UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**Defense Motion** to Dismiss the Charges and Specifications for Unlawful Influence 27 March 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.

2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves to dismiss the charges and specifications with prejudice. In the alternative, the Defense seeks to disqualify the Convening Authority and the Legal Advisor to the convening authority from further participation in this case.

3. **Overview:** The Military Commissions Act (MCA) prohibits the unlawful influence of trial or defense counsel. 10 U.S.C. § 949b (2006). The former Chief Prosecutor and his subordinates were subjected to unlawful influence by the Legal Advisor to the Convening Authority and by political appointees in positions of senior leadership in the military commission process. The Chief Defense Counsel and Deputy Chief Defense Counsel have also been subjected to unlawful influence by the Legal Advisor to the Convening Authority. In the alternative, if the Legal Advisor is permitted to direct the actions of the Chief Prosecutor, he has so closely aligned himself with the prosecutorial function that he cannot continue to provide the requisite impartial advice to the Convening Authority.

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. *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, 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 the appearance of unlawful influence. *See, e.g., United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). These same rules should apply to military commissions where Congress has afforded detainees greater protections against unlawful influence than those that are found in the Uniform Code of Military Justice (UCMJ).

5. <u>Facts</u>:

i. On April 15, 2004, the General Counsel for the Department of Defense promulgated Military Commission Instruction No. 6. (Appendix A.) Instruction No. 6 established reporting requirements for personnel involved in the military commission process. The Appointing Authority reported to the Secretary of Defense. The Legal Advisor to the Appointing Authority reported to the Appointing Authority. And the Chief Prosecutor Reported to the Legal Advisor to the Appointing Authority.

ii. Before Colonel Morris Davis was detailed to the position of Chief Prosecutor, he was interviewed by Department of Defense General Counsel William J. Haynes. During their conversation, Colonel Davis reminded Mr. Haynes that there had been acquittals at the Nuremberg tribunals. Mr. Haynes responded by saying, "acquittals, we can't hold these men for six years and have acquittals. We have to have convictions."

iii. On September 29, 2006, Colonel Davis attended a meeting of the Special Detainee Follow-Up Group. The meeting was held in Deputy Secretary of Defense Gordon England's office and was attended by Mr. England and Mr. Haynes. During the meeting, Mr. England raised the issue of charging so-called high value detainees: "We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the election."

iv. The Special Detainee Follow-Up Group met three times every week. Stephen Cambone, then the Under-Secretary of Defense for Intelligence, also attended these meetings. Mr. Cambone repeatedly advocated for the Department of Justice to have a greater role in the military commission process. He stated that military attorneys did not have the sophistication to deal with the cases before the commissions and that, if they had skill, they would be in the private sector. Colonel Davis resisted involvement in the military commission process by the Department of Justice. Before Colonel Davis resigned, no civilian attorney from the Department of Justice had made an appearance in Mr. Hamdan's case.

v. While these meetings were taking place, Congress was drafting the MCA. During that process, Colonel Davis met with Senators Lindsey Graham and John McCain. They asked him what he needed to accomplish the mission of the Chief Prosecutor. Colonel Davis advised them that both the Chief Prosecutor and Chief Defense Counsel should be uniformed officers. And he told them that these positions must be insulated from influence outside of their office. He drafted the language found in 10 U.S.C. § 949b that prohibits interference with the Chief Prosecutor.

vi. On January 9, 2007, Mr. Haynes called Colonel Davis and asked him how quickly he could charge David Hicks. Colonel Davis replied that the Secretary of Defense had not yet promulgated the Rules for Military Commissions or the Regulation for Military Commissions and that he could not charge Mr. Hicks before the Secretary of Defense had issued the Manual for Military Commissions.

vii. Ten days later, the Pentagon announced the issuance of the Rules for Military Commissions and the Regulation for Military Commissions. That same day, Mr. Haynes called Colonel Davis. He told Colonel Davis that he now had the Manual for Military Commissions and again asked how quickly he could charge David Hicks. He also asked Colonel Davis to charge a few additional detainees along with Mr. Hicks.

viii. On February 2, 2007, Colonel Davis had charges sworn against David Hicks, Omar Khadr, and Salim Hamdan to the Convening Authority. He was unable to forward the charges to the Convening Authority because there was no Convening Authority until February 7, 2007, when Mrs. Susan Crawford was appointed to her current position.

ix. On March 26, 2007, David Hicks pleaded guilty to one charge of material support for terrorism. Colonel Davis was not informed of the pre-trial agreement until he arrived at Guantanamo Bay to attend the scheduled arraignment of Mr. Hicks. After Colonel

Davis spoke publicly about not being included on pretrial negotiations, the Convening Authority privately counseled Colonel Davis on publicly breaking ranks with the Office of the Convening Authority.

x. On July 1, 2007, General Thomas Hartmann became the Legal Advisor to the Convening Authority. He immediately began what Colonel Davis describes as "nanomangement" of the Office of the Chief Prosecutor. He wanted to know the status of every case being worked up within the Office of the Chief Prosecutor. He wanted to review the evidence against each detainee and even the three main points each attorney intended to make during closing arguments. He wanted to know who was making the decisions on each case. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel. He wanted Colonel Davis to charge cases that were "sexy" or cases that had "blood on them." He specifically liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter.

xi. Colonel Davis had a policy against using evidence obtained through torture. General Hartmann took the position that prosecutors should not make the decision about whether evidence was reliable. He insisted that such decisions be left to military judges. Months later, during testimony before the Senate Judiciary Committee, General Hartmann reiterated his position that the military judge—not the prosecutor—would be the gatekeeper for such evidence. In response to a question from Senator Feinstein as to the admissibility of evidence obtained from waterboarding, General Hartmann twice declined to answer because "the discretion of a prosecutor is inappropriate to be dealt with in public." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann)(Appendix B). When pressed, he responded "Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence. And the question that will be before the judge when that comes up is whether the evidence is reliable and probative, and whether it's in the best interest of justice to introduce the evidence." *Id.* Similarly, when Senator Feinstein asked him, "So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used?," General Hartmann replied, "If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow." *Id.*

xii. In September 2007, Colonel Davis delivered a formal complaint regarding the interference of General Hartmann in his office to the Convening Authority. When he called the Convening Authority a week later to inquire as to the status of his complaint, she informed him that General Hartmann did not work for her and that the complaint had been forwarded to General Hartmann's boss, Mr. William Haynes.

xiii. Colonel Davis' complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA, which concluded that there had been no unlawful influence on the Chief Prosecutor by the Legal Advisor because the Legal Advisor was authorized by regulation to influence the Chief Prosecutor. Memorandum from

Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d)(Appendix C).

xiv. On October 3, 2007, Mr. England issued a memorandum 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 (Appendix D). Colonel Davis reported to the Legal Advisor to the Convening Authority. The Legal Advisor reported to the Deputy General Counsel who in turn reported to Mr. Haynes. Colonel Davis resigned the next day.

xv. Charges against Mohammed Jawad were sworn five days later on October 9, 2007.

xvi. On February 15, 2008, the Prosecution moved to admit into evidence a video-taped affidavit and film created by self-made terrorism expert Evan Kohlmann. The seven-part "documentary" chronicles the "history and development of the al Qaeda terrorist network and its declared war against the United States." Prosecution Motion to Pre-Admit the Documentary Motion Picture *the Al Qaeda Plan* dated Feb. 15, 2008 at 1.

xvii. On March 3, 2008, the Convening Authority denied a Defense request for an expert psychiatrist to testify in support of two motions at the next session of this Court. Letter from Convening Authority to LCDR Mizer dated March 3, 2008 (Appendix E).

xviii. On March 12, 2008, the Convening Authority denied a Defense request for an expert on al Qaeda to assist the Defense in its preparations for trial and to testify at trial. In its request, the Defense specifically outlined the need for expert assistance in preparing its opposition to the Prosecution motion to pre-admit the *Al Qaeda Plan.* Letter from Convening Authority to LCDR Mizer dated March 12, 2008 (Appendix F).

xix. Although the Prosecution has had the benefit of Mr. Kohlmann's assistance in preparing his video-taped testimony and "documentary," the Convening Authority has not approved any Defense request for expert assistance in refuting Mr. Kohlmann's testimony or for preparing Mr. Hamdan's defense.

6. <u>Law and Argument</u>:

I. THE UNIFORM CODE OF MILITARY JUSTICE REFLECTS AN ATTEMPT BY CONGRESS TO LIMIT THE INFLUENCE OF CONVENING AUTHORITIES OVER PARTICIPANTS OF COURTS-MARTIAL

The central focus of the framers of the Uniform Code of Military Justice was the elimination of "any influence of command control from a court-martial." *United States v. Goodwin*, 5 U.S.C.M.A. 647, 659 (C.M.A. 1955) (Quinn, C.J., dissenting). At the hearings before the House Armed Services Committee, the American Bar Association complained, "the

instances in which commanding officers influenced courts is legion." *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcommittee of the Committee on Armed Services United States Senate*, 81st Cong. 717-18 (1949). And, when interviewed by the Vanderbilt Committee, sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts." *Id.* Through the enactment of Article 37, UCMJ, Congress sought to put an end to this practice. *Id.* at 1019.

But before the House Armed Services Committee approved Article 37, Mr. Robert W. Smart, a professional staff member, noted: "[R]egardless of what you write into law...any smart CO can get through this section here or through this article 50 different ways if he really wants to influence a court...all [Congress] can do is to express its opposition in good plain words, as here, to such practices." *Id.* at 1021.

The framers of the Code were particularly concerned about so called "skin letters." *Id.* at 46. Skin letters were commonly used by convening authorities to reprimand the participants of courts-martial for actions that the convening authority disapproved of. *Id.* at 164-65. Professor Morgan, the principal architect of the Uniform Code of Military Justice, described the intent of the framers to eliminate command influence from courts-martial:

> On the question of command control, we have thought it was well enough to leave with the convening authority at present the appointment of the court and the officers as long as you have this kind of a review, *as long as you have lawyers in control of the trial, and a prohibition against any attempt to influence them unduly*.

Id. at 164-65. (emphasis added). But the power to appoint key members of the court did not remain with the convening authority for long. Congress stripped the convening authority of the

power to appoint military judges in the Military Justice Act of 1968. 10 U.S.C. § 826 (Oct. 24, 1968). The convening authority lost the authority to detail trial and defense counsel in the Military Justice Act of 1983. 10 U.S.C. § 827 (Dec. 6, 1983).

The detailing of trial and defense counsel is now left to service regulations. *Id.* In both the Navy and Air Force, trial and defense counsel are detailed by the Commander Naval Legal Service Command and Chief of Government Trial and Appellate Counsel Division respectively. COMNAVLEGSVCCOMINST 5450.1E, Mission and Functions of Naval Legal Service Offices and Trial Service Offices (June 18, 1997); Air Force Manual 51-204, United States Air Force Judiciary (Jan. 18, 2008). Army regulations delegate the authority to detail trial counsel to the command staff judge advocate. Army Regulation 27-10, Military Justice (Nov. 16, 2005). Army defense counsel are detailed through the Army Trial Defense Service. *Id.*

II. UNDER THE UNIFORM CODE OF MILITARY JUSTICE, A LEGAL ADVISOR TO A CONVENING AUTHORITY IS NOT A PROSECUTOR. HE MUST REMAIN NEUTRAL IF HE IS TO PROVIDE IMPARTIAL ADVICE ON THE STATUTORY FUNCTIONS OF THE CONVENING AUTHORITY

Although today's convening authority has less control over the participants at courts-martial than she did in 1947, she still controls critical aspects of courts-martial. She alone possesses prosecutorial discretion and determines if charges will be brought against an accused and in which forum. 10 U.S.C. §§ 822, 823, 830 (2006). She appoints the members who will decide the question of guilt or innocence and determine an appropriate sentence if an accused is convicted. 10 U.S.C. § 825 (2006). And, if an accused is convicted, she has the authority to approve, reduce, or set aside the findings and sentence of a court-martial. 10 U.S.C. § 860 (2006).

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)).

III. IN THE MILITARY COMMISSIONS ACT, CONGRESS BROADENED ARTICLE 37'S PROHIBITION AGAINST UNLAWFUL COMMAND INFLUENCE BY CREATING THE OFFICE OF CHIEF PROSECUTOR AND BY PROHIBITING INTERFERENCE WITH HIS PROFESSIONAL JUDGEMENT

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 by trial counsel or defense counsel." 10 U.S.C. § 949b (2006). Colonel Davis will testify 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. Senator Graham

later commented on Colonel Davis' service as Chief Prosecutor from the Senate floor: "There is no finer officer in the military than Colonel Davis. He is committed to render justice." 152 CONG. REC. S10394 (Sep. 28, 2006) (statement of Sen. Graham).

IV. THE SECRETARY OF DEFENSE CANNOT AUTHORIZE UNLAWFUL INFLUENCE OF THE CHIEF PROSECUTOR BY REGULATION

While Congress sought to create an independent Office of the Chief Prosecutor, and even recognized Colonel Davis by name from the floor of the Senate, it made no mention of the Legal Advisor to the Convening Authority. The Legal Advisor to the Convening Authority is solely a creation of the Secretary of Defense. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (Regulation) 8-6.

The secretarial creation of this position is particularly surprising given the fact that Congress appears to have deliberately omitted the position of legal advisor when it codified the MCA. As Steven Bradbury noted in his statement before the House Committee on Armed Services, the MCA "track[s] closely the procedures and structure of the UCMJ." *Hearing Before the House Armed Services Committee on the Military Commissions Act*, 109th Cong. 3 (2006) (statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice). But while Article 6 of the UCMJ addresses the function and role of staff judge advocates and legal officers, the MCA does not contain a single reference to either position. While Congress could have inserted Article 6 into the MCA, as it did with many other provisions of the UCMJ, it elected not to do so. Instead, Congress created an office entirely foreign to military justice: Chief Prosecutor.

Congress' failure to insert the UCMJ positions of staff judge advocate or legal advisor into the MCA was not an accident. One of the central purposes of the UCMJ was to strike a "delicate balance between justice and command discipline…." *United States v. Littrice*, 3

U.S.C.M.A. 487, 492 (C.M.A. 1953); Chief Judge Andrew S. Effron, Evolving Military Justice 172, Naval Institute Press (2002). During the congressional hearings on the UCMJ, "a sharp conflict arose between those who believed the maintenance of military discipline within the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from commanders military justice would always be a mockery." *Littrice*, 3 U.S.C.M.A. at 491. In the UCMJ, "Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws." *Littrice*, 3 U.S.C.M.A. at 491;*United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979) (The authority given to the staff judge advocate and the convening authority in military justice was intended to "establish the proper relationship between the legitimate needs of the military and the rights of the individual soldier").

In drafting the MCA, Congress did not have to strike the "delicate balance" between justice and command discipline. It was left to focus solely on justice and compliance with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Command discipline for the alleged members of the Taliban and Al Qaeda currently detained at Guantanamo was left to their commanders in the field. Mr. Hamdan is not in any chain of command within the U.S. military. Accordingly, all references to commanding officers were omitted, as were many of the powers retained for commanding officers under the UCMJ. While Congress retained a diminished convening authority in the MCA, it eliminated the legal officer entirely.

Despite the congressional declination to provide for a legal officer, the Secretary of Defense has attempted to reinsert the legal officer into the military commission process. Section 8-6 of the Regulation states that the Chief Prosecutor shall report to the Legal Advisor to the Convening Authority. The Defense does not suggest that the Secretary of Defense could not

have created a legal officer to advise the convening authority. But he cannot nullify the congressional intent to create an independent office of the chief prosecutor by subordinating the Chief Prosecutor to the Legal Advisor to the Convening Authority and ultimately to the Convening Authority herself. Nor can he circumvent the congressional prohibition against unlawfully influencing the Chief Prosecutor by cloaking such conduct in the purported legality of a regulation. The Tate Investigation concluded that General Hartmann did not unlawfully coerce or influence the Chief Prosecutor because regulation permitted him to coerce and influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d) (Appendix C).

Nothing in the plain language of § 949b or in the legislative history of the MCA suggests that Congress intended to subordinate the independent role and function of the Chief Prosecutor to functionaries later to be created by the Secretary of Defense. The creation of a Chief Prosecutor was itself a radical departure from the Uniform Code of Military Justice. And the congressional command that "no person" shall coerce or, without authorization, influence the Chief Prosecutor could not be plainer. If the Secretary of Defense can simply authorize coercion or influence of the Chief Prosecutor by regulation, what remains of the congressional prohibition against unlawful influence?

The attempt by the Secretary of Defense to authorize coercion and influence on the Chief Prosecutor is void *ab initio.* In cases of conflict, Manual provisions must yield to the statute. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000). Federal statutes prevail over provisions of the Manual unless the Manual provision provides the accused with greater rights than the statute. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). The C.A.A.F. has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the

statutory language of the UCMJ. *See e.g.*, *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). In this case, the Secretary of Defense cannot disregard the congressional command that "no person" coerce or, without authorization, influence the Chief Prosecutor by simply authorizing the statutorily prohibited conduct.

V. EVEN IF THE SECRETARY OF DEFENSE WAS WITHIN HIS AUTHORITY TO SUBORDINATE THE CHIEF PROSECUTOR TO THE LEGAL ADVISOR TO THE CONVENING AUTHORITY, THE LEGAL OFFICER HAS EXCEEDED HIS AUTHORITY AND HAS BECOME THE *DE FACTO* CHIEF PROSECUTOR

As addressed fully above, military courts have required that legal advisors to convening authorities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). The Legal Advisor to the Convening Authority in this case provides advice to the convening authority on whether or not to grant clemency, on the selection of members, and on whether charges should be referred for trial at all. 10 U.S.C. §§ 948h; 948i; 950b (2006). "A fair and impartial court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges." *United States v. Dowty*, 60 M.J. 163, 170 (C.A.A.F. 2004). A fair and impartial military commission is no less an equally fundamental protection for Mr. Hamdan. Like the selection of members for courts-martial, the selection of members for service on military commissions "is not the convening authority's solitary endeavor." *Id*. at 169. She must "necessarily rely on" her staff, including her legal advisor. *Id.*; *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999).

Military courts have consistently disqualified staff judge advocates and convening authorities from further participation in cases when their actions have called into question their impartiality. *United States v. Clisson*, 5 U.S.C.M.A. 277, 280 (C.M.A. 1954) ("[W]e do not doubt the personal integrity of trial counsel, but we cannot overlook the fact that his previous

antagonistic role prevents his exercising that degree of impartiality required by the Code."); *United States v. Coulter*, 3 U.S.C.M.A. 657, 659 (C.M.A. 1954) ("[H]uman behavior is such, that when a person, interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter."); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); *United States v. Howard*, U.S.C.M.A. 187 (C.M.A. 1974); *United States v. Lacey*, 23 U.S.C.M.A. 334 (C.M.A. 1975).

Perhaps with these cases in mind, the Tate Investigation warned the Legal Advisor in this case to "avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as trial counsel." Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d) (Appendix C). General Hartmann appears to have disregarded this admonition.

At a press conference to announce the preferral of charges against six detainees alleged to have conspired to attack the United States on September 11, 2001, General Hartmann announced that he had received sworn charges against the six men on February 11, 2008. Transcript of Press Conference of General Hartmann of February 11, 2008 (Appendix G). In fact, his office had been internally circulating drafts of the charges two weeks earlier. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix H). Moments later, General Hartmann explained how he would review the charges that his office assisted in drafting: "I will evaluate the charges and all of the supporting evidence, along with the Chief Prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the Convening Authority for the Military Commissions." Transcript of Press

Conference of General Hartmann of February 11, 2008 (Appendix G).

In a February 22, 2008, interview with National Public Radio's Madeleine Brand, General Hartmann denied that there was political interference in the commission process. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008) (Appendix I). He compared himself with Colonel Davis: "I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months—and in the last four months since Colonel Davis has been gone we have moved 10 cases." *Id.* He then explained the recent surge in prosecutorial activity: "It's from me insisting that we move the process." *Id.* In a letter published in the *Los Angeles Times*, General Hartmann stated that he "directed [Colonel Davis] to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office." Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007 (Appendix J).

General Hartmann made similar statements while testifying before the senate judiciary committee in December 2007. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann) (Appendix B). "If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trial process, it has been my effort, and no one has directed me in that regard." *Id.* In response to a question from Senator Sessions, General Hartmann elaborated on his role in driving additional prosecutions:

> Senator, the focus—my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material

> evidence, the most important evidence, the most significant evidence among the roughly 80-90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need—we needed to focus on the most material cases and bring those forward as rapidly as possible.

He testified that his focus "is on the 80 to 90 people we intend to try for war crimes trials with the military commissions process." *Id.* "The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record." *Id.*

If there was any doubt that General Hartmann was aligning himself too closely with the prosecutorial function when the Tate Investigation issued its findings on September 17, 2007, there can be none now. General Hartmann openly compares his achievements during his tenure as *Legal Advisor* with those of the former *Chief Prosecutor*, Colonel Davis. And he claims to have single handedly energized the prosecutorial effort. He has done all of this while serving in an office requiring objectivity and neutrality. As he noted when testifying before the Senate Judiciary Committee, an accused "will also have the right to have his findings, if he's found guilty, and his sentence reviewed by the convening authority, impartially, impartially." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann) (Appendix B). But the man who will advise her, and who continues to advise her in this case on issues such as funding for expert witnesses and the selection of members, is no longer impartial.

VI. THE LEGAL ADVISOR TO THE CONVENING AUTHORITY HAS ALSO SOUGHT TO UNLAWFULLY INFLUENCE THE OFFICE OF CHIEF DEFENSE COUNSEL

On January 25, 2008, a member of the Convening Authority's staff, Colonel Wendy Kelly, inadvertently emailed a draft copy of the charges against Khaleed Sheikh Mohammed and

five other detainees to Mr. Michael Berrigan, the Deputy Chief Defense Counsel. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix G). The draft charges were being circulated within the Office of the Convening Authority. *Id.* Mr. Berrigan immediately notified Colonel Kelly of the inadvertent disclosure but, after seeking counsel from his state bar, refused to return the draft charges.

On February 1, 2008, the Legal Advisor to the Convening Authority wrote a memorandum to the Chief Defense Counsel, Colonel Steven David. Memorandum from B.G. Hartmann to Colonel David dated Feb. 1, 2008 (Appendix K). General Hartmann stated that he had contacted the professional responsibility offices for the Army, Navy, and Marine Corps and they had opined that the Mr. Berrigan must return the draft charges against Mr. Mohammed. He demanded the return of the draft charge sheet. *Id.* General Hartmann forwarded a copy of the letter to Colonel David's immediate supervisor, Mr. Paul S. Koffsky. At time Mr. Koffsky, who is the Deputy General Counsel for Personnel and Health Policy for the Department of Defense, reported to Mr. Haynes.

The MCA prohibits attempting to coerce or unlawfully influence the professional judgment of trial or defense counsel. 10 U.S.C. § 949b (2006). While the Secretary of Defense has attempted to circumvent the statutory prohibition against unlawful influence of trial counsel by regulation, he has not done so for defense counsel. When unlawful influence is directed against a defense counsel, it "affects adversely an accused's right to effective assistance of counsel." *Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

The charge sheet, which was being circulated within the Office of the Legal Advisor, indicates that the Legal Advisor and the Convening Authority are playing a much larger role in the military commission process than was envisioned by Congress or that they will publicly

admit. The attempt by the Legal Advisor to coerce the Chief Defense Counsel into returning the draft charges by raising allegations of ethical misconduct was prohibited by statute. 10 U.S.C. § 949b (2006). Such conduct places an intolerable strain on the public perception of the military commissions system. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). The strain in this case is already readily apparent:

> Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in the media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008 (Appendix L).

7. **Request for Oral Argument:** The Defense requests oral argument 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 Mr. Michael Berrigan.

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

10. **Attachments:**

A. Military Commission Instruction No. 6.

B. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann).

C. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d).

D. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007.

E. Letter from Convening Authority to LCDR Mizer dated March 3, 2008.

F. Letter from Convening Authority to LCDR Mizer dated March 12, 2008.

G. Transcript of Press Conference of General Hartmann of February 11, 2008.

H. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008.

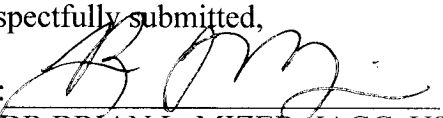
I. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008).

J. Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007.

K. Memorandum from B.G. Hartmann to Colonel David dated Feb. 1, 2008.

L. Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008.

Respectfully submitted,

By: 

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Attachment A

Department of Defense
Military Commission Instruction No. 6

April 15, 2004

SUBJECT: Reporting Relationships for Military Commission Personnel

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(c) Section 113(d) of Title 10 of the United States Code

(d) Section 140(b) of Title 10 of the United States Code

(e) Military Commission Instruction No. 1, current edition

(f) Department of Defense Directive 5105.70, "Appointing Authority for Military Commissions" (Feb. 10, 2004)

1. PURPOSE

This Instruction establishes supervisory and performance evaluation relationships for military commission personnel.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. POLICIES AND PROCEDURES

A. The Office of Military Commissions (OMC) shall consist of the Office of the Chief Prosecutor (OCP) and the Office of the Chief Defense Counsel (OCDC), and those offices and functions as otherwise designated by the Secretary of Defense, General Counsel of the Department of Defense, and/or the Appointing Authority. The Secretary of Defense has established the Appointing Authority for Military Commissions as an element of the Office of the Secretary of Defense by reference (f) with specific responsibilities and functions. The Office of the Appointing Authority includes the Legal Advisor to the Appointing Authority and other appropriate legal and support personnel.

B. *Supervisory and Performance Evaluation Relationships.* Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with references (a) and (b) shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual "reports," as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to reference (a) shall report to the Secretary of Defense in accordance with reference (c).

2) Legal Advisor to the Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

3) Chief Prosecutor: The Chief Prosecutor shall report to the Legal Advisor to the Appointing Authority and then to the Appointing Authority.

4) Deputy Chief Prosecutor: The Deputy Chief Prosecutor shall report to the Chief Prosecutor and then to the Legal Advisor to the Appointing Authority.

5) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Deputy Chief Prosecutor and then to the Chief Prosecutor.

6) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

7) Deputy Chief Defense Counsel: The Deputy Chief Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

8) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Deputy Chief Defense Counsel and then to the Chief Defense Counsel.

9) Review Panel Members: Members of the Review Panel shall report to the Secretary of Defense.

10) Commission Members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

11) Other Personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to Section 4(D) of reference (a), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

C. *Responsibilities of Supervisory/Reporting Officials.* Officials designated in this Instruction as supervisory/reporting officials shall:

1) Supervise subordinates in the performance of their duties.

2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate's Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.

4. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense

Attachment B

80 of 104 DOCUMENTS

Federal News Service

December 11, 2007 Tuesday

SECTION: PRESS CONFERENCE OR SPEECH

LENGTH: 14585 words

HEADLINE: PANEL I OF A HEARING OF THE TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE;
SUBJECT: THE LEGAL RIGHTS OF GUANTANAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT?;
CHAIRED BY: SENATOR DIANNE FEINSTEIN (D-CA);
WITNESSES: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISER TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS; STEVEN ENGEL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE;
LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

BODY:

PANEL I OF A HEARING OF THE TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE SUBJECT: THE LEGAL RIGHTS OF GUANTANAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT? CHAIRED BY: SENATOR DIANNE FEINSTEIN (D-CA) WITNESSES: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISER TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS; STEVEN ENGEL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C. TIME: 10:02 A.M. EST DATE: TUESDAY, DECEMBER 11, 2007

SEN. FEINSTEIN: (Strikes gavel.) That's the magic key, it appears. The meeting will come to order.

I know there are people in this room that have very strong feelings on a number of different subjects. I would request that you be respectful, that signs not block anyone's view, and that there be no comments made. I'd -- we would appreciate that. This is a serious hearing, and we're dealing with a very serious subject, and so we would appreciate everybody's cooperation. You're welcome to attend. We're delighted that you care. But please, be respectful.

And I'll begin with a brief statement, call on my ranking member, and then we will proceed.

Thirteen hundred miles south of Washington, in Guantanamo Bay, Cuba, the United States has built a detention facility to hold and interrogate suspected terrorists and other enemy combatants. Detainees began being brought to Guantanamo in January of 2002. Seven hundred and fifty-nine detainees have been held there. About 454 have been released or have died, four from apparent suicides. As of last week, 305 detainees remain. Of those, we understand approximately 60 to 80 have been cleared for release but are still being held because of difficulty sending them elsewhere. Only four detainees have been formally charged, and it is reported that the Defense Department plans to prosecute another 60 to 80 detainees.

The administration has repeatedly called those individuals at Guantanamo the worst of the worst, and there are bad people there.

However, today -- one of today's witnesses, Professor Denbeaux, has issued reports that challenge this assertion. This facility was established following a December, 2001, Office of Legal Counsel memo co-written by John Yoo that examined whether Guantanamo might be turned into a legal hybrid wholly under United States control but beyond the reach of the United States courts. The administration lawyer's theory was that since Guantanamo is not part of the territorial United States, the normal legal strictures could be avoided. However, once turned into a reality, this new facility has come under criticism, been the subject of many court challenges, and has harmed our nation's standing abroad.

For a period of more than 30 months, the Bush administration continued to hold these detainees at Guantanamo without providing them with any additional judicial or administrative review of their detentions. In June 2004, in Rasul v. Bush, the Supreme Court ruled that the reach of the United -- of the U.S. courts did extend to Guantanamo and the prisoners held there.

After that ruling, the executive branch granted the detainees some administrative review, although this process, too, has been criticized. All detainees were given a Combatant Status Review Tribunal, or a CSRT hearing. This was a one-time hearing to evaluate whether they were properly classified as an enemy combatant. Detainees were also given an annual review before an administrative review board, but this did not examine if their detention was lawful. Instead, the validity of each detention was assumed, and the review process only allowed each detainee to argue that he no longer constitutes a threat.

For the remaining limited number of detainees, they were to be tried by military commissions. However, the procedures initially put in place for those commissions by the administration were eventually struck down as inadequate by the Supreme Court in the Hamdan decision. The court ruled that the trials at Guantanamo had to be based on statute.

This led the Congress to pass, last fall, the Military Commissions Act. I voted against this legislation, because it allowed hearsay evidence, created a separate and lesser system of justice, and also eliminated the right of habeas corpus for all of Guantanamo's detainees. The 60 to 80 detainees that the department intends to try will be put through the military commission process, although when those hearings will take place is unknown.

Now, it is six years after the first detainees were brought to Guantanamo, and the administration still has not yet tried a single detainee, not in any U.S. criminal court and not by the military commissions. And only one detainee, David Hicks, has pled guilty. In addition, new concerns have been raised about the legal rights given to Guantanamo detainees, not just by outside scholars but by the very military officers who personally participated in the process. In fact, over the last few months, several military officers have publicly raised concerns about the procedures now in place.

First, Lieutenant Colonel Stephen Abraham, who served on the review board in the CSRT process, has said the DOD pressured him, and others on the CSRT review boards, to rehear a case and explain, quote, "what went wrong," end quote, when the CSRT issued a decision that one of the detainees should not be classified as an enemy combatant. Lieutenant Colonel Abraham also complained about the evidence being presented to the CRTs in order to determine detainee status. He said it was often generic, outdated, incomplete, and that no controls were in place to ensure that evidence of innocence was being disclosed.

And second, the Defense Department's chief prosecutor, Colonel Morris Davis, has recently resigned over his concerns about how the military commissions process has been politicized. Colonel Davis was previously one of the staunchest defenders of Guantanamo. Colonel Davis has written an op-ed in The New York Times and an article for the Yale Law Journal, this year, arguing that he and his prosecutorial staff at DOD could prove the critics wrong by holding full and fair trials at Guantanamo that would live up to the standards of American and international justice.

But on October 4th of this year, Colonel Davis resigned from his position after concluding that full, fair and open

trials were unlikely at Guantanamo.

Colonel Davis has stated to me, yesterday, that the convening authority, which is supposed to be independent and perform certain evaluations, has been compromised and politicized. Colonel Davis has stated to DOD and publicly that the prosecution process has been politicized, that the convening authority and its legal advisor would direct the prosecution's pretrial preparation, including directing the office about what evidence to use, what charges to file, and that his efforts to ensure that the military commissions would be open and fair were being overridden by administration officials who believed it was more important to get convictions before the 2008 elections.

As Colonel Davis told The Washington Post on October 20th, there was a big concern that -- this is a quote -- "there was a big concern that the election of 2008 is coming up. There was a rush to get high- interest cases into court at the expense of openness," end quote.

I invited Colonel Davis to testify at this hearing. However, the Defense Department has ordered him not to appear. That indeed is very disappointing. We assured the administration that Colonel Davis would not be asked about pending and open cases, but we were told simply that Colonel Davis was active duty military, and because he was active duty military, they could issue an order that he had to follow. I think this is a real shame that we will not have Colonel Davis as a witness today.

AUDIENCE MEMBER: (Off mike.)

SEN. FEINSTEIN: I think -- please. I think he has an important perspective. I wish the administration would allow him to appear.

Unfortunately, I have to conclude that by prohibiting Colonel Davis from testifying, the administration is trying to stop a fair and open discussion about the legal rights of detainees at Guantanamo. Clearly, the concerns that have been raised by Lieutenant Colonel Stephen Abraham and Colonel Morris Davis need to be discussed and evaluated.

I believe there also needs to be an examination of what is happening at Guantanamo, why cases are not being prosecuted, what needs to be done with detainees who can't be charged, and what legal rights should all detainees be afforded. That is the purpose of this hearing.

I look forward to hearing from the witnesses and am very pleased that my ranking member, somebody I've worked with on this committee now for about 12 years -- is that fair to say?

SEN. JON KYL (R-AZ): Yeah, 13 years.

SEN. FEINSTEIN: Thirteen years -- is here today. And I turn it over to you, Senator Kyl.

SEN. KYL: Thank you very much, Madame Chairman. And I appreciate your interest and the questions that you posed, and hope and trust that some light will be shed on them in today's hearing.

At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three afghan soldiers. Another has killed an Afghan judge. One led a terrorist attack on a hotel in Pakistan and also led to a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans -- and I'm quoting now -- "to fight America and its allies until the very end."

The reality is that this nation needs to be able to detain those active members of al Qaeda and related groups whom it captures. Releasing committed terrorists has already resulted in the deaths of allied soldiers and innocent civilians and

may very well someday result in the deaths of U.S. servicemen. Such a result would be unacceptable, and the possibility of such a result must always be kept in mind when we consider the kinds of rights that should be extended to these detainees.

A detention regime for terrorists whom we intend to detain until the end of hostilities should seek to weed out mistakes, but it must also be designed in a way that also protects our nation's legitimate interests. Extending the civilian habeas litigation regime to unlawful war prisoners is problematic, among other things because detainees will demand access to classified evidence. In the civilian habeas system, a detainee would have a presumptive right of access to such evidence. The government could seek to redact portions of the evidence or summarize it, but in the end, it must provide the defendant with the substance of the evidence. If it can't do so, if revealing the substance of the evidence compromises a unique source, then the government simply can't use the evidence.

As difficult as the problems with classified evidence have occasionally proven in criminal trials, it would be greatly exacerbated in proceedings involving al Qaeda detainees.

Much of the information that we obtain about al Qaeda and its members comes from our most sensitive sources of intelligence. For example, much information has been provided to the U.S. by various Middle Eastern governments. These governments are often afraid of al Qaeda or radicalized elements of their own populations, and they don't want anybody to know that they're helping us fight al Qaeda. Often these governments provide information to the U.S. only on the condition that it not be disseminated outside of the U.S. intelligence community. If we suddenly were required in a detainee litigation proceeding to reveal to a detainee and his lawyer that we had obtained particular information from one of these governments, we would badly damage our relations with that government and could lose access to an invaluable source of intelligence about al Qaeda.

The same problems arise with certain technological sources of intelligence or with regard to particular human sources, and there is no simple solution through redaction or summarization of the evidence. Ofttimes the most important types of intelligence are sui generis, and revealing the nature of the evidence reveals its source. These types of problems would arise again and again in enemy combat litigation and would repeatedly present the United States with a Hobson's Choice: either damage a valuable intelligence source that could provide information about future al Qaeda attacks or release a committed al Qaeda member. This is not a choice that the United States should be forced to make.

Another question that immediately arises when contemplating the extension of litigation rights to al Qaeda detainees is, where does it end? The United States is holding 800 detainees at Bagram Air Base in Afghanistan and tens of thousands in Iraq. If the Guantanamo detainees can sue, why shouldn't these detainees be allowed to sue as well? After all, the U.S. military's absolute control over Guantanamo is really no greater than its control over any other U.S. military base anywhere in the world.

If this is a matter of principle, it should have applied in past wars. The U.S. detained over 2 million enemy war prisoners during World War II, including 400,000 who were held inside the United States. Should they have been allowed to sue in U.S. courts? Would there have been enough lawyers in the United States to handle the litigation? At the very least, we should be able to agree that we should not extend greater rights and privileges to combatants who violate the rules of -- the laws of war, including terrorists, than we do those who obey the laws of war.

The Guantanamo debate poses many difficult questions, questions that remain unresolved in light of the Supreme Court's most recent foray into the area. I look forward to testimony from today's witnesses, and hope that, as the chairman said -- chairwoman said, it can shed light on some of these important questions.

SEN. FEINSTEIN: Thank you very much, Senator Kyl.

Senator Cardin, it's my understanding you'd like to make an opening statement.

SEN. BEN CARDIN (D-MD): Thank you, Madame Chair. And I'm going to ask that my entire written statement be made part of the record.

SEN. FEINSTEIN: So ordered.

SEN. CARDIN: And just let me summarize very quickly.

The original purpose for why detainees were transferred to Guantanamo Bay from Afghanistan over five years ago was for us to be able to obtain intelligence information from the detainees that would be very important to protect the safety of the people of our nation.

That was its original purpose.

In doing this, we made major mistakes. The first was that we did not -- the administration would not allow those that were sent to Guantanamo Bay to challenge their status. Ultimately the courts intervened and that was changed. We never reached out to the international community to seek their understanding as to what we were trying to do in Guantanamo Bay. That was also a mistake.

And it's hard to understand that after five years, that the people at Guantanamo Bay that are being detained have significant intelligence value as far as what we can obtain through interrogation. They should be brought to justice. They should be brought to justice consistent with the values embedded in our criminal justice system that we're so proud about.

Madame Chair, I must tell you that I wear another hat, and that is the co-chair of the Helsinki Commission. And in that capacity I represent the Congress at international meetings. And there has been no issue -- no issue -- that's been brought up more in, I guess, disappointment in the United States in the manner in which Guantanamo Bay has been handled and the total disregard for the international community in that respect.

I want to thank you for conducting this hearing, because as the courts have said, the Congress has a responsibility to determine the framework in which the detainees at Guantanamo Bay are to be brought to our criminal justice system. And I thank you or holding this hearing and I hope that we will be able to get some answers. I am disappointed that we were not able to get the full cooperation of the administration on the witnesses before our committee. I think that's wrong. It's disappointing. And I look forward to working with you as we try to craft the proper response to the current situation that we find ourselves in.

Thank you.

SEN. FEINSTEIN: Thank you very much, Senator Cardin.

SEN. JEFF SESSIONS (R-AL): Madame Chairman?

SEN. FEINSTEIN: Yes. Senator Sessions?

SEN. SESSIONS: Just briefly. You know, when you say they should be brought to justice, if that means that captured prisoners of war have to be tried, then I don't agree. Prisoners of war are not tried; they are detained until hostilities end. We know that a number of those that have been improvidently released, as Senator Kyl has noted, has attacked us -- have attacked us again. These are people who are dedicated to the destruction of America. Many of them are.

I wish it were not so. I wish it were not so.

I wish that we could release these people. I wish we could not have to have detention of those who are waging war against the United States and our allies.

But we must do so, unfortunately, and we cannot create that -- transform military detention of prisoners of war, even unlawful combatants who don't comply with the war, into a trial. So, and I think it's appropriate that the military pick and choose what are the appropriate cases to try first. I don't see anything wrong with that.

Thank you, Madame Chairman. I look forward to the hearing.

SEN. FEINSTEIN: Thank you, Senator Sessions. We'll now turn to the panel, the two witnesses.

Brigadier General Thomas W. Hartmann has served since July of 2007 as the legal adviser to the convening authority of the Department of Defense Office of Military Commissions. He is responsible for providing legal advice to the convening authority regarding referral of charges, questions that arise during trial and other legal matters concerning military commissions. His duties also include supervising the convening authority legal staff.

Steven Engel, deputy assistant attorney general, Office of Legal Counsel, Department of Justice, is the second witness. Since February of 2007, Mr. Engel has served as a deputy assistant attorney general in the Office of Legal Counsel, where he has provided legal advice to the executive branch on a variety of matters, including the detention and prosecution of enemy combatants, treaties, and congressional oversight. Mr. Engel also serves as co-chair of the president's Task Force on Puerto Rico's Status.

Gentlemen, we welcome you and we'll begin with General Hartmann.

GEN. HARTMANN: Good morning, Senator Feinstein.

SEN. FEINSTEIN: General, before you proceed, I'm going to have seven-minute rounds. So if you could confine your testimony to that period of time, and we will do the same.

GEN. HARTMANN: Okay.

SEN. FEINSTEIN: Thank you.

GEN. HARTMANN: Thank you, Senator Feinstein, Senator Kyl, Senator Sessions, Senator Cardin. I'll ask that my testimony just be made part of the record. I won't read that into the record but I thought that it would be useful for the subcommittee to see the rights that are described in the testimony in reality.

And if you had been at Guantanamo Bay on the 5th and 6th of December, during the continuation of the United States versus Hamdan case, you would have seen the following when you walked into the courtroom on Guantanamo Bay.

You would have seen an accused who was in a tie and a coat, and he had headphones on his head as he was listening to a live translation and -- live translation of his testimony -- not his testimony but the testimony and the statements of the court during his continued trial. So he was hearing it in his native language.

Sitting next to him was a translator, between him and five counsel who were at his table. He had a detailed military defense counsel, detailed civilian defense counsel, two counsel from a distinguished law firm in the United States, and a counsel who is a professor at Emory University -- five counsel at his table.

Behind him was a U.N. observer, Mr. Scheinen (sp), as well as five members of the press and five nongovernmental organizations, the ACLU, the American Bar Association, Human Rights Watch, Human Rights First, among others.

The press were limited to five. In the courtroom there's an overflow building that we have for the press. So there were other press, domestic and international press, in that location as well.

In the Khadr hearing that had occurred approximately a month before that, there were 30 members of the press, and over the period of times that we've handled the commissions in the last several months, more than a hundred press people have attended these hearings.

Also present in the courtroom were military prosecutors -- a Navy officer, an Army officer -- and a member of the Department of Justice. Pivotal to that process was a uniformed officer, a military judge, who has more than -- approximately 30 years of service in the United States Navy. The judges come from all the uniformed services. This judge was from the Navy. He wore a black robe, and he presided over the hearing.

The accused was allowed to remain silent because that's his right. The accused and his counsel were allowed to cross-examine witnesses presented by the government because that is his right. The accused was allowed to call witnesses for the first time in this hearing because that is his right. He accused was allowed discovery, and the accused was allowed to seek witnesses who he said were exculpatory, even to the point that the convening authority at 10:00 on the night of the first hearing granted immunity to that witness, so that that exculpatory evidence, whatever it was, could be given. Those are the rights you would have seen in that courtroom.

If the accused is found guilty, he will have a right that no one else has in the United States or in any other court, and that is a right of automatic appeal to the Court of Military Commission Review. That is a right that is similar to the rights that we give to our uniformed soldiers, but no other civilian has that right.

He will also have the right to have his findings, if he's found guilty, and his sentence reviewed by convening authority, impartially, impartially. And she alone will be able to reduce the sentence or adjust the findings downward -- not upward, downward -- a right that doesn't exist anywhere on Earth except in the Uniform Code of Military Justice and in this system.

If you had arisen early in the morning that day, you would have seen a silhouette of a military member from the Air National Guard of Puerto Rico with a dog walking across the top of the building, protecting our soldiers, sailors, airmen and the members of that tribunal from bombs. There were approximately 60 members of the Puerto Rican National Guard defending and protecting that proceeding. And the place that I saw that silhouette from was what we call "Tent City" or Camp Justice, which is the location of the new Expeditionary Legal Conference. And that complex is being built by the Indiana Air National Guard and several other Air National Guard units from around the country. That complex is designed to be ready about March 1st to deal with classified information and other things, and your soldiers, sailors and airmen are doing a magnificent job in not simply describing the rights that are in the Manual for Military Commissions or in the Military Commission Act, but effectuating them and bringing them to reality for alleged war criminals.

Thank you, ma'am.

SEN. FEINSTEIN: You've concluded?

GEN. HARTMANN: Yes, ma'am.

SEN. FEINSTEIN: Thank you very much. Appreciate it.

Mr. Engel.

MR. ENGEL: Thank you, Chairwoman Feinstein, Ranking Member Kyl, Senator Sessions, Senator Cardin. I appreciate the opportunity to appear here today to discuss the legal rights of the enemy combatants detained at Guantanamo Bay.

General Hartmann outlined a series of the rights that the accused in the military commission is enjoying and will enjoy as those prosecutions go forward. I'd like to take this time with my remarks to talk about the legal rights with

respect to detention because these are issues that have been developed over the course of a number of years that represent the joint action of the executive branch, of Congress, with the guidance of the Supreme Court. And of course, that guidance we expect will continue with the Boumediene decision.

As the subcommittee is well aware, the United States is currently engaged in an armed conflict with little precedent in our history. Like past enemies, the attacks of September 11th demonstrated that al Qaeda and its allies possess both the intention and the ability to inflict catastrophic harm on this nation. These terrorist enemies, however, show no respect for the law of war. They do not wear uniforms, and they seek to achieve their goals through covert and brutal attacks on civilians, rather than by directly engaging our armed forces. Although the law of war is based fundamentally upon reciprocity, the unconventional nature of our enemies -- including their refusal to distinguish themselves from the civilian population -- has perhaps paradoxically resulted in our providing the Guantanamo detainees with an ever-increasing set of rights so as to assure ourselves that those detained at Guantanamo, in fact, pose a continuing threat.

And again, to be clear, this is a strength in our system. This reflects our commitment to the rule of law. But it is a strength that must be reconciled with the need to vigorously prosecute this armed conflict and to defend our nation against future attacks.

The subcommittee conducts this hearing less than one week after the Supreme Court heard oral argument in the Boumediene case. That case, again, will no doubt shed considerable light on the scope of the detainees' rights. In Boumediene, the D.C. Circuit upheld Congress' authority to restrict the availability of habeas corpus, as it had done under both the Detainee Treatment Act and the Military Commissions Act passed last year.

There is no doubt that the writ of habeas corpus represents a fundamental protection under our law, but the writ is fundamentally tailored for peacetime circumstances. The Constitution specifically grants Congress the authority to suspend the writ, even for American citizens, during times of rebellion or invasion.

In the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to an alien prisoner of war.

Although the Detainee Treatment Act restricted the availability of habeas, it did not leave the detainees without a day in court. Rather, the act provides that the detainees, after receiving fair hearings before the Combat and Status Review Tribunal that the Department of Defense has set up, can further seek review of those decisions at the D.C. Circuit.

These CSRT procedures, as we call them, were themselves established to go beyond the requirements of the Geneva Conventions, the requirements owed to lawful prisoners of war, and as well as to provide the Guantanamo detainees with the due process that the Supreme Court in Hamdi versus Rumsfeld held appropriate for American citizens who choose for the enemy and are subsequently detained. The Detainee Treatment act, though, goes even further than those procedures and provides the D.C. Circuit with jurisdiction to review those CSRT decisions. This is a right of civilian judicial review that is virtually unprecedented during wartime.

The D.C. Circuit can consider all available constitutional and statutory arguments, and it can assure that the CSRT followed its own procedures, including a requirement that a preponderance of evidence supports the CSRT decision. The DTA review process would constitute an adequate and effective alternative to habeas corpus even if the detainees could claim such a right under our constitution. Still, the DTA procedures are more properly adapted than habeas corpus to the circumstances surrounding military detentions. As I noted, its extending habeas to Guantanamo would be unprecedented, and lacking precedence, it would raise a host of serious questions as to how habeas might apply.

For example, would we be required to bring the detainees into the United States to participate in habeas hearings? What rules of discovery would govern such proceedings? Could the detainees, for example, compel a United States soldier to return from Afghanistan or Iraq in order to appear and testify at such a hearing? And perhaps most seriously,

would a detainee have the right to review classified evidence such that the United States might be forced to choose between disclosing vital intelligence to the enemy or actually releasing members of al Qaeda?

The Department of Justice no doubt would argue for answers in any of these cases that would minimize their intrusion on our warfighting effort. But we can be equally assured that detainee's counsel would argue zealously on the other side. It is our hope that we will not need to answer these questions about how to apply habeas to a wartime situation, because the DTA procedures themselves provide a robust process that would be a constitutionally adequate alternative to habeas corpus, should the detainees be entitled to such rights.

In sum, the existing system reflects a careful and appropriate compromise between the needs of military operations and our commitment to the rights of the detainees. This system has been worked out between the political branches, fully consistent with existing judicial precedent and, we hope, will be upheld by the Supreme Court in its decision in Boumediene.

Thank you, Chairwoman Feinstein, Ranking Member Kyl and members of the subcommittee. And I look forward to answering your questions.

SEN. FEINSTEIN: Recognizing senators, it will be myself, Senator Kyl, Cardin, Sessions and Durbin.

Colonel Davis, General Hartmann, has also said that he directed his office not to use evidence obtained from or in connection with enhanced coercive interrogation techniques, specifically waterboarding. What is the current status of this issue?

GEN. HARTMANN: Ma'am, with regard to that, as a general matter, a prosecutor is not authorized and should not discuss matters of deliberation or how he's going to proceed with a trial in public. However, since Colonel Davis brought this matter to the public, the issue is very clear. As a matter of policy and as a matter of law, torture is prohibited under U.S. law. Statements obtained by torture are prohibited from being used in these commission proceedings.

As to other enhanced techniques and coercive techniques that might be used in connection with gathering evidence, that is the purpose for which the Military Commissions Act was created. That's why we have a judge in the courtroom. That's why the accused has the right to a defense counsel. That's why there are prosecutors, ma'am, and discovery. Those people will assess the facts and apply them to the law as it exists in the United States, and as it applies to the commissions. And that's the rule of law, not for me to make a decision about that in abstraction.

Trials, commission proceedings are 90 to 95 percent facts, and you apply the law to those facts. So to answer that in abstract is, number one, inappropriate. And anything dealing with the discretion of a prosecutor is inappropriate to be dealt with in public.

SEN. FEINSTEIN: So I understand, from the answer to your question, that evidence obtained from waterboarding is not being used to prepare cases.

GEN. HARTMANN: No, ma'am, I didn't say that.

SEN. FEINSTEIN: Well, would you repeat what you did say?

GEN. HARTMANN: Yes, ma'am, I will say that.

The evidence that we are gathering is the evidence that we are gathering. Whatever the methods that have been used to gather that evidence will be evaluated in connection with the law and in the trials. It can't be defined in an abstract way like that, ma'am.

SEN. FEINSTEIN: All right, so I understand it's a non-answer to my question.

Is evidence from other enhance/coercive interrogation techniques being used?

GEN. HARTMANN: Ma'am, I can't answer that either because these are ongoing trials and it's completely inappropriate for anyone associated with the preparation of cases or any kind of prosecution to prejudge those or to discuss those in the public. It's very critical that those involved in the prosecution effort have the ability to discuss those behind closed doors so that they can give unvarnished, unbiased, bark-off-the-tree opinions about the right answer.

SEN. FEINSTEIN: One last question on that subject. Do you agree that evidence obtained from waterboarding is unreliable and should not be used?

GEN. HARTMANN: Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence. And the question that will be before the judge when that comes up is whether the evidence is reliable and probative, and whether it's in the best interest of justice to introduce the evidence.

That is the rule of law, ma'am. That is the rule of evidence. That is the rule of law and the rule of evidence that is supported by the Military Commission(s) Act that the legislature passed.

SEN. FEINSTEIN: So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used?

GEN. HARTMANN: If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow.

SEN. FEINSTEIN: And how is that --

GEN. HARTMANN: That's the rules we must follow.

SEN. FEINSTEIN: -- how is that presented to the judge?

GEN. HARTMANN: How is --

SEN. FEINSTEIN: How is that issue presented to the judge in the course of a trial?

GEN. HARTMANN: Well, the -- I'm sorry -- the prosecution will raise the issue because the prosecution will be presenting the evidence or the defense will file a motion to exclude the evidence, and then the parties will deal with that motion and debate it.

SEN. FEINSTEIN: I see.

Did you, the convening authority, or anyone discuss the need to move quickly on cases because of upcoming elections?

GEN. HARTMANN: No, ma'am, I did not.

SEN. FEINSTEIN: That was never discussed?

GEN. HARTMANN: Absolutely not, ma'am.

SEN. FEINSTEIN: Would you agree that military commission trials should be open if possible?

GEN. HARTMANN: Yes, ma'am, absolutely. I fully support, and so does everyone in the commission process fully support, the value of having open trials and open presentations. We have moved mountains to try to get the press there, the nongovernmental organizations there, and we endeavor to do that. However, there will be circumstances in which classified evidence must be used to move forward on the cases, and in those limited sets of circumstances, it will

be necessary to close the trial to allow the evidence to come in.

Let me make one clarification which often gets in the newspaper which is inaccurate, and that refers to the word "secret" trials. There will be no secret trials. There is no mechanism for a secret trial. Every piece of evidence, every form of evidence, every type of evidence that will go before the jury will be seen by the accused and his counsel, subject to cross examination, subject to review. There will be no evidence that is used on a finding of guilt or innocence or a sentence that the accused does not have the right to see, object to and challenge.

SEN. FEINSTEIN: Thank you. I think that's helpful.

On April -- in April of 2004, DOD issued a press release saying that it was taking the general counsel out of the chain of command over the chief prosecutor to help ensure independence of the military commissions process. That was an important gesture because it took any political aspect out of the chain of command. This was done under Military Commission Instruction Number 6. Then on October 3rd, 2007, this position was reversed and new orders were issued putting the chief prosecutor under the legal advisor to the appointing authority, the deputy general counsel and the general counsel.

So in just a few months, you took out any opportunity for there to be civilian political influence, and then three months later, you put that back. Why was this change made?

GEN. HARTMANN: Ma'am, the fundamental principle of law in this country with regard to the military is civilian control over the military, so that's no surprise. And it is fundamental.

With regard to the change that you refer to as occurring on October 3rd or October 4th, the chief prosecutor always reported to the legal advisor. That's no change. The change was with regard to where I reported. I had no reporting official at that time, and one of the recommendations of the Tate (ph) investigative group was that that be clarified. And so the formal designation of my supervisor became the -- one of the deputy general counsel within the Office of the General Counsel.

That didn't change anything in reality, ma'am. And this is important. The person that was the deputy general counsel before that was the person who was also the deputy general counsel after that. I talked to that person regularly, every day. So did Colonel Davis. It was a very common form of association, a very common source of getting information and an understanding of the law and counsel. There was no change, ma'am, before October the 3rd or after October the 3rd, and there has been no political influence on this effort.

If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trials process, it has been my effort, and no one has directed me in that regard.

SEN. FEINSTEIN: Thank you very much. My time is up.

Senator Kyl?

SEN. KYL: Thank you, Senator Feinstein.

First, General Hartmann, are you aware of any war crimes tribunal ever, in a U.N. tribunal, the Nuremberg tribunals or any other past or present U.S. or international war crimes tribunal, that has ever provided as much due process to alleged war criminals as has the current U.S. Military Commission Act trials?

GEN. HARTMANN: Senator, the rights that are provided under the Military Commissions Act and the Manual for Military Commissions are absolutely unprecedented in their generosity and benevolence to the accused.

SEN. KYL: Okay.

Mr. Engel, I understand that Professor Denbeaux, one of the witnesses on the second panel of today's hearing, will release a study today that discounts or downplays the evidence that some Guantanamo detainees whom we've released have again taken up arms against the United States. You might have heard me detail a whole series of cases in which that has occurred. What unclassified information can you provide about released detainees who have returned to waging war against the United States?

MR. ENGEL: Sure. Thank you, Senator. I haven't had a chance, obviously, to closely review the study of Professor Denbeaux, which I understand relies upon only the materials that have been publicly released and not the extent of classified information that the Department of Defense has.

I understand that in terms of publicly, the Department of Defense has said that upwards of 30 detainees who have been released from Guantanamo Bay have returned to various theaters in order to continue to wage jihad, often against American forces or our allies in Afghanistan or Pakistan.

Among these individuals I -- the individual department disclosed is a man named Mullah Shahzada, who assumed control of Taliban operations in southern Afghanistan after he was released. Another was Abdullah Massoud, became a militant leader in southern Waziristan. Taliban regional commander -- another individual who was reported by Al-Jazeera -- he appeared and asserted that he was the deputy Defense minister of the Taliban, and he discussed defensive positions of the mujaheddin and claimed that he had recently been involved in the downing of an airplane. They have -- you know, DOD has specifically discussed, you know, upwards of seven detainees, and they sort of asserted that there are 30 others that are out there.

And you know, this just shows that we have to be very careful with respect to the individuals detained at Guantanamo Bay. Contrary to popular myth, the ticket to Cuba is a not a one-way ticket. We have released over half the folks who have ever been there, and the United States continues, where possible, consistent with our national security, consistent with our obligations to ensure that detainees who are released will be humanely treated in the county to which they are returned -- we have continually been releasing detainees throughout the process. And you know -- and no process is perfect, and these folks are evidence that sometimes we make mistakes. And these mistakes can be costly.

SEN. KYL: Just in round numbers, the number of people who have been released, who were originally taken, held for a period and then released -- what is that number, approximately?

MR. ENGEL: Well, with respect to Guantanamo, I mean, the United States has detained upwards of 10,000 detainees in Iraq and Afghanistan over time. About 755 -- I believe the chairwoman quoted 759 -- have been brought to Guantanamo, and something like 455 or so have been released.

We currently have about 305 there.

SEN. KYL: Okay.

General Hartmann, back to the question I asked you originally. Let's go down some of the specific kinds of rights. Did the Nuremburg tribunals apply a presumption of innocence to the Nazi war criminals who were tried before those tribunals?

GEN. HARTMANN: So such presumption existed, Senator.

SEN. KYL: Did those tribunals limit the types of evidence, like hearsay evidence or evidence obtained in coercive circumstances, that it could consider when it found a particular piece of evidence probative and otherwise inclined to consider it?

GEN. HARTMANN: There were no rules of evidence, and virtually any evidence as freely admitted.

SEN. KYL: Did those tribunals allow any judicial review whatsoever of their verdicts?

GEN. HARTMANN: No, sir. And that was painfully apparent to those who were found guilty and received the death penalty. They were hung within hours and days of the completion of the sentence announcement.

SEN. KYL: Mr. Engel, let me ask you what effect did the initial Rasoul decision have on interrogation of al Qaeda detainees held at Guantanamo? This, of course, permitted a statutory habeas type of litigation.

MR. ENGEL: Sure. Well, I mean, I think -- we have often quoted a statement of Michael Rattner from the Center for Constitutional Rights, who is an attorney for the detainees, who boasted that interrogation and any kind of effective interrogation is impossible once the detainee has regular access to a lawyer. I think any expert on interrogation will tell you that once of the keys to a successful interrogation is a rapport between the interrogator and the subject. And any good attorney who is able to come in and represent a client is going to come in shut that down as soon as possible. So again, you know, the access to -- these access to attorneys -- which, of course, there is access to attorneys in many of the existing processes, but they do come at real cost to the effectiveness of our interrogations.

SEN. KYL: If habeas rights were extended to Guantanamo detainees, would they be allowed to subpoena U.S. soldiers and potentially recall them from the battlefield so that they could be cross examined by the detainee's lawyers?

MR. ENGEL: Well, I think that would be a very serious question. As I mentioned in my opening statements, extending the peacetime notions of habeas corpus to military prisoners is unprecedented, and there would be serious concerns that the detainee asserting a right to a compulsory process would be -- would be able to require soldiers to come back from the battlefield. We, of course, in the Department of Justice, would argue that that should not be required, but I'm sure there would be a vigorous debate over it.

SEN. KYL: That, of course, is one of the things Justice Jackson warned about in the decision -- at least up till now had been the primary U.S. decision in the matter.

Incidentally, I understand you clerked for Justice Kennedy. I'm tempted to ask you what you think he might do in Boumediene case, but I'll refrain from doing that. (Laughter.)

MR. ENGEL: I appreciate that.

SEN. KYL: I don't think that would be prudent.

Let me just ask one final question here. If litigation rights were extended to these detainees, and they were given right -- well, would they be given potentially access to classified materials? What kind of problems would that create, or would the request, by their lawyers to gain access to that classified evidence, create?

MR. ENGEL: I think that's a big question and a big issue.

And really, one of the biggest issues and the greatest difficulties that we have faced, with respect to detaining individuals, with respect to the CSRT process, the DTA review process, the potential for habeas and the military commissions process, is, how do we deal with the wealth of classified information that we have and we rely on and must protect in order to wage a war, and at the same time provide some kind of adversarial process at times in which the detainees have the opportunity to confront the evidence against them? And the CSRT process, with the DTA review, has developed to what we think is a workable and a fair system, one grounded in familiar law- of-war principles.

As to alternatives, as to something like traditional habeas, again we would argue vociferously for limits on detainees' access to classified information. But CIPA rules require alternatives, if you're not going to give individuals the actual evidence, and it's not always easy to come by those alternatives. So we would be very concerned over precisely that issue.

SEN. KYL: I want to thank both of you for being here today, and apologize in advance. I have a meeting at 11. I'm going to have to leave in about five minutes for that and I wish I could be here for the remainder of your comments.

Thank you, Madame Chair.

MR. ENGEL: Thank you, Senator.

SEN. FEINSTEIN: Kyl.

Senator Cardin.

SEN. CARDIN: Thank you, Madame Chair.

General Hartmann, let me first make it very clear about the service of our people down at Guantanamo Bay. I've been to Guantanamo Bay, and the men and women who are serving our nation there are serving with great distinction in protecting our country and in the methods that they are using in carrying out their responsibilities. And I have nothing but praise for the men and women who serve our nation.

My concern is that -- why we never sought the advice of the international community in the manner in which detainees were treated, and decided to go to Guantanamo Bay. This is unprecedented, the unlawful combatant circumstances, and yet we chose to do this on our own, without really working with the international community. But for the courts, there would have been no opportunity, for those who were determined to go to Guantanamo Bay, that any type of a transparent process to decide whether they were appropriate to be at Guantanamo Bay or not.

I want to just -- first, in regard to Senator Kyl's point, those who have been charged at Guantanamo Bay -- are any of them charged with war crimes?

GEN. HARTMANN: They are charged with war crimes as defined in the Military Commissions Act. They're charged --

SEN. CARDIN: But not in regards to international -- Nuremberg, those were created under the auspices of the international community. Is there any effort here to use the international community's definitions? My understanding is that David Hicks pled guilty to material support, that Muhammed Dawood (sp) is charged with attempted murder. Am I wrong in those assumptions?

GEN. HARTMANN: You are correct in those.

SEN. CARDIN: Thank you.

And Mr. Engel, your point about wartime powers of the president, the wartime powers generally that we have, my concern with that as it relates to habeas corpus -- and I disagree with your analysis on the habeas corpus burdens; I think that these individuals are basically criminals and that criminals have the right of habeas corpus. But under the president's definitions of wartime powers, we're going to be at war during all of our lifetime. The war against terror is unlikely to have a definitive end. I think that's just a dangerous interpretation of the powers, to say that we're going to deny those who are now entering our criminal justice system the ability at early stages -- at this point it's already very late -- to have basic rights. And I just disagree with you on that.

I want to get back, though, to Chairman Feinstein's point on how cases are prepared. General Hartmann, you raise a point in regards to how evidence will be determined. You point out, and rightly so, that evidence that is obtained by illegal means cannot be used in a trial, should be excluded. And you've acknowledged that torture is illegal under U.S. law.

My question to you is, what process, if any, do you have in the development of a case to take a look at the methods

that were being used to obtain evidence to make an independent judgment as a prosecutor as to whether that evidence has been obtained lawfully or not? Any competent state's attorney in preparing a case will take a look at the evidence to see whether it is permissible to be used or not. What process have you developed within the military commissions to evaluate the legality of the information that's been obtained?

GEN. HARTMANN: Senator, those are -- that's an important question and it's a question that every prosecutor must ask himself or herself. And it's a process through which they must go. I am not going to describe that process to you in public.

It's a process and it's a matter of judicial and prosecutorial discretion. They must have the privacy, they must have the behind- the-doors ability to evaluate the evidence and to look at it in an unvarnished way. But for me to tell you in public, on the record, the process that they use would be completely inappropriate.

SEN. CARDIN: Are you --

GEN. HARTMANN: But I assure you there is a process.

SEN. CARDIN: And are you telling us that that process will exclude certain information because of the concerns about it being challenged?

GEN. HARTMANN: No, sir, I'm not telling you that. I'm telling you that there is a process, and that the obligation of the prosecution is to take the evidence through that process and to try to determine if they think it will be admissible or not, and the reasons for which they think any particular piece of evidence will be admissible. And if they intend to proceed with that, that issue will then be resolved in public in front of a court -- in front of the judge, the defense counsel, the accused and the prosecutor.

SEN. CARDIN: Explain to me why the process that you use cannot be discussed in a public forum.

GEN. HARTMANN: Because there's no particular -- there's no defined step one/step two/step three process that anyone uses, Senator. There's a process that you use. You take the evidence that you've got, which is unique in every single case, and you evaluate that against the law and the rules of evidence. So to say that you follow a specific process, it would be completely inaccurate in the first place.

Any prosecutor -- even if you're not a prosecutor, if you're a trial lawyer, you understand that the focus of your attention has to be on the facts -- not on generalities, not on even the broad outlines of the rules, but the facts. And then you figure out how to admit that evidence with the challenges that you will face in trying to admit that evidence.

SEN. CARDIN: You've acknowledged, and properly so, that information obtained or facts -- information obtained through coercion will not be -- should not be used and is unreliable. So we had a hearing yesterday in College Park, on the Helsinki Commission, on torture, and it was interesting as to one subject that came up, and that is the reliability of information that's obtained through torture or similar procedures, and that during the times of witchcraft, we had confessions that people were witches. So the reliability of this information is very questionable, and I think we would all feel more comfortable if you would be more forthcoming in telling us the process -- not talking about a specific technique that may or may not have been used, but a process -- so that we have a little more confidence that our government is, in fact, evaluating, as they prepare for criminal trials, the quality of the information that they have obtained.

GEN. HARTMANN: Senator, the key to your answer will be found in the well of the courtroom. That's where --

SEN. CARDIN: I disagree with that. I think there's an obligation on the government in preparing a case to make sure it's done properly.

GEN. HARTMANN: It will be done properly, Senator. And that's where you -- you will learn about that in the well of the courtroom.

The prosecutor's obligation, his fundamental obligation is to ensure justice in the military commissions process and in the Uniform Code of Military Justice process. That is his fundamental obligation or her fundamental obligation. So it's their duty to take the evidence, to assess the evidence, to determine its admissibility, to determine the risks of non-admissibility, to determine the law that applies to the admissibility of that evidence.

And then they make a decision whether they're going to try to use it in the case. And once they try to use it in the case, in the American system the defense counsel, a right that this Congress gave to these accused, will challenge that evidence. And the military judge, who will be present and who has experience, will be able to challenge it and will be able to evaluate it.

And the press that we bring down to these hearings will be able to see that and report that to the world. And the nongovernmental organizations that we allow to sit in the courtroom will see that and bring that to the attention of the world.

You will be very proud, Senator, of what your uniformed service members are doing. They are following the rule of law. They are following the rule of law. I am not going to presume on them what that is. They know the law. They know the evidence. These rules of evidence are quite similar to the things that they follow in the military court-martial process, which is renowned by some of our greatest trial advocates as an outstanding system.

SEN. CARDIN: I --

GEN. HARTMANN: Those are the same people who take an oath to protect the Constitution.

SEN. CARDIN: And I don't --

GEN. HARTMANN: The same oath they are using in the (desert ?).

SEN. CARDIN: I don't challenge anything you've said about the dedication of the people who are doing their job. I just come back to a point that I expect those who prosecute in the criminal cases will also try to help us improve the system, that's helped -- that's been done at the local levels, at the federal levels. And I would feel more confident if I knew that there was some evaluation being done by those who are preparing the case as to the methods that were used to obtain information.

GEN. HARTMANN: It is being done, Senator.

SEN. FEINSTEIN: Thank you very much, Senator Cardin.

Senator Sessions is next. (Pause.) Senator? You're up.

SEN. SESSIONS: Thank you. Thank you, Madame Chairman, and I thank the panelists.

There was a concern -- I remember reading in the paper, I think, about the selection process of what cases to try first. As a former United States attorney and attorney general of Alabama, I think good prosecutors always try to pick the cases they feel in a series of cases that have the greatest appeal, maybe the strongest evidence.

And to me, that's just good prosecutorial strategy.

Apparently, Colonel Davis (sp) objected to that. Explain to me what that disagreement is all about, General Hartmann.

GEN. HARTMANN: Senator, the focus -- my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material evidence, the most important evidence, the most significant evidence among the roughly 80 to 90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need -- we needed to focus on the most material cases and bring those forward as rapidly as possible.

SEN. SESSIONS: Well, I think it's almost prosecutorial incompetence not to think in those terms. It's important that you do so.

Let me ask you this. We had this long list of people that have been released. I would suggest that if those who have been released had killed a United States senator instead of an American military person, we'd have a lot different attitude about it.

And my question to you, General Hartmann, is, why are these people being released? We have some of them, you say, Mr. Engel, that they were al Qaeda leaders and this sort of thing. What kind of process allows us to take a person who it appears are dedicated to their cause to the point that some will blow themselves up to kill men, women and children, why we would release these persons that could result in the death of American servicemen?

MR. ENGEL: Well, Senator, I think that's a very good question. I think what it shows is that no process is perfect. And these are individuals who were detained initially and managed to convince the United States over a period of weeks, months, you know, even in some cases maybe years, that they were innocent or they were minor bit players, and that all they were looking to do was to go back home and you know, be with their families and return to, you know, whatever, you know, agricultural or otherwise activity that they do.

And you know, they frankly -- they tricked us, I mean, you know, and any process in which we are releasing individuals is a process with risk. And you know, we understand this risk, you know. But it is a risk that we are committed to, because we're not looking simply to being an indefinite jailer of all the individuals at Guantanamo; we are trying to work hard to make sure that individuals who can be released without a threat to our national security in fact are released. And that's sort of -- and what these cases reflect, though, is that no release is going to be a risk-free proposition, even if we believe that these individuals are no longer a threat.

SEN. SESSIONS: Well, I just thought you captured somebody in the course of a military conflict, and they were detained, because any good soldier, while they are being detained, know their rights and that sort of thing. But when they get out of jail, they go back and join the forces that they used to be a part of. I mean, that's what every -- people who escaped from prison went back to their American units and fought against the enemy and continued to do so. So that's why you hold them until the war is over.

And frankly, I think this committee and this Congress needs to focus a little bit more on trying to protect our soldiers, protect our homeland, make sure that murderers, killers who are dedicated to the destruction of America are detained, rather than trying to see how many we can release. And I suspect some of those -- released because there was a feeling that Congress is on your necks and you had to demonstrate that you were going to release a lot of prisoners so you would get less criticism at a hearing like this. And now we've got people dead as a result of it.

General Hartmann, with regard to the trials that you've referred to, just -- if you can clarify for the American people and me, because I tend to get confused about it, are you trying people to ascertain -- these trials are to ascertain whether they should be continued to be held in custody? Are these trials to ascertain whether they deserve punishment for committing acts unlawfully under the rules of war?

GEN. HARTMANN: It's the latter, Senator. We are focusing these trials on violations of the law of war. And based upon a finding of "guilty," they would be sentenced to confinement.

The other people are detainees as Mr. Engel has described. These are people who are going to be tried under the Military Commission Act for violations of the law of war, and they will be sentenced upon a finding of "guilty."

SEN. SESSIONS: Well, I remember what happened at Oklahoma City after those people were tried for bombing American citizens.

They were -- at least one of them was executed. Is it possible some of these who've murdered innocent men, women and children and American personnel could be executed?

GEN. HARTMANN: It's an option that's available under the Military Commission Act. And again, Senator, I won't prejudge any case or any charging.

SEN. SESSIONS: Well, I would just hope that if that kind of punishment is good enough for an American who kills Americans, that it ought to be good enough for a terrorist who kills Americans.

Mr. Engel, is there any judicial decision in the 800-year history of Anglo-American jurisprudence in which habeas corpus relief has been extended to someone who's been declared a prisoner of war?

MR. ENGEL: I'm not aware of one.

SEN. SESSIONS: I'm not either.

MR. ENGEL: Indeed the Supreme Court in considering this last week -- I think it came clear in oral argument no one at that court was able to find one that was directly on point, as you've said, Senator.

SEN. SESSIONS: I think it has grave implications for our ability to be successful as a nation in the defense of this republic if we capture people on the battlefield and then start treating them as American citizens who are being tried for a drug crime. It just does not make sense to me.

Now, how do we get to the point that our prisoners of war are now being entitled to personal attorneys? This is a step that's unusual in the history of war, it seems to me. General, my time's up, so if you'll briefly respond to how we got to this point, and is this consistent with the history of the way we treat prisoners of war in the past?

Because as you noted, Mr. Engel, when an attorney talks with a client, the first thing they tell them is to quit talking.

MR. ENGEL: That's right. With respect to detention issues, the use of lawyers is virtually unprecedented in the annals of armed conflict. With respect to the prosecution, I think in order to have prosecutions, there have been, of course, defense lawyers in those cases. But we grant an unprecedented degree of process here, including review by Federal Court of Appeals in the D.C. Circuit.

GEN. HARTMANN: I can't add anything to that, Your Honor. But as I said, Mr. Hamdan had five defense counsel at the table last week.

SEN. SESSIONS: Well, it's a dangerous group of prisoners that you're dealing with. I visited in Alabama our German prisoner of war camp in Pickens County. People were given a great deal of freedom.

They still have many items that they have there. And it was a different kind of prisoner than we have today.

SEN. FEINSTEIN: Thank you, Senator Sessions.

Senator Durbin.

SEN. RICHARD DURBIN (D-IL): Thank you, Madame Chair.

Mr. Engel, many of us were troubled to learn that CIA officials destroyed videotapes of detainees being subject to the so-called "enhanced" interrogation techniques. These techniques reportedly included forms of torture like waterboarding. According to some media reports, the Justice Department attorneys advised the CIA not to destroy these videos. Was the Department of Justice aware of the existence of these tapes prior to their destruction?

MR. ENGEL: Well, let me say what I can say, because the Department of Justice, as you know, has initiated a preliminary inquiry, which is being run by Ken Wainstein of the National Security Division in conjunction with the CIA's inspector general's office. And I also know that General Hayden is going to be testifying this afternoon.

I am not aware of my office being involved in providing legal advice on the subject, but you know, I've seen the press reports which suggest that some of these issues may have been discussed years ago. You know, and I think Mr. Wainstein's investigation, or the preliminary inquiry, will bring a lot of these facts to light.

SEN. DURBIN: Specific question: was the Department of Justice aware of the existence of these tapes before they were destroyed?

MR. ENGEL: Sitting here, I don't have an answer for that, Senator.

SEN. DURBIN: Did the Department of Justice advise the CIA not to destroy these tapes?

MR. ENGEL: Again, likewise. I've seen what's in the press reports, but sitting here, I don't have an answer, though --

SEN. DURBIN: When General Hayden said the destruction was in line with the law, do you have any indication or knowledge of the law as it was given to him or the standards that he was asked to follow in destroying these tapes?

MR. ENGEL: Again, sitting here, I am not aware.

SEN. DURBIN: General Hartmann, you said that the military commissions are transparent, provide a window through which the world can view military justice in action. You also claimed military commission defendants have the right to review and respond to all evidence. In the pending case of Omar Khadr, defense lawyers have been ordered not to tell the defendant or anyone else who the witnesses are against him. How can you call a system that relies on secret evidence transparent?

GEN. HARTMANN: We don't rely on secret evidence, Senator. Every piece of evidence that will go to the finder of fact, to the jury, will be reviewed by the accused or his counsel.

SEN. DURBIN: You are a graduate of law school and you know that confronting your accuser is part of our system of justice. In this situation, Mr. Khadr is not even given the identity of the witnesses who are testifying against him.

GEN. HARTMANN: There may be some limited cases in which that applies, Senator. However, in that -- the order to which you are referring says below it "except as provided below." In that order, it specifically said at 21 days before trial, the prosecution has the burden of explaining why that part of the order that you're focused on is to continue.

And if the prosecution does not do that, then all the witnesses are made available to the counsel and to the accused.

SEN. DURBIN: Well, the presumption is just the opposite, as I understand it. The presumption is that the prosecution -- the government -- can withhold the identity of the witness.

GEN. HARTMANN: No, I would say the presumption is just the opposite; that unless the prosecution makes an

affirmative effort, these witnesses will be disclosed to the accused.

SEN. DURBIN: And has that happened?

GEN. HARTMANN: We haven't gotten to 21 days before trial, sir.

SEN. DURBIN: I see.

Well, let me ask you this. In the six years that Guantanamo has been in operation for this purpose, how many convictions have taken place of the 775 people who've been detained there?

GEN. HARTMANN: One.

SEN. DURBIN: Would you repeat that for the record?

GEN. HARTMANN: One.

SEN. DURBIN: And was that not a plea bargain?

GEN. HARTMANN: It was a pretrial agreement, yes, sir.

SEN. DURBIN: And it involved a sentence of what duration?

GEN. HARTMANN: I believe it was a sentence of seven years, with everything above nine months deferred.

SEN. DURBIN: So it ended up nine months detention; correct?

GEN. HARTMANN: That may be the case, sir.

SEN. DURBIN: And this gentleman, Mr. Hicks, I believe, was a low-level operative?

GEN. HARTMANN: I don't -- I wouldn't categorize it, sir.

SEN. DURBIN: Isn't it interesting that in six years, with 775 detainees who have been characterized here as war criminals, bloodthirsty killers, that only one conviction has taken place? How do you explain that?

GEN. HARTMANN: I cannot explain it. There are reasons with regard to various legal delays. However, I am as disappointed in that as you are, and I am, with the various members of the Office of Military Commission, trying to move the process much more rapidly, Senator.

SEN. DURBIN: Somewhere in your heart of hearts, in those dark moments at night when you reflect on what you do, have you thought perhaps we're doing this the wrong way; maybe we don't have the people who are most threatening to the United States? Isn't the fact that we've released 470 of these detainees an indication that maybe we got it wrong in over half the cases in bringing them to Guantanamo?

GEN. HARTMANN: In my heart of hearts, Senator, I'm convinced we've got the right process with the military commissions. It is literally unprecedented the rights that we are making available to people we call alleged terrorists. Unprecedented.

SEN. DURBIN: Well, let me talk to you about some of those rights. Four hundred seventy of these people were arrested, transported, detained and interrogated for months and years and then released because we couldn't charge them with one single crime or one thing that they'd done wrong. Is that not correct?

GEN. HARTMANN: I don't know, Your -- I don't know, Senator. My focus is on the 80 to 90 people we intend to

try for war crimes trials with the military commissions process.

SEN. DURBIN: Well, that's a good focus. But I still wonder what happened to 470 people who took a little tour through Guantanamo for years and now go home to explain to the rest of the world what American justice is all about. Isn't that part of your concern as well?

GEN. HARTMANN: The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record.

SEN. DURBIN: So Senator Kyl talked about having to call in American soldiers as witnesses here, take them off the battleground, he said. But just how many of the people, those 775 that have been detained at Guantanamo, were in fact picked up off the battlefield?

GEN. HARTMANN: Your Honor -- Senator, that's outside of my area. That's in the --

SEN. DURBIN: Well, I'll tell you what Professor Denbeaux tells us. He tells us, according to his report, when President Bush says these people at Guantanamo have been picked up off the battlefield, the Defense Department has accused only 21 detainees of having ever been on the battlefield -- 21 out of 775. He'll testify as well the Department of Defense has alleged that only one -- only one detained in Guantanamo -- was captured on a battlefield. Do you have any evidence otherwise?

GEN. HARTMANN: I don't.

MR. ENGEL: I mean, Senator, I think it's important for the United States to be able to detain members of al Qaeda, members of the Taliban, whether we get them on a literal battlefield outside of Tora Bora or whether we get them in a city, you know, thereafter -

SEN. DURBIN: I don't argue with that premise. I think your premise is correct.

But this notion that somehow we're going to devastate our military by calling our soldiers off the battlefield to show up at these commissions to testify on behalf of the government is frankly not supported by the clear evidence here that these are not battlefield combatants that are under arrest.

MR. ENGEL: Well, again -- and you know, and I would defer to General Hartmann -- I mean, if we look only at the hearing last week in the Khadr case, we did have military officers appearing and testifying about the circumstance under which Mr. Khadr was apprehended --

SEN. DURBIN: Is there anything wrong with that?

MR. ENGEL: And there's nothing wrong with that, and the military commissions --

SEN. DURBIN: Isn't that part of a system of justice?

MR. ENGEL: Well, but we're talking here about two different things. We're talking about a military commissions process, and when we prosecute people, we do believe, if feasible, that we should be able to get the witnesses into the court, which will not always be feasible.

SEN. DURBIN: General Hartmann --

MR. ENGEL: But if we're talking about the detention of hundreds of enemy combatants, and if we're asking -- federal habeas courts in the United States are to conduct these hearings, these are quite significant burdens that, you know, raise serious questions.

SEN. DURBIN: My last question. General Hartmann --

GEN. HARTMANN: Senator, just to add to that, we did bring people off the battlefield last week to testify and to allow the accused to witness them in the courtroom, to confront them and to cross-examine them.

SEN. DURBIN: Senator Kyl suggests that that's an unreasonable burden on our government. Do you believe it is?

GEN. HARTMANN: We were happy to do it, Your Honor.

SEN. DURBIN: I'm glad you were.

General Hartmann former Secretary of State Colin Powell has stated, quote, "We have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like military commissions. We don't need it, and it's causing us far more damage than any good we get for it." That was a statement, a quote, from General Colin Powell.

What is your opinion with regard to that statement?

GEN. HARTMANN: With regard to that statement, I would say that the military commissions are an honor to the American justice system. You should be very proud of what was written in the Military Commission Act, what is in the manual for military commissions, what is in the regulations, and about those people I described at the beginning of my testimony, senator -- those people who enforce the rights, five defense counsel at the table of Hamdan.

SEN. DURBIN: I would just say to you --

GEN. HARTMANN: He's given access to counsel. He's given the right to cross-examine --

SEN. DURBIN: General Hartmann, please --

GEN. HARTMANN: Those are the basic rights that are made available through the American justice --

SEN. DURBIN: Every time we question Guantanamo and its use, you and others say we are somehow questioning the integrity of the men and women in uniform. That is not a fact. None of us have, and none of us will. They are good and brave soldiers, and they are doing their duty for their country.

But the policymakers have to be held accountable for a situation at Guantanamo which has become an embarrassment for the United States around the world, as General Powell stated, very, very clearly.

GEN. HARTMANN: Senator --

SEN. DURBIN: I respect him as well, as a man who served his country.

GEN. HARTMANN: Yes, sir. The rights that are available are written down. The rights that are available are written down. They are rules of evidence that virtually mirror the military rules of evidence. The people that are enforcing those rights -- the judge, the prosecutor, the defense counsel -- are the same people who take the oath of office on other things. They are very similar.

SEN. DURBIN: But one of the most fundamental rights under justice of habeas corpus, to know why you're being detained, to know what you're charged with, and to confront your accusers, you can't argue to me that that is being protected. What I will argue to you --

SEN. FEINSTEIN: Senator, you are doing a Schumer. You are two- and-a-half minutes over your time. (Laughter, applause.) Oh, no, no, no, please.

GEN. HARTMANN: I will say in response to that, your -- Senator -- I keep calling you "Your Honor" -- the process in the courtroom is extraordinarily fair. The appellate process is unprecedented.

SEN. FEINSTEIN: Senator Graham, welcome.

SEN. LINDSEY GRAHAM (R-SC): Thank you, General. I would agree that we're finally getting this right, but I hope you don't ignore the fact that we had to pull teeth to get here, you know. One reason we haven't prosecuted anybody is we had some pretty really weird theories that the courts kept knocking down, and now we're back to a more traditional way of doing business. And I want to applaud the fact that we do have dedicated men and women who are serving their country well as prosecutors, defense attorneys and military jurors, but I'm not going to sit here and just ignore three-and-a-half years of trying to sell things that nobody would buy. Well, now we've about got it right, and I'm willing to make it better if we can.

Bottom line for me is that the big distinction between us and anyone else in the world, Mr. Engel, is that we consider the people we're fighting enemy combatants, not common criminals. Is that correct?

MR. ENGEL: I think that's right.

SEN. GRAHAM: I don't think there's another jurisdiction in the world that takes al Qaeda suspects and tries them under the theory of the law of armed conflict. We do. The reason we do is because of September 11th, 2001. This country has to reconcile itself as to how we want to proceed. Did the people who attack us, were they a group of common criminals afforded due process of law under domestic criminal law? If that's the case, nothing we do at Guantanamo Bay can move forward, you're right, Senator Durbin.

That is not my theory. My theory is that we've been in an undeclared state of war with un-uniformed combatants who wish to kill us all if they could. And when we capture one of them, we have the obligation of a great nation to follow the law of armed conflict, which is very robust, has a rich history -- which I have played a small role in, insignificant as it may be, I am proud of it -- and we've tried to bastardize that, and we've tried to change it, and we've tried to cut corners, and we've paid a price.

Now, as I understand military law, that once you capture somebody and their status is to be determined, that is a military decision, not a federal judge's decision, under the Geneva Convention. Is that correct, General Hartmann? Either one of you.

MR. ENGEL: I think that's exactly right.

SEN. GRAHAM: Under Article V of the Geneva Convention, it requires, if there's a question of status, whether or not you're an unlawful enemy combatant, a traditional prisoner or war or an innocent civilian, a competent tribunal will be impaneled to make that decision. Is that not what the Geneva Convention says?

MR. ENGEL: That's exactly right.

SEN. GRAHAM: Now, based on that, we have taken Article -- Regulation 190-1, I believe it is, the Army regulation --

MR. ENGEL: Dash-eight.

SEN. GRAHAM: -- dash-eight -- and we've enhanced it.

Now, the question for people like me is, should you provide military lawyers at the Combat Status Review Tribunal, something I wanted to do three years ago? I wish I had done it now, because the reason I wish I had done it is, even though it's unprecedented, in traditional wars we assumed the war would be over when the powers met and declared an end to it. Do either one of you believe there will be a surrender ceremony in your lifetime regarding the war

on terror?

GEN. HARTMANN: I'm unable to answer that.

SEN. GRAHAM: Yeah. I will answer it for you: No. Never in my lifetime will some politician declare this war over and let everybody at Guantanamo Bay go. That's not going to happen. So what we need, I think, gentlemen, is an understanding we're at war but it's a different kind of war.

And to General -- Senator Sessions' comment, how did we let these people go, well, what we have at Guantanamo Bay is an initial decision-making process by the military, "You're an enemy combatant, unlawful enemy combatant." And every year, Senator, we look at the case anew. We look for three things. Is there any new evidence to change your status? Do you still have intelligence value that would be useful to the war? And third, are you a threat? And a board of officers meets every year, and you can have new input from the detainees' point of view along those three lines.

And we have let over 400 people go using that annual review board process. Unfortunately -- you're right, Senator Sessions -- 30 have gone back to the fight. We are at war.

SEN. SESSIONS: Thirty have been caught.

SEN. GRAHAM: Thirty have been caught, and who knows what the others are doing.

But having said that, Senator Sessions, I think it is incumbent upon us to have a hybrid process, because if we don't, the initial decision is a de facto life sentence. And I am proud of this process.

And when it comes to your side, General Hartmann, if there is an allegation that the evidence in question is tainted because it's a result of torture, it is my understanding the military judge must exclude any evidence that violates the torture statute; is that correct?

GEN. HARTMANN: Any statement obtained through torture is inadmissible.

SEN. GRAHAM: And as to an allegation of coercion, which our enemy is trained to allege -- al Qaeda operatives are trained into the American legal system. They know exactly what to say. It's my understanding at Guantanamo Bay the military judge will have a hearing regarding the allegation of coercion and will decide whether or not the evidence is reliable and should go to the finder of fact. Is that correct?

GEN. HARTMANN: Reliable, probative, and in the best interest of justice.

SEN. GRAHAM: And that judicial decision by that judge can be appealed to the civilian courts?

GEN. HARTMANN: That's correct. It can be appealed to the civilian courts after going through the military process.

SEN. GRAHAM: It is my understanding that every detainee at Guantanamo Bay, Senator Durbin, will have their day in federal court; that every decision by the military will be reviewed by the D.C. Circuit Court of Appeals, and that is ongoing right now.

The difference I have with you, my friend, is I don't want to turn over to the federal judges in this country the ability to determine the enemy for us in the first instance, because they're not trained to do so. That is a military decision. But I do not mind any judge in this -- any appellate court in this land looking over the shoulder of these gentlemen here to make sure they get it right. I think that is the sweet spot for this country.

Now, when it comes to whether or not there's political influence on these trials, Senator Feinstein, I want to get to the bottom of this. Now, I know Mo Davis (sp) and I know you. I've been an Air Force JAG for 25 years. I respect

you both. And I want to find out the best I can what's going on down there.

But I would like to just tell my good friend Senator Durbin, if we close Guantanamo Bay -- and maybe we should -- where do we send them and what do we do with them? And the only thing I ask of my colleagues is that as we try to correct the process and improve it -- and I think there's ways that we can go forward to make it better -- please don't lose sight that the people that we're dealing with, the truly guilty, are warriors, not domestic common criminals. And those who've been caught up in this net of trying to find out who the enemy is, some of them are probably either on the fringes or just at the wrong place at the wrong time, and that's been the nature of war as long as man has been engaged in war. What I'm looking for is not the outlier case where they went back to killing Americans -- because if you do that, nobody ever gets released -- or the idea that they're all victims and just at the wrong place at the wrong time. All we can hope to find as a nation is a process that will be flawed, but still adheres to our values. And I think we're very close to that process being correct in terms of us being at war.

Now, one of the issues facing this country is waterboarding. General Hartmann, do you believe waterboarding violates the Geneva Convention?

GEN. HARTMANN: I was asked that earlier, Senator. And with regard to this entire issue, we start with the following premise: torture is illegal in the United States.

SEN. GRAHAM: We have a downed airman in Iran. We get a report that the Iranian government is involved in the exercise of waterboarding that downed airman on the theory they want to know when the next military operation may occur. What would be the response of -- what should be the response of the uniformed legal community regarding the activity of the Iranian government?

GEN. HARTMANN: I'm not equipped to answer that question, Senator.

SEN. GRAHAM: You are.

GEN. HARTMANN: I will tell you the answer to the question that you asked in the beginning, Senator, and that --

SEN. GRAHAM: You mean you're not equipped to give a legal opinion as to whether or not Iranian military waterboarding -- secret security agents waterboarding downed airmen is a violation of the Geneva Convention?

GEN. HARTMANN: I am not prepared to answer that question, Senator. I am --

SEN. GRAHAM: Thank you. I have no further questions.

SEN. FEINSTEIN: Thank you very much, Senator. That completes this round. I'd like to just quickly make a brief comment.

I think Senator Sessions and Senator Graham have pointed out some interesting things, which indicate a real dichotomy in this situation that all of us have to deal with.

The first is the undeclared state of war, which is this situation. Senator Sessions pointed out that there is no requirement to try detainees toward the -- during the course of hostilities. Of a declared war, that is true. The president himself has said this could go on for a generation. And if you look at the history of terrorism in the world, it is likely to go on. Ergo, what happens to people who are not charged, who remain in custody for what period of time?

I'm going to ask and will send you in writing, both of you, a question. And that question will be, what is the government's plan to deal with the indefinite detention without charge of detainees for what may be decades? And I think we have to come to grips with that question. I think there has to be an answer. And if we need to legislate, we should.

With respect to Guantanamo and its closure, we've just done an inventory of supermax beds, and if there are 305 detainees currently, then we can add up those supermax beds and come to 326 available beds today in the United States between maximum security military brigs and maximum security federal prisons. So I think we have to come to grips with both of those and whether Guantanamo, left the way it is over the next half-decade, decade, really redounds to the credibility of this nation or whether it destroys that credibility.

And here we have different opinions. There are those that believe it does and there are those of us that believe it does not. And I think that's a real question. So we will put this in writing to both of you, and we will follow up. So we will not forget, so please answer the questions.

Thank you very much. We appreciate that.

MR. ENGEL: Thank you, ma'am.

LOAD-DATE: December 12, 2007

Attachment C

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

JALS-ZA

17 September 2007

MEMORANDUM FOR THE DOD GENERAL COUNSEL

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

1. Appointment: A team was appointed in accordance with the DOD/GC memorandum dated 6 September 2007 to examine the role of the Legal Advisor to the Convening Authority of the Office of Military Commissions. The team was composed of BG Clyde J. Tate II, USA, team chief; Brig Gen Richard C. Harding, USAF, team member; CAPT Hal H. Dronberger, JAGC, USN, team member; and SSG [redacted] recorder. In accordance with the letter of appointment, the team was directed to conduct an assessment and make findings and recommendations regarding the organization, effectiveness, and proper role of the office of the Legal Advisor to the Convening Authority of the Military Commissions and its supervisory relationship over, and interaction with, the Office of the Chief Prosecutor for the Military Commissions. The team did not consider issues raised during the assessment that were outside the scope of its charter, specifically [redacted]

2. Background. This assessment was prompted by a complaint from Colonel Morris Davis, Chief Prosecutor, Office of the Military Commissions (OMC), that the Legal Advisor, OMC, exceeded his authority in dealings with the prosecutors within the Office of the Chief Prosecutor responsible for the prosecution of the Non-High Value Detainees by, *inter alia*, requesting detailed information of pending cases, defining the sequence in which cases would be brought forward, implementing an advocacy training program for prosecutors in the OMC, bringing in outside military counsel to review the cases, and expressing an intent to personally conduct pretrial agreement negotiations with defense counsel.

3. Assessment Process: The assessment team convened 7-10 September 2007.

a. The team obtained statements from the following persons:

1. Brig Gen Thomas Hemingway, USAF (Ret.), Legal Advisor to the Appointing Authority and later Legal Advisor to the Convening Authority, Aug 03 – May 07 (Tab L)

2. Brig Gen Thomas Hartmann, USAF, Legal Advisor to the Convening Authority, Jul 07 – present (Tab M)

3. Col Morris Davis, USAF, Chief Prosecutor, Office of the Chief Prosecutor, OMC (Tab N)

4. [redacted] Prosecutor, Non-High Value Detainees (Tab O)
5. [redacted] Deputy Chief Prosecutor, Non-High Value Detainees (Tab P)
6. [redacted] Deputy Legal Advisor (Tab Q)

b. The team spoke for background with the following persons not directly involved in the complaint:

1. The Honorable Susan J. Crawford, Convening Authority, OMC
2. [redacted] Deputy Chief Prosecutor, High Value Detainees, OCP

c. The team examined the following documents:

1. Military Commissions Act of 2006, PL 109-366, dated 17 Oct 06
2. Manual for Military Commissions, 18 Jan 07
3. Regulation for Trial by Military Commissions, 27 Apr 07
4. Memo, 27 Aug 07 (Judge Crawford) (Tab C)
5. Memo, 30 Aug 07 (Col Davis) (Tab D)
6. Memo, 30 Aug 07 [redacted] (Tab E)
7. Addendum to 23 Aug 07 Complaint, 29 Aug 07 (Col Davis) (Tab F)
8. Memo, 23 Aug 07, (Col Davis) (Tab G)
9. Emails provided to the team by Col Davis:
    a. Email, dated 17 Aug 07, 4:24 p.m., Subject: Question (Tab H)
    b. Email, dated 17 Aug 07, 10:25 a.m., Subject: Security Concerns (Tab I)
    c. Email, dated 18 Jul 07, 11:48 a.m., Subject: RE: Request for Assistance (Tab J)
    d. Email, dated 13 Jul 07, 12:50 a.m., Subject: Case Summaries (Tab K)

4. Findings:

a. The OMC, and specifically the Office of the Legal Advisor and the Office of the Chief Prosecutor, consists of dedicated, bright, and skilled personnel committed to their respective missions. Each person with whom we dealt in those offices brings a passion to their work, is totally dedicated to the task at hand, and is focused on the very challenging mission assigned them. All have willingly made personal and professional sacrifices in support of this historic undertaking. How they approach and define their roles in this undertaking, however, is a matter of disagreement between the Legal Advisor and the Office of the Chief Prosecutor.

b. In his complaint, Colonel Morris Davis, Chief Prosecutor, OMC, maintains that the Legal Advisor to the OMC has a narrow charter: "The Legal Advisor's sole duty is to provide legal advice to the Convening Authority." Davis Statement, page 26, line 21-22. Colonel Davis did not believe that the role of the Legal Advisor included oversight of the performance of his duties. Davis Statement, page 35-36, line 15-2. By contrast, Brigadier

General Thomas Hartmann, Legal Advisor to the Convening Authority, OMC, perceives a broader role for the Legal Advisor. He believes the role consists of "two elements": (1) giving legal advice to the Convening Authority; and (2) supervising the Chief Prosecutor. Hartmann Statement, page 2-3. These contrasting views underlie Colonel Davis' complaint.

c. Neither Colonel Davis nor General Hartmann were given appointing orders at the time they reported for duty with the OMC. Davis Statement, page 12, line 11-16; Hartmann Statement, page 2-3, line 11-5. Brigadier General Thomas Hemingway, who was General Hartmann's predecessor as Legal Advisor to the Convening Authority, also did not receive an appointing order. Hemingway Statement, page 3, line 7-19.

d. General Hemingway viewed his role as being similar to the staff judge advocate for a military convening authority. Hemingway Statement, page 3, line 17-18. This comports with General Hartmann's views (page 27, lines 14-15) and the guidance provided by the Rules for Military Commissions (RMC) 103(a)(15).

e. According to RMC 103(a)(15), the Legal Advisor to the Convening Authority of the Office of Military Commissions is "an official appointed by authority of the Secretary of Defense who fulfills the responsibilities of that position, as delineated in [the Manual for Military Commissions], and otherwise provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the [Uniform Code of Military Justice]."

f. The Legal Advisor assists the Convening Authority of the OMC in carrying out her duties under the Military Commissions Act (MCA) of 2006 and the rules and regulations promulgated pursuant to that Act. As General Hartmann described these duties, the Legal Advisor gives "advice to the Convening Authority based upon a review of the charges and charge sheet that are presented by the prosecutor's office, and the goal there is to determine whether there is jurisdiction, whether a crime has been committed – a war crime has been committed under the MCA and whether there is probable cause to proceed with that." Hartmann Statement, page 3, line 8-16.

g. Generals Hemingway and Hartmann also believe that the Legal Advisor may be involved in the pretrial agreement process. In fact, RMC 705(d) states, "Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, *the legal advisor* (emphasis added), convening authority, or their duly authorized representatives." According to this, the Legal Advisor may speak to defense counsel and negotiate possible terms. Indeed, General Hemingway did just that when he negotiated a pretrial agreement with [redacted] in the Hicks case. Hemingway Statement, page 7-8. Likewise, General Hartmann believes that he can initiate, negotiate, and conclude a pretrial agreement in a military commission case. Hartmann Statement, page 16-17, line 13-8.

h. Colonel Davis contends that since the MCA does not specifically refer to the Legal Advisor, the working relationship between the Chief Prosecutor and the Legal Advisor in the Office of Military Commissions is not similar to the working relationship between the trial counsel and the staff judge advocate in military commands. Davis Statement, page 13-14, line 17-3. Colonel Davis further believes that the "reporting" relationship of the Chief Prosecutor to the Legal Advisor is limited to preparing the officer performance report evaluation, but does not include supervisory responsibilities. Davis Statement, page 46, line 6-15. When asked who he thought he worked for, Colonel Davis said, "I think I work for the Secretary of Defense, but I don't know." Davis Statement, page 9, line 17-19.

i. As previously mentioned, General Hartmann views his supervisory responsibilities more broadly. In support of that belief, General Hartmann cites section 8-6 of the Regulation for Trial by Military Commissions (hereinafter Regulation). Hartmann Statement, page 3, line 14-16. Regulation 8-6 describes the relationship between the Chief Prosecutor and the Legal Advisor: "The Chief Prosecutor shall report to the legal advisor to the convening authority." The term "report" is also defined in Regulation 8-6: "Unless stated otherwise, the person to whom an individual "reports" . . . shall be deemed to be such individual's supervisor. . . ."

j. General Hartmann sees the Legal Advisor's role as being the supervisor of the Chief Prosecutor under section Regulation 8-6 (b) and (c). Hartmann Statement, page 3, line 14-16.

k. Colonel Davis contends that Section 949b of the MCA prevents General Hartmann, in his role as Legal Advisor, from unduly influencing his exercise of prosecutorial discretion, especially in regard to the particular cases that are tried before military commissions. Davis Statement, page 35, line 2-9. Subsection 949b(a)(2)(C) prohibits any person from coercing or, by any "unauthorized means", influencing "the exercise of professional judgment by trial counsel or defense counsel."

5. Assessment of the Legal Advisor's Role:

a. To provide legal advice to the Convening Authority, the Legal Advisor must have substantial personal knowledge of the charges against individuals to be tried by Military Commissions as well as an understanding of the relevant evidence supporting those charges.

(1) The Legal Advisor to the Convening Authority is more than just a passive actor in the Commission's process; he must take affirmative steps to educate himself about the identity and background of the accused, the strengths and weaknesses of the preferred offenses, the particular evidence to be used against the accused at trial, and how, if at all, the use of that evidence at trial will affect national security.

(2) To properly perform this role, the Legal Advisor must have access to attorneys, documents, and other relevant information in the possession of the Office of the Chief Prosecutor, OMC. Without an appropriately coordinated effort between the Chief Prosecutor and the Legal Advisor, the Convening Authority will lack information necessary to determine the course of potential prosecutions.

b. The Legal Advisor to the Convening Authority of the OMC is the reporting senior for the Chief Prosecutor of the Office of Military Commissions. This includes the duty to provide performance appraisals of the Chief Prosecutor and to supervise the effectiveness, efficiency, and fitness of the Chief Prosecutor. Additionally, the Legal Advisor must remain informed about the underlying facts and supporting evidence necessary for trial of accused by military commissions. This requires a close working relationship between the Legal Advisor and the Office of the Chief Prosecutor. Nevertheless, the Legal Advisor must diligently avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as a trial counsel. (See also RMC 406 and 1106 for a discussion of the Legal Advisor's role in providing advice to the Convening Authority at different stages of an OMC proceeding.). This is especially true when the Legal Advisor is involved in pretrial agreement negotiations.

c. Col Davis argues that the failure of the MCA to specifically outline a supervisory role for the Legal Advisor over the OCP in a fashion similar to the supervisory role of a SJA over a trial counsel means that no such role can be attributed to a Legal Advisor in the OMC; this argument is without merit. The argument fails to consider that the Secretary has authority under the MCA (949a(c)) to prescribe regulations and he has done so in Regulation 8-6 that authorizes the Legal Advisor to supervise the Chief Prosecutor.

d. The language of 949b of the MCA focuses on coercion or "unauthorized" influence over the trial counsel's professional judgment. But other pertinent rules and regulations, especially Regulation 8-6, specifically authorize the exercise of supervision by the Legal Advisor over the Chief Prosecutor. None of the prosecutors within the Office of the Chief Prosecutor were subject to unauthorized influence or coercion by General Hartmann. The fact that the MCA is silent in regard to the supervisory role of the Legal Advisor over the OCP does not mean that the Secretary of Defense lacked the authority when promulgating the Manual for Military Commissions to authorize the Legal Advisor to supervise the OCP, and he did so in Regulation 8-6. Therefore, the team concluded that General Hartmann did not violate the MCA, 10 U.S.C. § 949b, in that his actions as supervisor did not attempt to "coerce" or "in an unauthorized fashion, influence" the professional judgment of a trial counsel.

e. While there was disagreement about the nature of the reporting relationship between the Chief Prosecutor and the Legal Advisor, there was no indication that the organization of the OMC contributed to the disagreement or to this complaint. While we did not find reason to doubt the effectiveness of the LA or the OCP, the current tensions, left

unabated, will likely impact adversely the effectiveness of both offices and, potentially, the OMC.

6. Recommendations:

a. Provide an appointing order for the Convening Authority, the Legal Advisor, the Chief Prosecutor, and the Chief Defense Counsel.

b. Describe the reporting and supervisory relationships of these officials within the appointing orders.

c. While the Legal Advisor is authorized to initiate pretrial negotiations, he should do so with careful consideration to avoid disqualifying himself to serve further as the Legal Advisor in that case.

d. The Legal Advisor and counsel within the OCP should be briefed on their roles, responsibilities, and supervisory relationships, and their questions and concerns should be addressed consistent with this Assessment.

Clyde Tate BG, USA

CLYDE J. TATE II
BG, USA

Attachment D

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

OCT - 3 2007

MEMORANDUM FOR LEGAL ADVISOR TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Appointment of Brigadier General Thomas Hartmann as the Legal Advisor to the Convening Authority

Effective July 1, 2007, you were appointed Legal Advisor to the Convening Authority (Legal Advisor). As such, you serve in the Office of the Convening Authority and report to the Deputy General Counsel (Legal Counsel) of the Department of Defense (DGC (LC)).

The duties and responsibilities of the Legal Advisor are as set forth in the Manual for Military Commissions and the Regulation for Trial by Military Commissions, and as otherwise directed by the DGC (LC). The duties of the Legal Advisor include providing legal advice and recommendations to the Director of the Office of the Convening Authority (Director) and the Convening Authority, and supervising the Chief Prosecutor. While supervising the Chief Prosecutor you will insure that you maintain the ability to objectively and independently provide cogent legal advice to the Director and the Convening Authority.

The DGC (LC) shall directly supervise you in the performance of your duties as Legal Advisor. The DGC (LC), as your reporting senior, shall fulfill all performance evaluation responsibilities of you as the Legal Advisor normally associated with the function of a direct supervisor in accordance with your Military Service's performance evaluation regulations.

10-3-07

cc:
General Counsel of the Department of Defense
Convening Authority for Military Commissions
Director of the Office of the Convening Authority
Deputy General Counsel (LC)

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

OCT - 3 2007

MEMORANDUM FOR CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Appointment of Colonel Morris D. Davis as the Chief Prosecutor for Military Commissions

In August 2005 you were appointed Chief Prosecutor, Office of Military Commissions. Following the enactment of the Military Commissions Act of 2006 (MCA), the Secretary of Defense reaffirmed this appointment (Memorandum for Deputy Secretary of Defense, Implementation of the Military Commissions Act of 2006, November 17, 2006).

The duties and responsibilities of the Chief Prosecutor are as set forth in the Military Commissions Act of 2006, Manual for Military Commissions (MMC), the Regulation for Trial by Military Commissions (Regulation), and as otherwise directed by the Chief Prosecutor's reporting senior. The duties of the Chief Prosecutor include the supervision of the overall prosecution efforts under the MCA, the MMC, and the Regulation, and the proper management of the personnel and resources of the Office of the Chief Prosecutor.

The Chief Prosecutor reports to the Legal Advisor to the Convening Authority (Legal Advisor), consistent with the authorities cited above. The Legal Advisor shall directly supervise you in the performance of your duties as Chief Prosecutor. The Legal Advisor, as your reporting senior, shall fulfill all performance evaluation responsibilities associated with the function of a direct supervisor in accordance with your Military Service's performance evaluation regulations.

Gordon England
10-3-07

cc:
General Counsel of the Department of Defense
Convening Authority for Military Commissions
Legal Advisor to the Convening Authority

Attachment E

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

MAR 3 2008

MEMORANDUM FOR LCDR Brian Mizer, Detailed Defense Counsel of Salim Ahmed Hamdan

SUBJECT: U.S. v. Hamdan: Response to Request for Additional Hours for Psychiatric Expert Witness

I have received your 12 February 2008 request for additional funding for Dr. Emily Keram in the amount of $33,500. After careful consideration, I deny your request at this time. On 18 September 2007, I requested additional justification before I approved a previous request for more hours of psychiatric evaluation and expert testimony at government expense. Specifically, I requested that you justify your request in light of the factors set forth in *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), provide a brief discussion to satisfy Sections IV and VII of the Military Commissions Rules of Evidence, and offer a detailed evaluation plan. I am aware of no further information from you on this.

Your current request seeks approval of expenditures to support new defense theories, but does not provide the level of detail I previously requested. Your request does not clarify how the expert could outline the alleged punitive nature of confinement; nor does it allude to the nature of any allegedly coercive interrogation techniques. Since your request does not contain sufficient information, I am unable to grant it at this time.

Susan J. Crawford
Convening Authority
For Military Commissions

Attachment F

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

12 March 2008

MEMORANDUM FOR LCDR Brian Mizer, Detailed Defense Counsel

SUBJECT: *U.S. v. Hamdan*: Response to Request for Expert Witness (Professor Williams)

I have reviewed your 6 March 2008 request to employ Professor Brian Williams as an expert witness in light of the Military Judge's Ruling on Motion to Dismiss (Unlawful Combatant Status). I conclude that your request makes an insufficient showing that Professor Williams' proposed testimony is relevant and necessary under Rules for Military Commission 703(b)(1) and (d).

According to your expert witness request, Professor Williams would testify that Taliban and Ansar forces were under the control of the Taliban government, did not direct hostilities toward protected persons, and were conventional fighting forces not involved in terrorism. The request states that Professor Williams' testimony will be relevant to rebut allegations in the charge sheet "by showing that [the] nature and character of hostilities surrounding the siege of Kandahar and the particular characteristics of the enemy fighting forces involved in such combat were within generally accepted criteria for lawful combat...."

In light of the Military Judge's ruling of 7 March 2008, the request fails to tie Professor Williams' proposed testimony to a material issue in the case. According to the ruling, in order to raise the defense of lawful combatancy, "Hamdan must show some evidence that he was a member of the armed forces or a regular militia of a nation, that he wore a uniform or some other distinctive insignia or mark, that he carried arms openly, and that he and the military organization of which he was a part conducted their operations in accordance with the law of war." Ruling on Motion to Dismiss (Unlawful Combatant Status), at 2. The request does not address any of these factors. Additionally, this appears to be a factual issue rather than one requiring expert testimony. Without evidence that Hamdan was associated with the Ansars, expert testimony regarding the Ansars does not appear to be relevant.

I encourage you to continue to pursue your request and to follow up with any concerns.

Susan J. Crawford
Convening Authority
For Military Commissions

Attachment G

3 of 3 DOCUMENTS

Federal News Service

February 11, 2008 Monday

SECTION: DEPARTMENT DEFENSE BRIEFING

LENGTH: 5260 words

HEADLINE: DEFENSE DEPARTMENT BRIEFING;
BRIEFER: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISOR TO THE CONVENING AUTHORITY IN THE DOD OFFICE OF MILITARY COMMISSIONS;
LOCATION: DOD BRIEFING ROOM, THE PENTAGON, ARLINGTON, VIRGINIA

BODY:

DEFENSE DEPARTMENT BRIEFING BRIEFER: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISOR TO THE CONVENING AUTHORITY IN THE DOD OFFICE OF MILITARY COMMISSIONS LOCATION: DOD BRIEFING ROOM, THE PENTAGON, ARLINGTON, VIRGINIA TIME: 11:00 A.M. EST DATE: MONDAY, FEBRUARY 11, 2008

BRYAN WHITMAN (Pentagon spokesman): Well, good morning and welcome. Today, we have reached a significant legal milestone in the history of our operations at Guantanamo. As you know, over the past several years we've been moving forward with the military commission process, which holds accountable individuals accused of alleged war crimes. Since 2004 we've had dozens of pretrial hearings that have been held on a total of 12 detainees at military commissions. Under the Military Commissions Act of 2006 one was found guilty of material support to terrorism last year. Two are currently facing trial dates in the next several months, and several are in various early stages of the commission process.

But here today we have to announce new sworn charges and to discuss the military commissions process and these new charges today is Air Force Brigadier General Thomas Hartmann, who is the legal advisor to the Convening Authority for the Office of Military Commissions.

And with that, General, why don't I let you walk them through this.

GEN. HARTMANN: Good morning.

Today, the Convening Authority for Military Commissions received sworn charges against six individuals alleged to be responsible for the planning and execution of the attacks upon the United States of America, which occurred on September the 11th, 2001.

These attacks resulted in the death of 2,973 people, including eight children.

These charges allege a long-term, highly sophisticated organized plan by al Qaeda to attack the United States of America.

The accused are Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa

Ahmed Adam al Hawsawi and Mohammed al Kahtani.

Now that sworn charges have been received, the Convening Authority will review the charges and supporting evidence to determine whether probable cause exists to refer the case to trial by military commission.

The chief prosecutor has requested that the charges be tried jointly, and that they be referred as capital for each defendant. If the Convening Authority, Mrs. Susan Crawford, in her sole discretion, decides to refer the cases as capital, the defendants will face the possibility of being sentenced to death.

Each of the defendants is charged under the Military Commission Act with the crime of conspiracy and with the separate substantive offenses of murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism and material support to terrorism.

The first four defendants -- Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh and Ali Abdul Aziz Ali -- are also charged with the separate substantive offense of hijacking or hazarding an aircraft. All the charges are alleged to have been in support of the attacks on the United States of America on September the 11th, 2001. The charge sheet details 169 overt acts allegedly committed by the defendants and their uncharged co-conspirators in furtherance of the 9/11 events.

The charges allege that Khalid Sheikh Mohammed was the mastermind of the 9/11 attacks by proposing the operational concept to Osama bin Laden as early as 1996, obtaining approval and funding from Osama bin Laden for the attacks, overseeing the entire operation and training the hijackers in all aspects of the operation in Afghanistan and Pakistan.

Walid Bin 'Attash is alleged to have administered an al Qaeda training camp in Logar, Afghanistan, where two of the September 11th hijackers were trained. He is also alleged to have traveled to Malaysia in 1999 to observe airport security by U.S. air carriers to assist in formulating the hijacking plan.

Ramzi Binalshibh is alleged to have lived in the Hamburg, Germany, al Qaeda cell where three of the 9/11 hijackers resided. It is alleged that Binalshibh was originally selected by Osama bin Laden to be one of the 9/11 hijackers and that he made a martyr video in preparation for the operation. He was uncertain -- he was unable to obtain a U.S. visa and therefore could not enter the United States as the other hijackers did. In light of this, it is alleged that Binalshibh assisted in finding flight schools for the hijackers in the United States and continued to assist the conspiracy by engaging in numerous financial transactions in support of the 9/11 operation.

Ali Abdul Aziz Ali's role is alleged to have included sending approximately $127,000 to the hijackers for their expenses and flight training and facilitating the travel to the United States for nine of the hijackers.

Mustafa Ahmed Adam al-Hawsawi is alleged to have assisted and prepared the hijackers with money, Western clothing, travelers checks and credit cards. He is also alleged to have facilitated the transfer of thousands of dollars between the 9/11 hijackers and himself on September the 11th, 2001.

Mohamed al Kahtani is alleged to have attempted to enter the United States on August the 4th, 2001, through the Orlando International Airport, where he was denied entry. It is also alleged that al Kahtani carried $2,800 in cash and had an itinerary listing a phone number associated with al-Hawsawi.

Now that the charges have been sworn, they are being translated into the native language of each of the accused and served on them. I will evaluate the charges and all of the supporting evidence, along with the chief prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the convening authority for the Military Commissions.

She will review all of the information and make her independent decision whether to refer any or all of the cases to trial by military commission and, if so, whether to refer them as capital. Just as in military court martial practice, the pretrial advice must contain my legal conclusions, as well as whether the charges are supported by probable cause, are subject to jurisdiction by the military commission and should be tried by military commission.

The convening authority's final decision follows her review and consideration of my advice, the file provided by the prosecutors and any national security concerns. This is very similar to the sequence of events that occurs in military legal offices thousands of times a year, all around the world. If the convening authority refers the charges to trial, the prosecution bears the burden of proving the case beyond a reasonable doubt, which is the standard applied in all U.S. and military criminal trials.

In the military commission process, every defendant has the following rights. The right to remain silent and to have no adverse inference drawn from it. The right to be represented by detailed military counsel, as well as civilian counsel of his own selection, at no expense to the government. The right to examine all evidence used against him by the prosecution. The right to obtain evidence and to call witnesses on his own behalf, including expert witnesses. The right to cross-examine every witness called by the prosecution. The right to be present during the presentation of evidence. The right to have military commission panel of at least five military members determine his guilt by a two-thirds majority or, in the case of a capital offense, a unanimous decisions of a military commission composed of at least 12 members. The right to an appeal to the Court of Military Commission Review, then through the District of Columbia Circuit Court of Appeals to the United States Supreme Court.

These rights are guaranteed to each defendant under the Military Commission Act and are specifically designed to ensure that every defendant receives a fair trial, consistent with American standards of justice. The sworn charges, prepared by the joint team of military and Department of Justice prosecutors, highlight the tremendous cooperative efforts put forth by a multitude of government agencies, and reflect the continued progress of the military commissions.

And as the legal advisor to the Convening Authority, I remind you that the sworn charges are only allegations, only allegations of violations under the Military Commission Act, and that the accused are and will remain innocent unless proven guilty beyond a reasonable doubt.

Take your questions.

Q Sir, can you talk about the steps once more but with a timeframe? How soon would Crawford come back with her decision? When might trials start?

GEN. HARTMANN: There's no specific statutory time specified for Judge Crawford to review the file. We will receive the file, I expect, later in the week, and we will work on it very quickly, as quickly as we can with the entire staff focused on that.

I can't give you a specific time frame. When Judge Crawford completes her review and should she decide to refer the case to trial, then 30 days following that the accused will be arraigned, within 30 days the accused will be arraigned, and that means that they'll be read the charges in court and have the opportunity to enter a plea.

One hundred twenty days after Judge Crawford refers the case the court is assembled. That means the jury is brought in or the members -- the panel members, the military panel members. In between that time, there will certainly be discovery and motions as there have been in the past, so I expect that the 120 days will push out, but you will have -- after the arraignment, you will begin to see activity in the courtroom in terms of discovery and motions and that sort of thing.

As to when you would see what most people call a trial, the taking of evidence in front of a jury, I can't predict that at this time, but it will be certainly at least 120 days and probably be well beyond that -- beyond the time Judge Crawford makes her referral decision.

Q There'll at least be some court activity by May or June.

GEN. HARTMANN: We expect there to be some, but I -- don't hold me to that. I can't predict that.

Yes?

Q Sir, would you expect that KSM confession during his CSRT would be admissible given the fact that the CIA has been -- said that it used the waterboarding technique during the interrogation?

GEN. HARTMANN: All of the issues with regard to the admissibility of evidence and the decision of what evidence to produce and to try to bring into the court will be the decision of the prosecutors. That's not my decision. We have the rule of law. We have a Military Commission Act that's been determined by the Congress and the president, supported by the Department of Defense. We will follow the rule of law. We will apply the rule of law. And evidence with regard to the admissibility of evidence will be determined by the prosecution and the defense fighting out and a military judge making that decision.

Q Two questions. What about the destruction of evidence, as in the destruction of the KSM tape. And you used the word "jointly;" were you saying that all six are going to be tried together?

GEN. HARTMANN: Yes. All six are going to be tried together. The -- all six have been recommended for trial together. The chief prosecutor has recommended that all six be tried jointly. That decision remains in the discretion of Judge Crawford as to whether she will refer them jointly, and then that can also be challenged. Even if she should refer them jointly, that can still be challenged.

As to the destruction of evidence, I'm not familiar with the details of that, and again that matter will be decided in the courtroom, among the prosecutors and the defense, in front of the military judge. And they will decide the extent to which any possible destruction of evidence has an impact on these cases.

Q Two questions.

Can you clarify the death penalty issue? Do the sworn charges recommend that these be taken as capital cases? Or is that an option for you and Judge Crawford?

And I had a second question.

GEN. HARTMANN: The answer to both is yes. They recommend that they be referred to trial as a capital case, and Judge Crawford will make the decision as to whether to actually refer them to trial as capital. That's her decision, her sole discretion.

Q I have a question on KSM. Among the more high-profile claims he made was that he killed Wall Street Journal journalist Daniel Pearl with his blessed right hand, I think, was the phrase. Is that one of the charges in the sheet we'll see today?

GEN. HARTMANN: That is not one of the charges in this case.

Q Why not?

GEN. HARTMANN: That is -- the case you have before you is the case that has been brought to me by the chief prosecutor, through his prosecutors. This is the level of evidence they have on these cases. If there is a decision to try somebody else for the Pearl case, that decision will be made later.

Q In terms of the trial, is it fair to assume that it will be completely public? And also in terms of classified evidence, will that also be made public during the course of the trial?

GEN. HARTMANN: That's a good question, and I'll try to answer them both in the same answer.

As to classified, there will be no secret trials. Every piece of evidence, every stitch of evidence, every whiff of evidence that goes to the finder of fact, to the jury, to the military tribunal will be reviewed by the accused, subject to confrontation, subject to cross- examination, subject to challenge, exercising the rights I described to you before.

In terms of the openness of the trial, it is our goal to have the trials as completely open as possible. They're designed for that. We've has more than 100 members of the press down to the commissions before, 30 more recently, and then there were sessions last week where the commissions were present. So we will make every effort to make everything open.

There may be limited circumstances in which classified evidence will be presented. Classified evidence is classified for the purpose of protecting the national security interest and our soldiers, sailors, airmen and Marines in the field, and other operatives. So to the extent that that is necessary, we will apply that standard in the courtroom.

I've been advised by the prosecutors that relatively little amounts of evidence will be classified, but it's still a possibility. And we have rules and procedures, and rules of evidence, in place to deal with that.

Q Do you have concerns that the CIA may not provide the prosecutors with some of the evidence that they extracted while some of these detainees were held in secret prisons, or perhaps waterboarded?

Are you finding it difficult to get that information from the CIA?

GEN. HARTMANN: We're very appreciative of the total interagency effort that has gone on among the law enforcement, intelligence and legal community, and that will be decided in the courtroom when the prosecution decides what evidence it needs to present, as to whether there are any debates or disputes about the availability of the evidence, but I'm not aware of any at this time.

Q How many of these detainees actually have lawyers at this point in time, military or civilian?

GEN. HARTMANN: Of all the detainees?

Q Of the six that were -- (off mike).

GEN. HARTMANN: Of the six, the -- effective today with the swearing of charges, they will be entitled to a detailed military counsel, so that'll occur after today.

Q Can you tell us, was any of the information that was derived from aggressive -- from aggressive interrogations of either KSM or any of the other five defendants used in preferring these charges?

GEN. HARTMANN: I don't know the answer to that question. The prosecutors will make a determination about what evidence they are going to produce in the case in chief. I haven't seen the files yet, and they will -- that will identify to us what evidence is used. But let me be clear: We are a nation of law and not of men. And the question of what evidence it will be admitted, whether waterboarding or otherwise, will be decided in the courts, in front of a judge, after it's fought out between the defense and the prosecution in these cases. That's the rule of law, that's the procedure that Congress has provided to us, and that's what we will use to finally answer these questions.

Q But just based -- excuse me, a follow-up. But just based on your own legal expertise, is that kind of evidence normally permissible against the defendant if it's -- if it's achieved through duress?

GEN. HARTMANN: Well, I'll answer the same question. It's not -- this issue is not based upon my legal experience. This issue is based upon the rule of law. And the military judge will decide if this evidence is going to be admitted. That's the procedure we have set up. That's the American standard of justice, that the court decides, the judge

decides.

And so we're very proud of the system that we've set up with all the rights we've defined here; that the accused will have the opportunity to have his day in court and to challenge these things to the extent they're even presented. I can't predict that anything like that will be presented, but to the extent it is, it will be in open court.

Q And a technical question, just a very quick technical question, please. Is the appeal process in a capital case like this automatic, as it is in some civilian courts?

GEN. HARTMANN: That's an excellent question. In this process, unlike --

Q Finally. Two out of three. (Laughter).

GEN. HARTMANN: In this process -- and it's quite a unique process -- if the accused is found guilty of anything, he gets an automatic right of appeal through the Court of Military Commission Review, very similar to the military process but very dissimilar to any other process. It's an extra right for the accused in this case.

And in addition, let me say this. Before he even gets to that, his sentence and the charges would again be reviewed by the convening authority; again, another right that doesn't exist anywhere on Earth except in the military system.

So it's an extraordinary set of rights that we're providing to the accused. And just so you know, at Nuremberg there were no rights of appeal.

Q Just to be clear about the admissibility of some of this evidence. You don't take that into account in your looking at the charges, nor does Judge Crawford?

GEN. HARTMANN: We take that into account in determining whether there's probable cause to proceed, whether there's probable cause or reasonable cause to believe that the accused committed these offenses and if there's jurisdiction. But we have to look at the files before we make any determination.

Q But you will -- excuse me, you will make a decision on the admissibility of that particular evidence?

GEN. HARTMANN: We'll make a decision as to whether we think the evidence is admissible or not.

Q Well, I want to follow up on -- (off mike) -- now I'm really confused. But let me ask you first, in the -- you speak of rule of law. Is there anything in your law or procedure for these matters that allows you to compel the intelligence community on discovery? Do you only ask them or can you compel them for full discovery?

And I'm now confused about the second part of what you just said. When you decide, and Judge Crawford, on the admissibility of the evidence in the charges preferred to you, do you have information on how this evidence came into being?

GEN. HARTMANN: As to your first question, I have very little power to compel anyone to do anything. So I'm -- we are not in the position to compel any other government agency to produce information.

As to the general question about Judge Crawford's role, my point is that we will evaluate the evidence that comes to us and review it to determine if there's probable cause. I don't know the source of the information that's coming to us. I don't know what that information is. So once we see that information we will evaluate it and apply a legal standard to determine whether there's probable cause to proceed. And a variety of factors is used in making that evaluation.

Judge Crawford has 15 years on the bench as -- on the Court of Appeals of the Armed Forces. She was the general counsel to the Army and also the DOD IG, so she has a great deal of background in terms of evaluating these things. And that's how we'll proceed. And I will do a similar review before it gets to her.

Q So, to be clear, in fact the military process here -- you basically have to take whatever the intelligence community tells you at face value. You have no independent means of discovery on the U.S. intelligence community.

GEN. HARTMANN: Well, we receive -- whatever evidence we receive, we receive it from the various communities, and the law enforcement, intelligence community, and we use that evidence and proceed with the evidence that's been provided. It's been a very cooperative effort.

Q And could I just also ask you one -- it can't, you know, sort of escape notice. You're standing here in the Pentagon announcing charges against the men believed to be responsible for the 9/11 attacks, including on this building that morning. Just wondering your thoughts as a general officer in the United States military; it must be a fairly compelling experience for you.

GEN. HARTMANN: I'm glad to be an American, proud to be an officer in the United States Air Force in the military, and we are going to move the process forward.

It's our obligation to move the process forward, to give these people their rights. We are going to give them rights. We are going to give them rights that are virtually identical to the rights we provide to our military members, our soldiers, sailors, airmen and Marines who fight in the battlefield and I think we'll all agree are national treasures.

So thank you for asking that question.

Q Where were you on the morning of 9/11?

GEN. HARTMANN: I was working in a civilian company. I'm recalled to active duty.

Q Sir, can I ask a question and then a follow-up on Guy's question. There's currently not a facility on Guantanamo to actually have the death penalty. Can you talk to whether -- if the death penalty actually occurs, whether a facility will be constructed at Guantanamo, if someone will be brought back to the United States to do that? And the follow-up is, on the classified evidence, you said that the defense will have all the opportunity to challenge, to review. In prior proceedings that has only been done through the Offices of Military Counsel, but the defendant himself has not been to look at it, neither -- or nor his civilian attorney if he hires one. Is there a change there? Is actually the defendant himself or a civilian attorney allowed now to take a look at that during the procedure?

GEN. HARTMANN: Let me answer the first one. The -- as regard to the death penalty, we're a long way from determining for even focusing on this press conference procedures with regard to the death penalty. First of all, Judge Crawford has to make a decision that she will refer some or all of them as death eligible. Following that, at least 12 jury members, 12 tribunal members must conclude unanimously that the accused committed the offense. Following that, they must evaluate from a sentencing point of view that he has committed one of the aggravating factors that are listed in the military commissions manual, unanimously. And then they must unanimously agree on the sentence. Following that, Judge Crawford will again review the case file, as I mentioned before, tremendously helpful rights of the accused to determine if she agrees that the death penalty is the appropriate penalty.

Then the case goes through the Court of Military Commission Review, the D.C. Court of Appeals and potentially to the Supreme Court. So we are a long way from determining the details of the death penalty, and when that time comes, if it should ever come at all, we will follow the law at that time and the procedures that are in place at that time.

As to your other question, with regard to the classified evidence, the rule is that the accused will get to see every piece of evidence that goes to the finder of fact, every piece of evidence that goes to the finder of fact.

Q One last procedural one. Could I follow up on Jim's question about appeals?

GEN. HARTMANN: Yeah, sure.

Q There are procedures in the military -- in the law that allows some appeal to go to the civilian court, the D.C Court of Appeals. Can you define what gets to go to them, and if a finding of guilt is able to be appealed eventually to civilian courts?

Or is that only through the military courts?

GEN. HARTMANN: Right.

In this process, they all go through the Court of Military Commission Review first, and then to the D.C. Court of Appeals.

Q So there is an eventual possible appeal to the civilian courts.

GEN. HARTMANN: Yes, absolutely, absolutely.

Q To what extent did the White House Office of Legal Counsel review any of these charges before this morning? Did they suggest any tinkering? And did they suggest capital --

GEN. HARTMANN: They reviewed it not at all and made none of those suggestions, because they reviewed it not at all.

Q One of the problems in the previous commission hearings down at Guantanamo is that some of the defendants did not have the right to call their own witnesses. Are you saying it will be different in these cases, and that if they call witnesses from overseas, for example, does that mean the U.S. government will the pick them up, pay for them and bring them to the court? How does that work?

GEN. HARTMANN: They have the right to call witnesses, including expert witnesses. To the extent that they're available at Guantanamo, it's a little easier. To the extent that they're somewhere else in the world, we would, subject to the judge's direction, make the appropriate effort to obtain them, to the extent that they're available.

Those are factors that apply. Also the judge has to decide if they're material and relevant to the case. So the judge will make a determination, once the case begins, as to whether a witness is material, relevant and whether the witness should be available. Or the witness can be made available by remote means, by deposition, by video, by phone.

Q So it's conceivable that one of these defendants could call Osama bin Laden as a witness.

GEN. HARTMANN: I suppose. It's conceivable.

Q General, along those lines, has there been any thought about charging Osama bin Laden at military commission, even though he is not in custody?

GEN. HARTMANN: Not that I'm aware of.

Q General, you have spent a lot of time describing the rights that are available in Guantanamo. And much of what you've described parallels the American civilian system, and you've made that point.

This morning, obviously this case is going to be scrutinized all over the world. What is your explanation of why the United States is charging these people in a military system, rather than in the American civilian system?

GEN. HARTMANN: Fundamentally it's because the president of the United States and the Congress of the United States created the Military Commission Act and determined that that was the appropriate place to proceed with these people.

The military commissions are not unique to this process. They existed under General George Washington, under General Andrew Jackson, Winfield Scott. They were used following the Lincoln assassination for the conspirators of the Lincoln assassination, and they were used extensively following World War II.

These processes that we have before the military commissions in many ways parallel the military justice system which, I think, is very well regarded by the defense community as giving tremendous rights to defense. In our case, we have to make some adjustments for national security, for pretrial rights, speedy trial and so forth, because of the nature of the global war on terror, which has extended for some time and is continuing.

So that's why there have been some adjustments in this system that are slightly different from the military system. And the president and the Congress worked together to create the Military Commission Act, and that's why we're bringing these cases today for military commission.

MR. WHITMAN: We've got time for maybe one or two more.

Q Can you tell us the background of the members of the commission? Have any been a part of this process before? Have they done any ARBs and have they done CSRTs? Where are they coming from?

And I think you mentioned that it takes a unanimous 12 votes for the death penalty to be confirmed. Is there a time in between the commission judgment and the impaneling of the sentencing panel?

GEN. HARTMANN: No, the panel has not been -- Judge Crawford would refer the case to a particular panel at the time she makes a referral decision. So those people have not been designated yet, and they haven't gotten the case. But she chooses them based upon their age, education, experience, training and judicial temperament, after reviewing their records.

I didn't catch the second question.

Q I think you said there was a 12-person panel that carries out the sentence or confirms the sentence.

GEN. HARTMANN: There's a 12-person panel that we would -- in the civilian world you'd call a jury.

Q So they are the ones that in turn confirm the death penalty.

GEN. HARTMANN: They're the ones that will make the sentencing decision. They are the sentencing authority in the first case, and then it is reviewed by Judge Crawford and subject to appeal, et cetera. But they are the ones, just like in any other jury, that make the sentencing decision.

Q And what is their make-up?

GEN. HARTMANN: We -- it'll be the same as the --

Q What available pool do they come from?

GEN. HARTMANN: They are appointed -- they are nominated by the services. They are -- there's a large pool of officers nominated by the services, and that's the pool that we draw from.

Q Why did you decide to try this group together? And why are you doing it right now?

GEN. HARTMANN: The decision to try them together or the recommendation to try them together was made by the chief prosecutor, and he would have evaluated the commonality of fact, evidence, charging, the fairness and the administrative burdens of trying the cases separately and the impact on the victims, among many factors. I don't know specifically what factors he used. And we're trying them now because the prosecution has sworn the case and believes

it's ready to proceed to trial.

Q Will there be television cameras permitted inside the hearing room during this? Will it be made that public?

GEN. HARTMANN: It will not be -- there will not be television cameras in this military commission process. There are -- in the military process and in federal courts, there is no provision for televising of proceedings, so we will not televise the proceedings.

Q Will 9/11 families be able to listen to the proceedings, or --

GEN. HARTMANN: We expect -- and we're working on process whereby we would -- consistent with the Moussaoui practice, which was an extraordinary practice, to bring some video back to the families, so that they can view that in a safe environment.

Q JAG -- (inaudible) --

MR. WHITMAN: All right. We've got to bring it to an end now. Thank you, though.

LOAD-DATE: February 12, 2008

Attachment H

Berrigan, Michael, Mr, DoD OGC

From: Kelly, Wendy, COL, DoD OGC
Sent: Tuesday, January 29, 2008 10:42 AM
To: Foster, Jason, Mr, DoD OGC; Berrigan, Michael, Mr, DoD OGC
Subject: FW: 9-11 Draft Charges -25 JAN.doc
Attachments: 9-11 Draft Charges -25 JAN.doc

electronic copy of charge sheet.

From: Johnson, Clinton, MAJ, DoD OGC
Sent: Monday, January 28, 2008 3:58 PM
To: Kelly, Wendy, COL, DoD OGC
Subject: FW: 9-11 Draft Charges -25 JAN.doc

As requested

From: Gifford, Robert, MAJ, DoD OGC
Sent: Monday, January 28, 2008 1:59 PM
To: Johnson, Clinton, MAJ, DoD OGC
Subject: 9-11 Draft Charges -25 JAN.doc

<<...>>

Attachment I

1 of 1 DOCUMENT

SHOW: Day to Day 4:00 PM EST

February 22, 2008 Friday

LENGTH: 2188 words

HEADLINE: A Twist in the Case Against Bin Laden's Driver

ANCHORS: MADELEINE BRAND, ALEX CHADWICK

BODY:

MADELEINE BRAND, host:

From the studios of NPR West, this is DAY TO DAY. I'm Madeleine Brand.

ALEX CHADWICK, host:

I'm Alex Chadwick.

Coming up, in a state that hasn't executed a prisoner in almost 70 years, how do you build an execution chamber?

BRAND: But first, a stunning turn of events at Guantanamo. The former chief prosecutor there has decided to testify on behalf of one of the defendants, Salim Ahmed Hamdan - that's Osama bin Laden's former driver.

Air Force Colonel Morris Davis joins me now. Welcome back to DAY TO DAY.

Colonel MORRIS DAVIS (United States Air Force): Oh, thank you for having me.

BRAND: Well, you resigned as chief prosecutor last fall, and you have said you think the prosecution of the Guantanamo prisoners is flawed because it has become politicized. Why did you decide to go another step and actually testify on behalf of one of the defendants, Hamdan?

Colonel DAVIS: What I've agreed to do is to tell the truth, which I've offered to do a number of times. And it seems that some folks are violently opposed to me telling the truth. So whether it's for the prosecution, defense, or before a congressional hearing, I intend to tell the truth.

BRAND: What is that truth?

Colonel DAVIS: The truth is that Congress gave us what I view is a very fair piece of legislation - the Military Commissions Act - that gives us the ability to have full, fair and open trials. But you have some political appointees who just frankly don't trust people in uniform. They view that, you know, if you wear a uniform obviously you must be not that bright or you'd be out in the real world making real money, and so they have to control the process. And that's where I think this political influence in the process is taking justice out of the military justice system.

BRAND: And specifically what do you mean by political interference?

Colonel DAVIS: Well, I think - as you probably know, Jim Haynes is the DOD general counsel. When I first took the job as chief prosecutor, the general counsel didn't have a formal role in the chain of command over the prosecution. But that changed in October - last fall - the day I resigned was the day that Deputy Secretary of Defense Gordon England signed a memorandum that placed the general counsel in a command position above me.

If you followed Mr. Haynes, the general counsel, you know that he was one of the architects of the, you know, what became known as the Torture Policy and the Torture Memorandum that said waterboarding is a lawful technique to use on the detainees, which I wholeheartedly disagree with. And also when I had my interview for the chief prosecutor job, that's where he made the statement that we can't have acquittals, we've got to have convictions.

You know, at the time that was just his opinion, but in October of last year he, you know, went into a - where he had command authority over the prosecution, a person who said we can't have acquittals and waterboarding's okay. And that's when I decided it was time to quit.

BRAND: When he said we can't have acquittals, we've got to have convictions, couldn't that be interpreted as something along the lines of just rallying the troops, rallying the prosecutors to prosecute these cases vigorously?

Colonel DAVIS: Yeah, it could. And that's the way I took it. At the time the statement was made, as I said, Mr. Haynes in the general counsel's office did not have a formal place in the chain of command over the prosecution. But as I said, in October, you know, he had a - then had a formal role, a command position, over the prosecution, where he can - his opinions are no longer opinions, they're orders.

BRAND: So you're going to testify for the defense - for Hamdan's defense. What exactly will you testify to?

Colonel DAVIS: Something I've made clear to the defense is, you know, I'm more than happy to talk about my views of where I think the process has gotten off the tracks and it's no longer going to be a full, fair and open trial. But my concerns about the process certainly don't translate into a view that their clients are innocent or they should be excused for their conduct.

I mean, if you take Mr. Hamdan, for instance, he was captured with two surface-to-air missiles in his car. And in Afghanistan at that time the only thing flying were geese and us. So I have no sympathy for Mr. Hamdan, but I do think he's entitled to a fair trial that's free of political influence.

BRAND: What do you think about the 80 or so men who are going to face these trials? Do you think that they will - each one of them will not get a fair trial?

Colonel DAVIS: Well, I think that - as I said, I think the folks in uniform - the judges, the counsel, and the members that'll sit on the jury - I think you'll find that they're going to think for themselves. So I think the uniform folks are going to do their best to do justice.

But my concern is you have some political appointees that, you know, have a vested interest in trying to make sure that we achieve a certain outcome. And in my view they need to be removed from this process. It's a military commission. The military ought to be running it, not political appointees.

BRAND: You were forbidden to testify before Senator Feinstein's committee. Yet you have been free by the military to speak to the media about this. Why do you think that is?

Colonel DAVIS: Well, I think the characterization of free to speak by the military - I think by and large, you know, the folks in uniform I don't think have a problem with what I'm saying. There are a few folks - a few political appointees I think are probably extremely upset with what I'm saying. I think the military as a whole I think is concerned about,

you know, doing justice and doing what's right and upholding American values and not trying to rig a system.

So I think there are a couple of people who are probably real upset, but they don't have command authority over me and the folks who do have told me that as long as I tell the truth and I'm not breaking the law that I can say what I feel like I need to say.

BRAND: What do you think of the Bush administration's announcement that it will prosecute six men - six of the worst of the worst, they call them - for the 9/11 terrorist attacks, including Khalid Sheikh Mohammed?

Colonel DAVIS: Mm-hmm. Well, I'm not surprised. As I've stated before, there is some impetus to get these cases moving and to get some momentum. There was a fear that if some progress wasn't made, that this whole process was going to implode. And you know, this administration's coming to an end. There will be a new administration coming in less than a year, and if you couldn't get this thing up and running that it was just going to collapse of its own weight.

And certainly getting some cases into the system, and particularly cases like Khalid Sheikh Mohammed, and energizing the families of the victims of 9/11 and getting them, you know, energized and engaged in this process will - I think the view is that'll get some momentum behind this and make it hard to stop.

BRAND: So it sounds like you don't think these six men will receive a fair trial.

Colonel DAVIS: Well, I have serious concerns. I mean, my commitment was to conduct full, fair and open trials, and I think we may go 0 for 3 on full, fair and open.

BRAND: Well, Colonel Davis, thank you very much for speaking with me again.

Colonel DAVIS: It's my pleasure. Thank you for having me.

BRAND: Colonel Morris Davis is director of the Air Force Judiciary, and we've been speaking to him about his decision to testify on behalf of one of the Guantanamo Bay prisoners, Salim Ahmed Hamdan.

Joining me now is one of the men Morris Davis complains is politicizing the process. He is Brigadier General Thomas Hartmann. He's the legal advisor to the convening authority of the Office of Military Commissions at the Pentagon, and that's the office that overseas the legal proceedings at Guantanamo.

Colonel Morris Davis is complaining that the process at Guantanamo to try these defendants, to try the prisoners there, is hopelessly politically tainted. What do you say to that?

Brigadier General THOMAS HARTMANN (Office of Military Commissions): I say that he's wrong. The process is in so many ways the essence of American justice. The protections for the accused are frankly protections that exceed those that were available at Nuremburg, those that are available in the more recent times in connection with other international tribunals.

We give them - the accused - in these cases virtually the same rights that we give our soldiers, sailor, airmen, and marines with slight adjustments. That's quite an indication of the strength of the American judicial system and our willingness to make these trials fair and just.

BRAND: Well, he's saying they are not fair and just because you'll be using evidence gathered during waterboarding, which he considers torture and should not be admissible. He says they're not going to be open in terms of classified material not being shared with the defense. And that they won't be free, in essence.

Brigadier General HARTMANN: Well, Colonel Davis was part of the process for two years. In that two year period he was able to get two cases sworn and charged. In the period of time since he's left - just four months - we've charged 10 new cases. The trials will be fair. We've had more than 120 members of the press down there to

Guantanamo Bay to witness this. We've had the United Nations observers. We've had non-governmental organizations - the ACLU, the Human Rights Watch, Human Rights First - and if anybody should know the rules of evidence and the rules of procedure, Colonel Davis should know them. They are extremely broad, extremely generous, and they in many ways match the military justice system that we've had for more than 50 years in place and are quite similar to the Article 3 courts in the United States. And they are far in excess of the rights in terms of evidence, openness, that are available in other international tribunals.

BRAND: Now, Colonel Davis is also accusing the Pentagon general counsel, William Haynes, of pushing for convictions, despite any perhaps contradicting evidence, saying, quote, "We can't have acquittals, we've got to have convictions."

Brigadier General HARTMANN: Well, any prosecutor - and Colonel Davis was the chief prosecutor - so the chief prosecutor's duty is to bring justice. But the chief prosecutor's focus is on getting evidence together to achieve a beyond a reasonable doubt standard. So a prosecutor strives for convictions within the system achieving justice. However, he can anticipate some acquittals if he's trying hard cases. If you have a prosecutor who hasn't had an acquittal, he has never tried a hard case.

BRAND: do you think that any evidence gathered during the process of waterboarding should be admitted?

Brigadier General HARTMANN: What I think is what I will say - and Colonel Davis was a part of this for the two years - and that was setting up the military commissions. The military commissions very much match the Uniform Code of Military Justice system we have. They have a uniformed defense counsel and several defense counsel in addition to uniformed people. They have the prosecutors and they have a judge.

Those issues will be decided in the courtroom, and very consistent, very consistent with the American system of justice, where evidence is presented by the prosecution, challenged by the defense, cross-examination, confrontation, witnesses in front of the judge, and the judge makes a decision with finality. That's the American system of justice.

That's the system we have with these military commissions, with the military court-martial process, with the Article 3 courts in the United States that we see every day. There's nothing different about that. It's the standard of justice and it's an honorable system of justice. We should all be very proud of that system.

BRAND: And so there is no political interference, as far you're concerned?

Brigadier General HARTMANN: Not only as far as I'm concerned, absolutely not. I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months - and in the last four months since Colonel Davis has been gone we have moved 10 cases. That's not from political pressure. There is none. It's from me insisting that we move the process.

BRAND: What do you think of his decision to testify on behalf of Mr. Hamdan?

Brigadier General HARTMANN: He's certainly free to testify on behalf of anyone he wants to. That's the American system of justice. If the defense needs a witness - in this case it's another indication of the rights in this case - the defense can call anyone that's material and relevant to the case. And Colonel Davis is one of those people that they think that is material and relevant to their case. So if the judge concurs and that's the way it goes, then we're happy to listen to Colonel Davis in the courtroom.

BRAND: That's Brigadier General Thomas Hartmann. He is the legal advisor to the Office of Military Commissions. That office oversees the legal proceedings at Guantanamo Bay.

LOAD-DATE: February 22, 2008

Attachment J

http://www.latimes.com/news/opinion/commentary/la-oew-hartmann19dec19,0,5821562.story?coll=la-home-commentary
From the Los Angeles Times

BLOWBACK

There will be no secret trials

A Defense Department legal advisor responds to his subordinate's resignation.

By Thomas W. Hartmann

December 19, 2007

I have read with great disappointment the Op-Ed article by Morris D. Davis, former chief prosecutor for the Office of Military Commissions, particularly his comments with regard to Susan Crawford, the military commissions convening authority.

Since October, Davis has repeatedly complained about the very military commissions he oversaw for two years. He has criticized the commission process for moving too slowly, resulting in only one case being tried, by a guilty plea. After that plea was negotiated, with Davis' written concurrence, he claimed publicly that he was not properly consulted.

Davis has recently protested that politics has been inserted into the process, which he in many ways controlled, alleging improper pressure from me, from the department's general counsel, Jim Haynes, and now from Crawford. Specifically, Davis insinuates that she is politically motivated and that she lacks impartiality. He claims — though that he never breathed a word of this to me — that the pressure to move cases more rapidly was politically motivated.

But one should be careful when one challenges the reputation of others. Crawford has not directed or influenced the way any military commission case will be tried. Davis knows that I, without any political interference, directed him to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office. Interestingly, when I testified before Sen. Jeff Sessions (R-Ala.) that some cases are moved more quickly than others because they have the most material evidence, he commented: "Well, I think it's almost prosecutorial incompetence not to think in those terms. It's important that you do so."

Davis further contends that he resigned within hours of learning that I would report to General Counsel Haynes, and as my subordinate, Davis would be under Haynes in the chain of authority. This was also just hours after he learned the results of an independent military panel — appointed by Haynes after consultation with the service Judge Advocates General — that concluded I had not improperly asserted my authority. That report was immediately made available to the public. It is worthy of note that Haynes had, months before, signed a performance evaluation on Davis, suggesting that Davis was already in the chain of command. Davis did not object then.

Davis also charges that the commissions are no longer "full, fair, and open trials." This is particularly biting as he knows that the process offers unprecedented rights to alleged war criminals. Indeed, he wrote and spoke of that often. He also knows how much effort the prosecution and defense teams have dedicated to the fairness of the process — a process played out in United States vs. Hamdan.

Regarding his new allegations that the trials are not open, Davis knows that national security demands that certain evidence remain classified. He had an especially high security clearance for that very reason. But there will be no "secret" trials. Though we must safeguard classified information in order to protect ongoing operations and our soldiers, sailors, airmen and marines, not one piece of evidence will go to a commission jury without review and the opportunity to object by the accused and his counsel.

Military commissions are now moving forward fairly and transparently. As they continue, critics will see uniformed service members, including judges, prosecutors and defense counsel, conduct trials with the dignity, fairness, and respect for law that defines American military justice — a justice system that remains the envy of the world.

Air Force Brig. Gen. Thomas W. Hartmann is a legal advisor to the Department of Defense Office of Military Commissions.

Attachment K

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

LEGAL ADVISOR

1 February 2008

MEMORANDUM FOR Chief Defense Counsel, Office of Military Commissions

SUBJECT: Inadvertent Disclosure of Attorney-Client Privileged Work Product

1. On January 29, 2008 the OMC Director of Operations, COL Wendy Kelly (the "DO"), erroneously sent the Deputy Chief Defense Counsel, Mr. Michael Berrigan (the "Deputy"), an email with an attachment that included attorney-client privileged work product. The subject line of the email also identified the attachment in a way that might have advised the Deputy of the sending error. The Deputy immediately notified the DO that he had received the email both by voicemail message and email. The email specifically asked, "Did you intend to send me this document?" I applaud this proactive step that indicated sensitivity to the potential of an inadvertent disclosure and the issues it might raise. The DO replied by voicemail and email that the transmission was an error, that it was attorney-client work product, and that it was not intended for the Deputy. The Deputy has advised that he has discussed the matter with you, and has forwarded it to his state bar. On January 30, 2008 the Deputy also sent an email to the DO indicating that he clearly understood that the disclosure was a "mistake." This letter constitutes a formal demand for the return of the document and deletion from any electronic format.

2. In light of this improper and inadvertent disclosure, we have reviewed some of the applicable professional responsibility rules. ABA Model Rule 4.4 (b) states that, "A lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Model Rule 4.4 Comment [3] goes on to state that, "[T]he decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer." Of course, the rule is not precisely on point because the Deputy has no client. The Army, Navy, and Marine Corps professional responsibility offices indicated that, under these circumstances, any counsel, uniformed or civilian, who works for that service must inform the sender of the inadvertent disclosure and promptly return the document without providing it to anyone else.

3. We are uncertain of the states in which the Deputy is licensed, but I am advised that the majority of state professional responsibility rules follow a similar pattern. Some state bars do not specifically require the receiving counsel to return the privileged material. The rationale for those states is that the receiving counsel also has an ethical obligation to act in the best interests of his client. In this case,

the Deputy serves in a supervisory attorney capacity and does not represent clients. To my knowledge, he does not have an attorney-client relationship with any of the individuals mentioned in the privileged materials. Therefore, returning the privileged materials presents no conflict with any duty to represent a client. In this instance and in light of the previously cited service rules and basic professional responsibility, I believe that the clearest ethical guidance is that the Deputy should return the document and not use it in any fashion. I can think of no circumstances in which the document could properly be shared with any other person.

4. I am happy to discuss this matter further.

THOMAS W. HARTMANN
Brigadier General, USAF
Legal Advisor to the Convening Authority

cf: OSD-DGC, PHP (Mr. Koffsky)
OSD-DGC, LC (Mr. Castle)

[redacted]

Attachment L

TITLE	# The Great Guantánamo Puppet Theater
DEPARTMENT	No Comment
BY	Scott Horton
PUBLISHED	February 21, 2008

Last week the Department of Defense launched a major media offensive. It announced that trials of six "high-value detainees" linked to the attacks on 9/11 would be charged in proceedings before the Guantánamo military commissions this spring. Specific accusations concerning the roles played by each of the six in the tragedy of 9/11 were all over the media. For the most part, the media has only lightly embroidered the Pentagon's script. The *Washington Post* told us about the "clean team" that the Pentagon had sent in, top-notch no-nonsense prosecutors to do the job. PBS's NewsHour gave an extended segment over to the Pentagon's key spokesman on the issue, Brigadier General Thomas Hartmann, to set out the case for the proceedings.

Curiously, this ran side-by-side with a series of public presentations by leading figures of the Administration—Attorney General Mukasey, Steven Bradbury (acting head of Justice's Office of Legal Counsel), Director of National Intelligence Michael McConnell and even President Bush himself—shoring up the Administration's barely comprehensible position on waterboarding and other coercive interrogation techniques. The overlap was not coincidental, because the two projects were closely intertwined. The Administration took the position that it doesn't presently authorize waterboarding, but now acknowledges that it did in the past and reserves that it might again in the future. It argues that there's nothing wrong with waterboarding, and that any waterboarding done in the past was done lawfully. Why not just say that waterboarding is "torture"? There's one immediate reason: doing so would exclude a mass of evidence that appears to be available for the pending

prosecutions.

But while the American mainstream media presented the story with the main spotlight on the Pentagon and its announcements and some trivial sideshows in which bickering lawyers raised quibbles about vexatious technicalities like the hearsay rule, access to exculpatory evidence and the ever-present torture, overseas the Guantánamo proceedings got a different treatment. Outside of the United States, "Guantánamo" is a by-word for torture, authoritarian abuse and injustice. And the fact that the U.S. had elected to put these six detainees on trial before a military commission in Guantánamo drew a predictable review. "There will not be six persons on trial, but seven," editorialized the predictably pro-American German newspaper *Die Zeit*. The seventh, of course, is the Bush Administration and its hopelessly corrupted concept of justice.

The American media seems by-and-large not to understand the "justice" angle of the military commissions debate. They instantly want to run into the weeds with extended discussions of evidentiary issues, and they miss the glaring question that hangs over the entire affair. And now a week into the process, the proposed trials have taken a strange twist. Will the American media at last recognize that the real questions about this process go to the fundamental *independence* of the courts? Dramatic disclosures in an article published yesterday in *The Nation* require them to take a close look at it. So far, they don't seem to be willing to do so. Here's the core of Ross Tuttle's dramatic piece:

> According to Col. Morris Davis, former chief prosecutor for Guantánamo's military commissions, the process has been manipulated by Administration appointees in an attempt to foreclose the possibility of acquittal. Colonel Davis's criticism of the commissions has been escalating since he resigned this past October, telling the Washington Post that he had been pressured by politically appointed senior defense officials to pursue cases deemed "sexy" and of "high-interest" (such as the 9/11 cases now being pursued) in the run-up to the 2008 elections. Davis, once a staunch defender of the commissions process, elaborated on his reasons in a December 10, 2007, Los Angeles Times op-ed. "I concluded that full, fair and open trials were not possible under the current system," he wrote. "I felt that the system had become deeply politicized and that I could no longer do my job effectively."

Then, in an interview with The Nation in February after the six Guantánamo detainees were charged, Davis offered the most damning evidence of the military commissions' bias–a revelation that speaks to fundamental flaws in the Bush Administration's conduct of statecraft: its contempt for the rule of law and its pursuit of political objectives above all else. When asked if he thought the men at Guantánamo could receive a fair trial, Davis provided the following account of an August 2005 meeting he had with Pentagon general counsel William Haynes–the man who now oversees the tribunal process for the Defense Department. "[Haynes] said these trials will be the Nuremberg of our time," recalled Davis, referring to the Nazi tribunals in 1945, considered the model of procedural rights in the prosecution of war crimes. In response, Davis said he noted that at Nuremberg there had been some acquittals, something that had lent great credibility to the proceedings.

"I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process," Davis continued. "At which point, [Haynes's] eyes got wide and he said, 'Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals, we've got to have convictions.'"

Davis submitted his resignation on October 4, 2007, just hours after he was informed that Haynes had been put above him in the commissions' chain of command. "Everyone has opinions," Davis says. "But when he was put above me, his opinions became orders."

Colonel Davis is not just any JAG officer. He was an up-and-comer widely viewed in his peer group as someone in line for a star, and ultimately perhaps, to be the Air Force's Judge Advocate General. He is also no whining civil libertarian, but rather a no-nonsense conservative, whose prior scraps with civilians in the Pentagon came over the restraints they put on his ability to charge forward and prosecute cases.

In particular, Davis and other Guantánamo prosecutors were crest-fallen over the handling of the case of David Hicks. An Australian sheepskinner turned Middle East adventurer, Hicks was labeled one of the "worst of the worst" and was charged with being a weapons-toting terrorist. Just as his trial got under way, and Davis confidently delivered a searing opening promising to make Hicks out as a bloodthirsty figure who had betrayed his homeland and turned to a path of "Islamic" violence, the public learned that a plea-bargain had been reached. Curiously however, all this transpired without involving the prosecutors.

You might well wonder how that was possible. And indeed, that is the very nub of the current accusations over the rigging of the commissions, because the handling of the Hicks case quite dramatically supports Colonel Davis's charges. Over the next several weeks, the details of the Hicks plea bargain—which led very quickly to a minimal sentence for Hicks, his transfer to Australia, and his release—trickled out. Apparently the Hicks case turned on one single issue: politics. Indeed, electoral politics.

Australian Prime Minister John Howard was facing a difficult election campaign. The imprisonment of David Hicks was figuring as a terrible issue for him and his Liberal Party. Public opinion has swung against his government, as people, led by the legal community, questioned how an Australian citizen could be abandoned to the perils of Guantánamo—when the U.K. and other nations had fetched their nationals home. Vice President Dick Cheney visited Howard, discussed the Hicks case, and returned home. Within a short period, a Cheney protégée, particularly close to Cheney's chief of staff David Addington, Susan J. Crawford, was installed as the convening authority for the Military Commissions, and Ms. Crawford's legal advisor quickly negotiated a plea bargain with Hicks's attorneys. Later it was learned that Jim Haynes, known for his tight connections with the Vice President's office, had played a key role as intermediary in the affair.

The Australian public welcomed the release of David Hicks, but the manipulation of his case produced a significant scandal. It was, as several Australian papers charged, the impermissible manipulation of legal proceedings through a political process and for political reasons–which many speculated is about all the Guantánamo process had been from the outset. John Howard and his Liberal Party were humiliated at the polls, and in an astonishing embarrassment, voters in Howard's own constituency decided to retire him from political life. But American media reacted to the entire affair with a collective yawn.

So the first high profile military commissions case ran its full course. And it turned on nothing *except* politics. Not a good sign for the future.

But as foreign media were regularly observing, there was something extremely fishy about these "military" commissions. In fact one of the major insights critics offered up was that they *were not really "military" at all.* They had the appearance of being "military," because

the courtroom scene on which all the cameras focused were filled with men and women in uniform. But as the Hicks case showed, the military actors were all like so many marionettes. Behind the scenes, the puppet masters were pulling the strings. And the puppet masters were suspiciously partisan political figures. Two were points of focus. The first is Susan J. Crawford, who served as convening authority. In the military justice system the convening authority is a uniformed military commander whose command responsibility covers the territory or subject matter of the legal proceedings. He is the "convening authority" because the military justice process is seen as an extension of his command authority. Under the doctrine of *Yamashita*, military commanders have a specific responsibility to implement the laws of armed conflict, and they may in fact bear liability if they fail in this duty.

But unlike her predecessor, Major General John D. Altenburg, Susan J. Crawford is a convening authority who has never worn a uniform nor held a military command. She is a civilian. Indeed, her principal qualification for the position appears to be her political proximity to Vice President Cheney, and specifically to his legal policy guru, David Addington. In fact at an event held last year to mark Crawford's retirement as a military appeals judge, she went out of her way to note the presence of and thank just one person, her friend David Addington.

Given this tight relationship, it then emerges as no surprise that Crawford and her office are so receptive to the concerns of Vice President Cheney's office and so prepared to allow another Addington crony, Jim Haynes, to dictate the terms of the proceedings.

But, unseemly as this situation was already, it actually got much worse following the Hicks case. Apparently judging the military commissions process as a matter of tight personal concern, Jim Haynes decided he needed to have tighter and more direct control over them. He then proposed a change in the command structure for the participants. They were to be subordinated directly to his command.

Haynes crafted and secured Deputy Secretary of Defense Gordon England's signature on two documents. The first, which can be examined here, directs that Brigadier General Thomas Hartmann, Legal Advisor to the convening authority and the person who

effectively manages her office, reports to Paul Ney, DOD Deputy General Counsel (Legal Counsel), who, of course, in turn, reports to Jim Haynes.

The second memorandum, which can be examined here directs that Colonel Morris Davis, the Chief Prosecutor, reports to Brigadier General Hartmann, who reports to Ney, who reports to Haynes. This memorandum was particularly necessary as an after-the-fact adjustment to cover Haynes's manipulation of the Hicks case, establishing a chain-of-command justification for his intervention to direct the plea bargain resolution of the case.

Same relationship exists for the Chief Defense Counsel, who reports to Paul Koffsky, DOD Deputy General Counsel (Personnel & Health Policy) who, like Ney, reports to Haynes.

The cumulative effect of these changes masterminded by Haynes is plain enough: the already very obvious threads attached to the commission participants were replaced with some crude hemp rope. It was obvious to all observers who was calling the shots. And it was plainly illegal and unethical. Professional rules require the defense counsel, prosecutor, and judges to exercise independent professional judgment. Moreover, the Military Commissions Act of 2006 guarantees the professional independence of these actors in the process. The command structure crafted by Haynes was plainly designed to achieve the political subordination of the JAGs, defying the MCA's guarantee of independence.

Davis resigned because he felt the commissions system was rigged. He also filed a formal complaint over the improper role played by the convening authority's legal advisor in the Hicks case. That complaint is in the process of investigation by the Department of Defense. Here is a memorandum posted to the Department of Defense's website concerning the still pending investigation and the issues raised. Note that while Davis was not in a position to premise the complaint on Haynes's involvement, that is the 800 pound gorilla in the room. But Davis was not the only, nor even the first prosecutor to resign. Three others–Maj. Robert Preston, Capt. John Carr and Capt. Carrie Wolf–asked to be relieved of duties after saying they were concerned that the process was rigged. One said he had been assured he didn't need to worry about building a proper case; convictions were assured.

Of course, the number of *defense* counsel claiming that the system is stacked against them is legion. I surveyed the views of the defense lawyers, and the serious mistreatment they frequently faced at the hands of the Rumsfeld Pentagon, in this article.

Even the chief judge at Guantánamo, Colonel Ralph Kohlmann is plainly troubled by the military commissions arrangement. He wrote in a paper published in 2002 that "even a good military tribunal is a bad idea." Col. Kohlmann argued that the "apparent lack of independence" of military judges would present "credibility problems." Col. Kohlmann wrote these words *before* the obvious political manipulation of the Hicks case and *before* Haynes's jiggered the command structure to place himself in control of the entire process. The "apparent lack of independence" of which he wrote has ballooned into a nightmarish reality.

Brigadier General Hartmann is a focal figure in all of this. His "independent judgment" has been dramatically displayed in his testimony before a Senate Committee. He was asked a few questions about waterboarding and torture, and the answers he gave were strictly those of his puppet master. A number of senators, from both parties, expressed their disgust with his stooge-like behavior. Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences–but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Hartmann was quick to invoke the model of the Nuremberg trials, calling these proceedings a "modern Nuremberg." In fact, the Nuremberg process is worthy of emulation and had the Bush Administration turned to its grand design, or even some of the

other model international tribunals, most of the embarrassment that now surrounds the Gitmo moral swamp would have been avoided. Robert H. Jackson, arguably America's greatest attorney general, was responsible for structuring those proceedings. He made clear throughout that he was guided by two concerns. The first was to do justice. And the second was to be damned sure that the public recognized that justice was being done. He accomplished both goals, and the result was a landmark international law and a point of pride for America.

But the military commissions crafted by the Bush Administration are an embarrassing stain compared to Nuremberg. One of the main reasons is that they have been crafted by political hacks out on a partisan agenda, and the experts who could have done a credible job–first among them the military lawyers in the JAG corps–have been ignored or overruled at each turn. The ability of defense counsel to conduct a meaningful defense has been impeded, with gains coming grudgingly only after the Supreme Court overturned the first, colossally incompetent structure in *Rasul*. Most menacingly, the specter of torture hovers over the current military commissions proceedings, with the acknowledgement that many of the defendants were subjected to techniques which the entire world (excluding only the Bush Administration) considers to be torture.

Even most critics concede the professionalism and integrity of the military lawyers who are assigned to the military commissions system as judges, prosecutors and defense counsel. Their professionalism and integrity are not an issue, or more precisely, protecting their professionalism and integrity from political predators *is* the issue. Critical attention focuses today just where it did at the outset: on the political hacks who have shamelessly attempted to manipulate the system, and whose misconduct is bringing shame and opprobrium upon the United States. Colonel Davis's description of his conversation with Haynes comes as a surprise to no one who has been tracking this issue. To the contrary, it is a bit of the well-understood reality of the situation bubbling to the surface.