



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

16 January 2009

Dear Judge Crawford:

I request, in the interests of justice, you immediately and unequivocally withdraw the referrals in all pending Military Commission cases. Withdrawal by you is the legally and morally correct course. I agree with and admire your decision refusing to refer Mohammed al-Qahtani's case for prosecution "because his treatment met the legal definition of torture" (as you are quoted recently in the Washington Post). The same consideration is due to the many other detainees with credible evidence of torture.

You have recently been presented with letters from counsel for Mohammed Jawad and Abdu Rashim al-Nashiri, whose cases are currently before the Commission, asking that the charges be withdrawn due to credible evidence of torture. You are undoubtedly aware of the extensive additional evidence, as noted in government reports as well as media sources, of the torture or abuse of other detainees. Indeed, you are even quoted as saying that you "assume torture" was committed against some or all of the accused in the 9/11 conspiracy, whose cases are proceeding even now after your comments were published. The historic legal issue squarely confronting you is, how many detainees who have been charged or referred for prosecution have also been subjected to "torture" within the legal definition? I submit that all cases should be withdrawn until this question can be properly answered.

You have rightly identified the key issue: "If we tolerate this and allow it, then how can we object when our servicemen and women, or others in foreign service, are captured and subjected to the same techniques? How can we complain? Where is our moral authority to complain?" Until the question of torture is fully investigated and publicly aired, justice demands that these criminal cases be put in abeyance.

It is increasingly clear President-elect Obama intends to stay Commission prosecutions upon assuming office. Staying pending cases in their current postures, with numerous unresolved issues, ranging from the legality of the charges filed to the competence to stand trial of some of the accused, will enormously increase the complexity of the new Administration's policy decisions. Conversely, withdrawing the referrals will maximize the new President's options and permit a far more orderly and consistent treatment of the all of the accused's cases. You are quoted saying that it is "too late" for the Commissions now. It is time to give a new approach to these cases its chance. Accordingly, the pending cases should be withdrawn

I am aware that there is currently a dispute about whether you already withdrew the referrals in all pending cases, and whether your subsequent re-referral included the 9/11 conspiracy cases. This dispute has further clouded an already confused record and provides an independent ground for an unequivocal withdrawal to establish clarity for the incoming Administration. In any event, your authority to order such an unequivocal withdrawal is unquestioned.

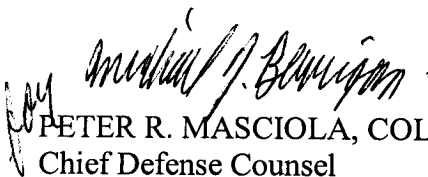


As you know, judges, witnesses, attorneys, paralegals, interpreters, court personnel and the family of victims will all be traveling tomorrow, at taxpayer expense, to attend further pre-trial hearings in the 9/11 cases and pretrial hearings in the case of Omar Khadr, an accused "child soldier." These hearings are scheduled to start on Monday, January 19; ironically, that date is also Dr. Martin Luther King, Jr. day, a day that should be set aside as a celebration of freedom and justice. The following day is President-Elect Obama's inauguration.

It may be the case, as you are quoted as saying, that not all the accused were tortured. But as you also say, "Unfortunately perception is reality." The perception of pervasive torture now saddles the incoming Administration and its efforts to set these proceedings on a just course. Only yesterday, at a hearing in federal district court in Washington, D.C. on one of the 9/11 co-conspirator's habeas petitions, United States District Judge Emmet G. Sullivan described his view of the military commissions process confronting him as "the antithesis of fairness."

There is only one way to begin changing that perception, and also the reality, of fundamental injustice: Withdraw the referrals now.

Very respectfully,



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Chief Defense Counsel  
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Cc: Colonel Lawrence J. Morris (Chief Prosecutor)  
Mr. Daniel J. Dell'Orto (Principal Deputy General Counsel, DOD)