

UNITED STATES OF AMERICA

RULING

v.

**Defense Motion
To Dismiss
D075**

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

(due to Unlawful Influence by)
Senior DOD Officials)

1. The Defense requests the Commission to dismiss all charges and specifications on the grounds of unlawful influence. In the alternative, the defense requests the Convening Authority and the legal advisor to the Convening Authority be disqualified from further participation in this case.
2. The Defense alleges that: senior DOD officials have unlawfully influenced the professional judgment of the prosecutor in this case; and the legal advisor to the Convening Authority unlawfully influenced the professional judgment of the prosecutor in this case. The Government opposes the motion in that the conduct by any senior DOD official was not unlawful and that the legal advisor did not act improperly. The Commission finds that the accused is entitled to some relief; however, dismissal of all the charges and specifications is not an appropriate remedy.
3. COL Morris Davis assumed his duties as Chief Prosecutor for the Office of the Military Commissions on or about September 2005. BG Thomas Hartmann assumed his duties as Legal Advisor to the Convening Authority on or about 2 July 2007.
4. Charges were originally preferred against the accused in November 2005, long before BG Hartmann assumed his present duties. The charges against the accused were stayed by the Convening Authority in June 2006 after the Supreme Court decision in Hamdan v. Rumsfeld (citation omitted). The current charges against the accused were preferred on 5 April 2007 and referred by the Convening Authority on 24 April 2007, prior to BG Hartmann assuming his current duties. It is clearly obvious that BG Hartmann had no influence over preferring and referring the present charges against the accused.
5. There is some evidence that some senior DOD officials, notably Mr. Jim Haynes, the DOD General Counsel, and Mr. Gordon England, the Deputy Secretary of Defense, expressed some interest in commission cases moving along more quickly. However, there is not even a scintilla of evidence that any senior DOD official singled out the accused by name or told COL Davis or any other member of the prosecutor's office that charges must be preferred against the accused. COL Davis made it clear in his testimony before the commission that his office always planned to prosecute the accused. COL Davis also made it clear in his testimony before the commission that no DOD official ever ordered him to prefer baseless charges against the accused or any other detainee.

There is no evidence before this commission which in any way suggests that any senior DOD official exercised any unlawful influence in preferring or referring charges against this accused.

6. BG Hartmann serves as the legal advisor to the Convening Authority, Office of Military Commissions, Department of Defense, and as supervisor of the Office of the Military Commissions-Prosecution. These are not mutually exclusive roles. The role as legal advisor is compared to the duties of a staff judge advocate under the Uniform Code of Military Justice. See Rule for Commission (RMC) 103(a)(15). A staff judge advocate normally provides general supervision over the prosecutors in his office. There is nothing inherently wrong with the staff judge advocate or legal advisor wanting to be briefed on cases to learn their strengths and weaknesses. There is nothing inherently wrong with the staff judge advocate or legal advisor wanting to make sure the prosecutors are properly trained. There is nothing inherently wrong with the staff judge advocate or legal advisor wanting to move cases along in a timely manner, even when his view of “timeliness” does not coincide exactly with the prosecutors’ view of “timeliness”. A supervisor may triage cases as part of his supervisory responsibilities. The legal advisor’s role in supervising prosecutors does not invalidate his role in giving legal advice to the convening authority. See generally, United States v. Hardin, 7 M.J. 399 (CMA 1979). There is no evidence that BG Hartmann improperly influenced any action by any prosecutor in the processing of the accused’s case. Likewise, there is no evidence that the Convening Authority improperly influenced anyone’s actions in processing of the accused’s case.

7. Certainly, COL Davis and BG Hartmann did not see eye to eye on their respective management-leadership styles. BG Hartmann simply has a different management-leadership style than does COL Davis. It is clear, and the Commission finds, that BG Hartmann has taken an extremely active approach to his duties as the supervisor of the Office of the Military Commissions-Prosecution. The legal advisor need not be totally disinterested in the outcome of the proceedings when providing pretrial advice as the legal advisor is required to provide a personal and independent recommendation to the Convening Authority. See RMC 406(a). While an active supervisory role of the prosecutor’s office is not inherently inconsistent with his pretrial duties as the legal advisor to the Convening Authority, that same active approach raises an issue about his ability to remain neutral and impartial during his post trial duties. See RMC 1106 discussion.

8. The legal advisor provides advice to the Convening Authority during the post trial process, to include matters presented by the accused in post trial submissions. BG Hartmann, by his active approach to his supervisory responsibilities of the prosecutors in this case, has created the appearance that he will be unable to remain neutral and impartial as the legal advisor to the Convening Authority during the post trial process of the accused’s case. The Commission will provide a remedy for that appearance issue.

9. Accordingly, the motion is denied in part and granted in part. That part of the motion to dismiss all charges and specifications is DENIED. That part of the motion to

exclude further participation in this case by the current Convening Authority is DENIED. That part of the motion to exclude further participation in this case by BG Hartmann is GRANTED only to the extent that he is prohibited from taking any role in providing legal advice to the Convening Authority during the post trial process in this case.

So Ordered this 3rd day of September 2008.

A handwritten signature in black ink, appearing to read "Patrick J. Parrish". The signature is fluid and cursive, with a prominent initial "P".

Patrick J. Parrish
COL, JA
Military Judge