of the Chief Defense Counsel  
Office of Military Commissions  
1099 14<sup>th</sup> Street NW, Ste 2000E  
Washington, DC 20005  
(202) 761-0133, ext. 106

**Attachments:**

1. Memorandum from COL Sawyers to Brig Gen Hartmann dated 21 Jan 08
2. E-Mail from Brig Gen Hartmann to COL Sawyers dated 27 Jan 08
3. Pretrial Advice dated 28 Jan 08
4. Supplemental US Report to the U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, submitted for 22 May 2008 session of the Committee.<sup>14</sup>
5. Harper's article William Glaberson, Judge's Guantánamo Ruling Bodes Ill for System, NY Times.
6. Scott Horton, The Great Guantanamo Puppet Theatre, Harper's Magazine.
7. Ross Tuttle, Unlawful Influence at Gitmo, The Nation
8. President Bush's Remarks on Signing Military Commissions Act of 2006
9. ABA Letter to President Bush

---

<sup>14</sup> Further information available at <http://www2.ohchr.org/english/bodies/crc/crcs48.htm>