

# HALTING MILITARY TRIALS IN GUANTANAMO BAY: CAN THE PRESIDENT CALL A TIME-OUT?

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## INTRODUCTION

On January 22, 2009, shortly after he assumed office, President Barack Obama issued an executive order closing the United States military detention facility at Guantanamo Bay and halting the military commissions that were then underway.<sup>1</sup> The order called for a committee to review whether and how Guantanamo Bay detainees should be prosecuted.<sup>2</sup> However, detailed procedures for prosecuting Guantanamo detainees already existed and, in fact, trials were already underway in Guantanamo Bay.

After President Obama issued the January 22nd Executive Order halting military trials, most judges and prosecutors in Guantanamo Bay complied despite the fact that no law, including the Military Commissions Act of 2006 and the *Manual for Military Commissions*, gives any President the power to order prosecutors to ask for, or order a judge to grant, a conti-

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1. Exec. Order No. 13492, 74 *Fed. Reg.* 4897 (Jan. 22, 2009).
2. *Id.* § 4(c)(3):

Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations. *Id.*

nuance.<sup>3</sup> Nonetheless, prosecutors filed motions to stop the trials, and judges granted them. There was one lone exception.<sup>4</sup>

Army Colonel James Pohl, who was presiding over the prosecution of Abd al-Rahim al-Nashiri (the alleged mastermind of the U.S.S. Cole bombing in 2000), refused to stop the trial.<sup>5</sup> Colonel Pohl said that the Military Commissions Act of 2006 governed the proceedings, and stated, “[t]he public interest in a speedy trial will be harmed by the delay in the arraignment.”<sup>6</sup> Colonel Pohl also stated, “[t]he Commission is bound by the law as it currently exists not as it may change in the future.”<sup>7</sup> Colonel Pohl pointed out that the Military Commissions Act of 2006 gave the military judges “sole authority” to grant delays once charges had been referred for trial.<sup>8</sup>

On the heels of Colonel Pohl’s refusal, the Pentagon issued a statement. Pentagon spokesman Geoff Morrell said that “Pohl would soon be told to comply with Obama’s executive order.”<sup>9</sup> He went on to explain, “all I can really tell you is that this department will be in full compliance with the President’s executive order. There’s no if, ands or buts about that [sic].”<sup>10</sup> He then added, “while that executive order is in force and effect, trust me that there will be no proceedings continuing, down at Gitmo, with Military Commissions.”<sup>11</sup> As predicted, a few days later, the charges against al-Nashiri were dropped.<sup>12</sup> Colonel Pohl—the presiding judge—was not involved in that decision.<sup>13</sup>

This Article examines President Obama’s decision to unilaterally halt military trials and analyzes that decision in the context of applicable law, including the Military Commissions Act of 2006 and the *Manual for Military Commissions*. It also discusses and analyzes the law prohibiting unlawful command influence and ultimately concludes that President Obama’s decision to halt Guantanamo trials, over the objection of the presiding military judge (Colonel Pohl), may have violated governing law and may have

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3. Carol J. Williams, *Guantanamo Judge Says He’s Forging Ahead; He Defies Obama’s Request to Suspend Tribunal Proceedings*, L.A. TIMES, Jan. 30, 2009, at A9.

4. *Id.*

5. *Id.*; see also *Military Judge Refuses to Halt Trial of USS Cole Bombing Suspect*, FOX NEWS (Jan. 29, 2009), <http://www.foxnews.com/politics/2009/01/29/military-judge-refuses-halt-trial-uss-cole-bombing-suspect>.

6. Ruling on Government Motion to Continue Arraignment, *United States v. Al-Nashiri*, (Jan. 29, 2009), available at [http://www.defenselink.mil/news/Jan2009/DelayArraignment\\_MJ.pdf](http://www.defenselink.mil/news/Jan2009/DelayArraignment_MJ.pdf).

7. *Id.*

8. Williams, *supra* note 3.

9. *Id.*

10. Geoff Morrell, Pentagon Press Secretary, U.S. Dep’t of Defense News Briefing (Jan. 29, 2009), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4345>.

11. *Id.*

12. *Charges Dropped in USS Cole Terror Trial*, MSNBC (Feb. 5, 2009), <http://www.msnbc.msn.com/id/29042139>.

13. *Id.*

amounted to unlawful command influence.

#### I. LAW GOVERNING MILITARY COMMISSIONS & UNLAWFUL COMMAND INFLUENCE

Military commissions were not then, and are not now, a creature of the Executive Branch.<sup>14</sup> They exist in accordance with a federal statute—an act of Congress—entitled the Military Commissions Act of 2006.<sup>15</sup> The trials are also governed by detailed rules contained in the *Manual for Military Commissions*.<sup>16</sup> These provisions together establish procedures for conducting military commissions. They also include important restrictions on power.<sup>17</sup> For instance, the Military Commissions Act of 2006 specifies that only presiding judges have authority to grant delays<sup>18</sup> and the *Manual for Military Commissions* makes it illegal for any official to improperly influence the action of a military commission (or, to put it another way, it prohibits what the military calls “unlawful command influence”).

Because meddling commanders threaten the independence of military trials, the *Uniform Code of Military Justice* (“*UCMJ*”) makes command influence illegal.<sup>19</sup> It is a punishable crime, and (among other things) prohibits any commander from influencing an action of any military tribunal.<sup>20</sup> This protects military trials and helps to ensure that jurors and judges are objective and make decisions based only on evidence admitted at the trial, and not on the perceived, or expressed, desires of any chain of command.

Congress included the same prohibition in the recently enacted *Rules for Military Commissions*. Under these rules, it is unlawful for any official to improperly influence the action of military commissions in the global War on Terror.<sup>21</sup> In fact, the *Military Commissions Rule* is actually more broad than the *Courts Martial Rule* because it covers “*all persons*” and specifies that “*no person may attempt*” to unlawfully, or by unauthorized means, influence the military commission.<sup>22</sup> The *Courts Martial Rule* only applies to

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14. For further discussion and analysis of Military Commissions, see Rotunda, *supra* note 1. Portions of this piece were adapted from that article.

15. Pub. L. No. 109–366, 120 Stat. 2600.

16. See RULES FOR MILITARY COMMISSIONS, MANUAL FOR MILITARY COMMISSIONS, available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>. [hereinafter RULES FOR MILITARY COMMISSIONS].

17. See Military Commissions Act of 2006.

18. *Id.* § 949(e); see also Ruling on Government Motion to Continue Arraignment, *supra* note 7.

19. See RULES FOR COURTS MARTIAL, MANUAL FOR COURTS–MARTIAL, pt. II, ch. I, R. 104, at II–4 (2008).

20. *Id.*

21. See RULES FOR MILITARY COMMISSIONS, *supra* note 17, pt. II, ch. I, R. 104, at II–8 (2007).

22. *Id.* pt. II, ch. I, R. 104(a)(2) (emphasis added).

“all persons subject to the code.”<sup>23</sup> This expansion is important because it means that civilians and non-active duty members (those not ordinarily subject to the code) are prohibited from influencing military commissions. It suggests that Congress was particularly concerned with preserving the integrity and independence of the military commission process.

Courts consistently recognize the deleterious impact of unlawful command influence on military trials. One court called it the “mortal enemy of military justice.”<sup>24</sup> Another referred to it as “a malignancy that eats away at the fairness of our military justice system.”<sup>25</sup> Military courts have interpreted the crime of unlawful command influence to include even *the appearance* of unlawful command influence.<sup>26</sup>

But what conduct falls within the realm of unlawful command influence? Where is the line? While no bright line exists, tests include “whether a reasonable member of the public . . . would have a loss of confidence in the military justice system and believe it to be unfair.”<sup>27</sup> Another test asks whether the command influence placed “intolerable strain on public perception of the military justice system.”<sup>28</sup> Figuratively and generally speaking, the test for unlawful command influence asks whether the Commander was “brought into the deliberation room”—whether he controlled the trial or the court.<sup>29</sup>

Military courts have repeatedly held that almost any interference with military trials amounts to unlawful command influence. For instance, one court found that a hospital commander committed unlawful command influence when he generally criticized witnesses (after the trial was over) for testifying on behalf of alleged drug offenders.<sup>30</sup> Even when his statements could not have possibly impacted the outcome of a trial—a trial that was over—the court, in an abundance of caution, nonetheless found that unlawful command influence existed.

Another court held that an Army General committed unlawful command influence when he advised subordinate officers against recommending a bad conduct discharge for a soldier, only to then testify at the sentencing phase that the same convicted soldier was a “good soldier.”<sup>31</sup> The General believed, understandably, that the two positions were inconsistent. The court found that unlawful command influence existed. It said, “in this area [un-

23. *Id.*

24. Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 263 (1996) (citing *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986)).

25. *Id.* (citing *United States v. Gleason*, 39 M.J. 776, 782 (A.C.M.R. 1994)).

26. *Id.* at 264–65 (citing *United States v. Allen*, 31 M.J. 572, 590 (N-M.C.M.R. 1990)).

27. *United States v. Allen*, 31 M.J. 572, 590 (N-M.C.M.R. 1990).

28. *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003).

29. *Allen*, 31 M.J. at 590 (quoting *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983)).

30. *United States v. Sullivan*, 26 M.J. 442 (CMA 1988).

31. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984).

lawful command influence] the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous.”<sup>32</sup> In this case, the court erred on the side of preserving discretionary functions, even when those functions were carried out in an inconsistent (and possibly unjust) manner.

In another rather curious case, a court held that an informal inquiry into suspected unlawful command influence could itself amount to unlawful command influence. After a military judge ruled leniently in three cases, a group of senior military lawyers (including the Judge Advocate General of the Air Force), opened an informal inquiry into whether the judge had been subjected to unlawful command influence by his chain of command. The U.S. Court of Military Appeals barred such inquiries and said that only official investigations “made by an independent judicial Commission established in strict accordance with the guidance contained in Section 9.1(a) of the AGA Standards . . .” were permitted.<sup>33</sup> The court was concerned that the *inquiry itself* could amount to unlawful command influence.<sup>34</sup> It is unclear how an investigation aimed at uncovering possible unlawful command influence might itself amount to unlawful command influence. However, the court, in a skittish attempt to steer far away from even the appearance of unlawful command influence, barred the JAG Officers from asking questions designed to stop unlawful command influence.

The above are but a few examples of conduct that military courts consider unlawful command influence. These cases illustrate that military courts are consistently aggressive about protecting the integrity of military trials and that they have a propensity to find that almost any interference with military trials amounts to unlawful command influence.

This general propensity is sharpened when the interference threatens the integrity of sitting judges. A recent case, *United States v. Lewis*,<sup>35</sup> demonstrates that military courts are particularly protective of judicial decision-making. The holding in *Lewis* is instructive in analyzing President Obama’s decisions with respect to trials underway in Guantanamo Bay.

## II. UNLAWFUL COMMAND INFLUENCE AND SITTING JUDGES: THE APPLICABILITY OF *U.S. v. LEWIS*

In *United States v. Lewis*,<sup>36</sup> a military prosecutor and his supervising lawyer (the Staff Judge Advocate, or “SJA”) aggressively sought to have a Marine Corps Judge recuse herself on the grounds that the judge had a personal

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32. *Id.* at 653.

33. *United States v. Ledbetter*, 2 M.J. 37, 43 (C.M.A. 1976).

34. *Id.*

35. *See* 63 M.J. 405 (C.A.A.F. 2006).

36. *Id.* at 407–08.

relationship with the defendant's lawyer (who was a former Marine). The prosecutor alleged that the judge and civilian defense counsel had interacted socially, even while the trial was ongoing.<sup>37</sup>

The prosecutor introduced evidence that the military judge and defense counsel were seen together at a play while the trial was underway.<sup>38</sup> When initially questioned about attending the play with the defense counsel, the judge failed to disclose that interaction. Later, she explained that it had "slipped [her] mind."<sup>39</sup> She then conceded that she and the defense counsel had "occasional social interaction with no discussions of any military trials pending before me."<sup>40</sup>

In addition to the social relationship, the prosecutor also pointed out that the defense counsel had a practice of sending copies of e-mails about pending cases to this particular judge and that the defense counsel had previously expressed a preference for this military judge in other cases.<sup>41</sup>

The prosecutor also introduced evidence that the judge had been voir dired about her personal relationship with defense counsel in several other cases.<sup>42</sup> In one instance, after being voir dired by the prosecutor in an earlier case, the judge told a colleague that she felt she had been put "through an inquisition" and that "it would take . . . a few days to get back on good terms with the government."<sup>43</sup> The prosecutor introduced this prior statement as evidence of partiality toward this particular defense counsel.<sup>44</sup>

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37. *Id.* at 408.

38. *Id.* at 409.

39. *Id.*

40. *Id.*

41. *Lewis*, 63 M.J. at 408–09.

42. *Id.* at 409.

43. *Id.* at 408.

44. *Id.* at 408–09. The prosecution's motion for recusal went as follows:

Ma'am, at this time taken all of the facts that have come to light during this inquiry, your previous involvement with the companion cases, having worked with Colonel [JS] in the past, *having a social relationship limited to interactions at the barn*, as well as the fact that defense counsel in the *Neff* case apparently received statements from the assistant civilian defense counsel expressing preference for you as military judge, also the fact that you expressed in the *Scamahorn* case displeasure with the way that you had been voir dired in the *Curriel* case; also the fact that civilian defense counsel in this case has made a habit of CC'ing you on electronic mail messages which contained disputed and contested substantial issues relating to suborning perjury, discovery issue, and making recommendations to you as to what would be an appropriate resolution for failure to comply with pretrial milestones: All of that taken together, ma'am, would you agree that creates an appearance of impartiality [sic] that a reasonable person might perceive with respect to this case, ma'am?

*Id.*

The military judge at first denied the prosecution's motion to recuse. The prosecutor sought a three day continuance to determine whether the government would appeal the ruling. The judge denied that request. The prosecutor then amended the request and asked for only a three hour continuance in order to seek a stay of the proceedings. The judge denied that request, too.<sup>45</sup>

Ultimately, after consulting with other judges in the circuit, the judge changed her mind and recused herself.<sup>46</sup> She stated, "I'm emotional about this,"<sup>47</sup> and explained that she was "mortally disappointed in the professional community that is willing to draw such slanderous conclusions from so little information."<sup>48</sup> She went on to explain, "I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]"<sup>49</sup> She held prosecutors responsible for her inability to be objective, stating, "my emotional reaction to the slanderous conduct of the SJA has invaded my deliberative process on the motions."<sup>50</sup>

After the sitting judge recused herself, the military assigned a new judge, LTC FD.<sup>51</sup> Incredibly, he accepted the case only to almost immediately recuse himself, too. What were his reasons for recusal? "The manner in which [trial counsel] handled the voir dire in this case particularly offends me."<sup>52</sup> He characterized the SJA's voir dire of the former judge as a "crass, sarcastic, and scurrilous characterization of the social interaction between Major [CW] and Ms. [JS] . . ."<sup>53</sup> He explained that he could "neither understand nor set aside" the "ignorance, prejudice, and paranoia on the part of the government . . ."<sup>54</sup>

But how, exactly, did the diligent voir dire of a former judge prejudice the present judge? It seems that the military judges mounted a united, public front against voir dire directed at them. One can only understand this as a warning to JAG prosecutors that judges are off limits. Arguably, it is this united front that taints the fairness of military trials—not prosecutors doing their jobs.

Although the case seems more about judicial recusal than unlawful command influence, it morphed into a case resting on principles of unlawful command influence. On appeal, the U.S. Court of Appeals for the Armed Forces held that the prosecutor and the SJA's diligent attempts to recuse the

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45. *Id.* at 409.

46. *Id.* at 411.

47. *Lewis*, 63 M.J. 410.

48. *Id.* at 410–11.

49. *Id.* at 411.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Lewis*, 63 M.J. 411.

54. *Id.*

judge amounted to unlawful command influence.<sup>55</sup> Without citing any evidence that the prosecutor or SJA were actually influenced by their chain of command, or that they acted out of anything but professional diligence, the Court of Appeals found unlawful command influence. It said:

*[t]o the extent that the SJA, a representative of the convening authority, advised the trial counsel in the voir dire assault on the military judge and to the extent that his unprofessional behavior as a witness and inflammatory testimony created a bias in the military judge, the facts establish clearly that there was unlawful command influence on the court-martial.*<sup>56</sup>

That is, the Court simply held that *if* the prosecutors acted as puppets for the command then unlawful command influence occurred. But that is nothing new under the sun. The Court failed to answer the dispositive question of *whether* the commander was at all involved. And, if he was, did that involvement rise to the level of unlawful command influence?

The Court of Appeals for the Armed Forces agreed with the lower court, also without citing any evidence that the prosecutors were motivated by any commander. It simply held that “a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government’s conduct with respect to MAJ CW [the military judge].”<sup>57</sup> It did not explain why a reasonable observer would reach such a conclusion.

It is unclear how a prosecutor aggressively seeking to have a judge recuse herself, whom the prosecutor reasonably believed was biased, amounts to unlawful command influence. How would it lead one to believe that the procedures were not fair? In fact, the opposite is true. One would think that a military prosecutor facing off against a military judge in open court demonstrates that the proceedings *are* fair; that they *are not* orchestrated; that both prosecutors and defense counsel diligently represent their clients, despite the fact that they all work for the military.

Whether one agrees or disagrees with the holding in *Lewis*, one cannot deny the fact that its holding would prohibit President Obama—or any president—from stopping military trials already underway. If minor interferences with a trial by a prosecutor amounts to unlawful command influence, then surely a President halting a trial altogether qualifies as well. If the *mere theoretical possibility* that a commander encouraged a prosecutor to recuse a judge amounts to unlawful interference, then certainly a President *actually* halting a trial and *involuntarily removing* the judge qualifies as well. Is there any greater “interference” than ordering a judge to stop a tri-

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55. *Id.* at 414–15.

56. *Id.* at 412 (emphasis added).

57. *Id.* at 415.



al?

Ironically, one of the sitting judges, Judge Susan Crawford, who decided the *Lewis* case,<sup>58</sup> later yielded to and even facilitated President Obama's order to halt military commissions that were already underway in Guantanamo Bay. Only a few months after *Lewis*, Defense Secretary Robert Gates designated Judge Crawford as the convening authority for military commissions.<sup>59</sup> Her position as the convening authority meant that she would supervise the office of Military Commissions, review and approve charges, and appoint members of the military commission, along with other duties.<sup>60</sup>

When Colonel Pohl would not yield to President Obama's order to halt the trials, Judge Crawford intervened and dismissed the charges against al-Nashiri, who was the alleged mastermind of the U.S.S. Cole bombing.<sup>61</sup> The case was not before her.

The same Pentagon official who said approximately one week before the dismissal that "Pohl would soon be told to comply"<sup>62</sup> confirmed that Crawford yielded to the President's order. He stated, "[i]t was her decision, but it reflects the fact that the [P]resident had issued an executive order which mandates that the commissions be halted . . . ."<sup>63</sup> On the heels of her decision in *Lewis*, in which she took a rigid stand against unlawful command influence with relatively weak facts, Crawford yielded to President Obama's order to halt military trials.<sup>64</sup>

That is, the same Judge who believes that diligent voir dire directed at military judges amounts to unlawful command influence, holds different and inconsistent views when the command influence originates with a sitting President. The precise reason for the inconsistency is unclear.

However, one reasonable explanation for the inconsistency is that perhaps Judge Crawford herself was a victim of unlawful command influence. That is, perhaps she can *identify* unlawful command influence, but she cannot *resist* it when the order comes from the highest commander—the President and commander in chief. Indeed, that is why the military prohibits unlawful command influence, and defines it broadly.

In *Hamdan v. Rumsfeld*,<sup>65</sup> the Supreme Court criticized President Bush for changing the rules governing military commissions after the trials were already underway. It said that changing the rules "at the whim of the Ex-

58. *Id.* at 406; *see also* Press Release, U.S. Dep't of Defense, Seasoned Judge Tapped to Head Detainee Trials (Feb. 7, 2007), [www.defenselink.mil/REleases/Release.aspx?ReleaseID=10493](http://www.defenselink.mil/REleases/Release.aspx?ReleaseID=10493).

59. Press Release, U.S. Dep't of Defense, *supra* note 56.

60. *Id.*

61. MSNBC, *supra* note 12.

62. Williams, *supra* note 3.

63. MSNBC, *supra* note 12.

64. *Id.*

65. 548 U.S. at 633 n. 65 (2006).

ecutive” was “irregular.”<sup>66</sup> Surely, if the Supreme Court thinks that changing the rules mid-trial is unfair, it would also conclude that halting the trials all together in violation of a governing federal statute is also unfair.

Arguably, the Pentagon orders did not merely bring President Obama “into the deliberation room.” Instead, they allowed the President to figuratively block the deliberation room door by stopping a trial that was already underway and removing the presiding judge. Importantly, the Executive Order and the Pentagon’s statements responding to Colonel Pohl’s refusal to stop the trial left no room for Colonel Pohl to exercise judicial discretion or to issue rulings in a case before him. This interference undermined the integrity of the judicial system and is arguably the reason why the military has laws prohibiting unlawful command influence. In this case, the President arguably substituted his judgment for that of a sitting judge.

### III. CONCLUSION

In the Global War on Terror, President Obama halted military commissions in violation of the Military Commissions Act, and possibly in violation of the prohibition against unlawful command influence. Executive interference with military trials undermines their legitimacy and cuts against the existence of procedural protections. What good are procedural protections if the Executive, acting alone, can undo them? What good are independent judges when a President can unseat them or order cases before them to be dismissed?

What, if any, impact President Obama’s decision will have on the overall integrity of military commissions remains to be seen. President Obama, in concert with Attorney General Eric Holder, ultimately decided that some detainees would face trial before Article III (civilian) courts, while others would face trial by military commission in Guantanamo Bay. Presently, no lawyer has raised a complaint of unlawful command influence. However, if and when military trials resume, lawyers could raise the complaint at that time. Would a court curtail unlawful command influence with military commissions when a sitting President is involved? Would it maintain its current rigid stance against unlawful command influence? Perhaps, but we cannot know for sure. One thing is clear: only time will tell whether the President’s involvement in military commissions is for better or for worse; or whether it will ultimately be regarded as unlawful command influence and presidential error.

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66. *Id.*