

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 555EEE</p> <p>RULING</p> <p>Mr. al Baluchi's Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor</p> <p>10 January 2019</p>
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1. Procedural History.

a. On 9 February 2018, Mr. Ali (a.k.a. al Baluchi) moved to dismiss all charges,¹ claiming (1) the terminations of Mr. Harvey Rishikof and Mr. Gary D. Brown from their positions as Convening Authority (CA) and CA’s Legal Advisor, respectively, had been in retaliation for certain decisions in those capacities; and (2) the terminations, therefore, constituted unlawful influence (UI) over Messrs. Rishikof and Brown by then-Secretary of Defense (SecDef) James N. Mattis² and then-Department of Defense Acting General Counsel (DoD AGC) William S. Castle.³ The Government responded on 26 February 2018, arguing the Defense had not met its initial burden and, in any event, had not alleged acts constituting UI.⁴

¹ AE 555 (AAA), Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 9 February 2018, p. 1.

² The Commission takes judicial notice that SecDef Mattis submitted a letter of resignation on 20 December 2018, and no longer served as SecDef as of 1 January 2019. See Jeremy Diamond, et al., *Mattis quits, says his views aren't 'aligned' with Trump's*, <https://www.cnn.com/2018/12/20/politics/donald-trump-james-mattis-out/index.html> (last updated 21 December 2018, 4:46 PM); Holly Rosenkrantz, *Trump ousts Mattis 2 months early, taps Shanahan as acting defense secretary*, CBS News Online, <https://www.cbsnews.com/news/trump-expected-to-order-mattis-to-leave-job-immediately-appoint-patrick-shanahan-defense-secretary/> (last updated 23 December 2018, 4:02 PM). As Mr. Mattis was SecDef throughout the events relevant to this motion series, for simplicity he will be referred to by that title herein.

³ The Commission notes Mr. Castle relinquished the AGC role in August 2018. See fn 26, *infra*, and accompanying text. However, as he was AGC throughout the events relevant to this motion series, for simplicity he will be referred to by that title herein.

⁴ AE 555A (GOV) (Corrected Copy), Government Response To Mr. Ali’s Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 26 February 2018 (original filed 23 Feb 2018), para. 3.

b. Since the initial motion and response, filings in this series have been many and voluminous.⁵ The parties have presented witness testimony and engaged in substantial argument regarding many of the procedural and substantive issues identified. The Commission has considered all of the filings,⁶ argument, and evidence in the AE 555 series. This ruling will address the following:

(i) AE 555P (GOV),⁷ a motion by the Government for the Commission to reconsider a prior order (AE 555O).⁸ The only remaining question in that motion is whether the Commission should fully grant reconsideration by permanently rescinding its directive in AE 555O for the Government to (1) disclose the CA's monthly status reports, and (2) produce Mr. Rishikof to testify.⁹

⁵ The filings include declarations submitted by Secretary Mattis, AGC Castle, and Messrs. Rishikof and Brown, filed at the Commission's request. AE 555B, Trial Conduct Order: Mr. al Baluchi's Motion to Dismiss For Unlawful Influence Over Convening Authority and Legal Advisor, dated 27 February 2018; AE 555E (GOV), Government Notice Of Declarations Requested By The Military Commission, filed 19 March 2018, Attach.'s B (hereinafter, "Mattis Declaration"), C (hereinafter, "Castle Declaration"); AE 555G, Notice of Receipt: Declaration of Harvey Rishikof and Gary D. Brown, filed 20 March 2018, Attach. A (hereinafter, "Rishikof & Brown Declaration 1"); AE 555L, Notice of Receipt: Second Declaration of Harvey Rishikof and Gary D. Brown, filed 30 April 2018, Attach. A (hereinafter, "Rishikof & Brown Declaration 2").

⁶ This includes Mr. Mohammad's recent supplement, and the Government's response. AE 555CC (KSM Sup), Mr. Mohammad's Supplement to AE 555CC, filed 2 January 2019; and AE 555DDD (GOV), Government Response To AE 555CC (KSM Sup), Mr. Mohammad's Supplement to AE 555CC (KSM), filed 4 January 2019. The Commission's analysis herein is unaltered even when assuming the facts proffered in Mr. Mohammad's latest supplement are accurate. *See* fn 25, 33, *infra*. Accordingly, the Commission finds no Defense reply to the Government's response to be necessary.

⁷ AE 555P (GOV), (U) Government Combined Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, and (U) Response To AE 555 (AAA 2nd Sup), AE 555 (KSM 2nd Sup) Defense Supplemental Motions to Dismiss for Unlawful Influence Over the Convening Authority and Legal Advisor, filed 6 June 2018.

⁸ AE 555O, Order: Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 23 May 2018.

⁹ In AE 555O, the Commission granted Defense motions (a) to compel production of certain materials, and (b) to compel production of Messrs. Rishikof and Castle as witnesses, while (c) denying a request to compel production of Mr. Brown. AE 555O, para. 4. The Government in AE 555P (GOV) moved the Commission to reconsider that ruling regarding (a) certain specified documents (the CA's monthly status reports and Tabs 4-7 of the December 2017 Management Memorandum) and (b) both witnesses. AE 555P (GOV), para. 2. On 21 June 2018, following *in camera* review of the documents, the Commission issued an interim ruling in which it (a) directed production of the memo tabs, but (b) granted reconsideration regarding the CA's monthly status reports and the witnesses, while (c) deferring final ruling regarding those reports and witnesses. AE 555S, Interim Ruling: Government Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 21 June 2018, para. 5. On 1 November 2018, the Commission issued a further ruling in which it directed the production of Mr. Castle, but continued to defer with regard to the status reports and

(ii) AE 555 (AAA 2nd Sup),¹⁰ AE 555R (AAA),¹¹ and AE 555CC (AAA),¹² in

which Mr. Ali moved to compel certain witnesses;

(iii) AE 555GG (KSM),¹³ Mr. Mohammad's motion for a conclusion of law regarding whether the Defense has met its initial burden of production regarding UI; and

(iv) AE 555 (AAA), the base motion seeking dismissal based on alleged UI.

c. Further oral argument is unnecessary for the Commission to resolve these matters.¹⁴

2. Findings of Fact. The Commission makes the following findings of relevant fact based on the evidence presented; the undisputed assertions of the parties; and/or, where appropriate, the assumption that certain Defense allegations are true.

a. On 3 April 2017, Mr. Harvey Rishikof was designated as CA and Director, Office of the CA (OCA).¹⁵ On 28 April 2017, Mr. Gary Brown was appointed as CA's Legal Advisor.¹⁶

b. On 5 May 2017, Mr. Rishikof met with then-Deputy Secretary of Defense (DepSecDef) Robert O. Work and informed him of a perceived need for realignment of

Mr. Rishikof. AE 555AAA, Ruling: Government Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 1 November 2018, paras. 5-6. Mr. Castle testified on 13 November 2018 by video teleconference (VTC). Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 13 November 2018 from 9:03 A.M. to 9:36 A.M. at p. 21128 (start of AGC Castle's testimony). (Note that, for brevity's sake, subsequent cites to the unofficial transcript in this ruling will simply be by page number, *e.g.*, "Transcript 21128.")

¹⁰ AE 555 (AAA 2nd Sup), Mr. al Baluchi's Second Supplement to Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 21 May 2018, para. 4, Attach. B. This supplement had been filed prior to the Commission's initial ruling regarding certain discovery requested by the Defense (AE 555O); however, as the briefing cycle for the supplement was not complete, the Order did not address it. AE 555O, fn 8.

¹¹ AE 555R (AAA), Mr. al Baluchi's Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 18 June 2018.

¹² AE 555CC (AAA), Mr. al Baluchi's Second Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 26 July 2018.

¹³ AE 555GG (KSM), Motion for a Conclusion of Law that the Defense Has Provided 'Some Evidence' Of Unlawful Influence in the Firing of the Convening Authority, filed 29 August 2018.

¹⁴ The opportunity to present oral argument regarding pretrial motions is afforded at the sole discretion of the Military Judge. R.M.C. 905(h); R.C. 3.5.m.

¹⁵ The SecDef memorandum designating Mr. Rishikof as CA was signed 4 April 2017, but by its terms was effective as of 3 April 2017. AE 555P (GOV), Attach. K, Tab B, Tab 1; Mattis Declaration para. 3.

¹⁶ AE 555A (GOV), p. 3; AE 555P (GOV), Attach. I.

authorities and additional spending associated with military commissions.¹⁷ DepSecDef Work subsequently “requested [Mr. Rishikof] provide his views on paths forward in a written document,” and the two “had a mutual understanding that [as] Mr. Work was Mr. Rishikof’s direct supervisor . . . no formal coordination was expected.”¹⁸

c. Sometime in May 2017, Mr. Rishikof informed the Chief Defense Counsel (CDC), Military Commissions Defense Organization, that he wished to meet with Learned Counsel to discuss, *inter alia*, potential for pretrial agreements (PTAs).¹⁹ On 30 May 2017, Messrs. Rishikof and Brown met with the CDC and six learned counsel, and Mr. Rishikof “invited interested defense counsel to contact him regarding plea negotiations.”²⁰ On 27 June 2017, Messrs. Rishikof and Brown discussed potential for a PTA with Counsel for Mr. Mohammad.²¹

d. On 6 July 2017, Messrs. Rishikof and Brown met with then-DepSecDef Work and his incoming replacement, Mr. Patrick Shanahan,²² and briefed them on the possibility of resolving the cases by PTA²³ and the perceived need for realignment of military commissions authorities.²⁴

¹⁷ AE 555BB (KSM AAA), Mr. al Baluchi’s and Mr. Mohammad’s Combined Position Regarding Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor and Related Pleadings, filed 25 July 2018, pp. 18, 32; AE 555CC (AAA), Attach. B, pp. 3, 12.

¹⁸ AE 555CC (AAA), Attach. B, pp. 3, 13; *see also* Transcript 20801-03 (Defense investigator describing interview in which former DepSecDef Work said “he gave direct instructions to . . . Mr. Rishikof[] to report only to him on paths forward [regarding] the suggested reorganization . . . of OMC,” and email in which former DepSecDef Work said that because he “did not want a lot of chatter” in DoD, “I would not have expected [Mr. Rishikof] to discuss this across the department, given the political ramifications[, a]nd if he had not discussed things with the GC, I would have . . . called a meeting to discuss.”)

¹⁹ AE 555BB (KSM AAA), pp. 18, 28.

²⁰ AE 555BB (KSM AAA), p. 28; AE 555CC (AAA), Attach. B, p. 3; AE 555UU (AAA), p. 4.

²¹ AE 555BB (KSM AAA), pp. 9, 28.

²² DepSecDef Work relinquished the office to Mr. Shanahan on 19 July 2017. AE 555T (GOV), Government Response To Mr. Ali’s Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 2 July 2018, p. 6; AE 555EE (GOV), Government Response To Mr. Ali’s Second Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 9 August 2018, p. 4.

²³ AE 555BB (KSM AAA), p. 28; AE 555UU (AAA), Mr. al Baluchi’s Closing Argument Memorialized for AE 555P (GOV), AE 555R (AAA), and AE 555CC (AAA), filed 27 September 2018, p. 4.

²⁴ AE 555BB (KSM AAA), p. 32.

e. On 15 August 2017, counsel for Mr. Mohammad forwarded a proposed PTA to the OCA.²⁵

f. On 27 August 2017, Mr. Castle was appointed as Principal Deputy General Counsel (PDGC) for the DoD, and assumed the role of DoD AGC the same day.²⁶

g. In early September 2017, during a routine meeting, Mr. Castle's staff advised him that Messrs. Rishikof and Brown had requested to meet with him.²⁷ Mr. Castle asked OGC attorneys for background information, and was told about some issues with the CA.

At that time, I had little specific knowledge about the ongoing Military Commissions. Prior to holding that meeting, I spoke to attorneys within [OGC about] what Mr. Rishikof and Mr. Brown might want to discuss. I recall that around this time I asked for and received OGC attorneys' view of Mr. Rishikof and Mr. Brown's performance in managing the OMC. Their general view was that Mr. Rishikof and Mr. Brown alternated between not coordinating administrative aspects of their jobs and coordinating in a needlessly disruptive and divisive manner. This caused me to question whether Mr. Rishikof and Mr. Brown were the right individuals to manage . . . OMC.²⁸

The specific performance issues cited by the OGC attorneys included an attempt to use unauthorized air transportation to U.S. Naval Station, Guantanamo Bay (NSGB) and a change to boat transportation at NSGB that had resulted in cancellation of a commissions hearing session.²⁹

Mr. Castle's staff also advised him that (1) the CA was exploring potential non-capital PTAs with the Defense,³⁰ a process that was "well under way;"³¹ (2) it was imperative he not

²⁵ AE 555VV (KSM), Mr. Mohammad's Closing Argument Memorialized for AE 555P (GOV), AE 555R (AAA), and AE 555CC (AAA), filed 27 September 2018, p. 15. In his recent supplement, Mr. Mohammad cites to a prior proffer of this fact made on the record and, in light of the Government's contesting of that proffer, argues that the testimony of Mr. Rishikof is necessary to establish it. AE 555CC (KSM Sup), pp. 1-2. Accepting that proffered fact as true, however, will not change the decision the Commission renders here. Accordingly, the Commission has entered a finding of fact consistent with the Defense proffer, and finds Mr. Rishikof's testimony in that regard unnecessary.

²⁶ Castle Declaration para. 3; Transcript 20902, 21131, 21137. He remained AGC until August 2018, after which he continued to serve as DoD PDGC. Transcript 21131.

²⁷ Transcript 21170-74.

²⁸ Castle Declaration, para. 10.

²⁹ Transcript 21175-76.

³⁰ That is, "agreements to take the death penalty off the table in exchange for a guilty plea and life in prison." Transcript 21335.

³¹ Transcript 21174, 21360.

substantively discuss or attempt to influence those negotiations in any way;³² and (3) the Defense had indicated they would not agree to any PTA unless the CA first obtained concurrence from the Department of Justice (DOJ).³³

h. The requested meeting with Mr. Rishikof was held sometime in late September or early October 2017.³⁴ During that meeting, AGC Castle shut down any substantive discussion of PTAs in order to avoid UI issues: “[A]nytime [Mr. Rishikof] would try and bring up anything . . . to do with plea agreements, I . . . literally would physically wave him off. I mean, I was literally moving my arms back and forth saying, ‘That is not my business. That is . . . what you do. I don’t have any role in that.’”³⁵

i. On 29 September 2017, Messrs. Rishikof and Brown met with counsel for Mr. Ali to discuss “possible disposition” of the case, to include potential for a PTA.³⁶

³² Transcript 21174 (“[My staff] explained to me what the [CA] was, and they explained . . . Mr. Rishikof was actively exploring the possibility of [PTAs] . . . and they also explained to me the concept of [UI] and how it was absolutely essential that I not discuss . . . plea agreements with him at all.” *Id.*); Transcript 21301 (AG Castle testifying that “my staff was very . . . concerned about me saying anything or doing anything that would have to do with a UI,” and that “I was not supposed to say anything that could be construed one way or the other as supporting or not supporting” PTA negotiations. *Id.*)

³³ Transcript 21302, 21306, 21345, 21360-61, 21368. The Commission notes that, in his supplement to AE 555CC, Mr. Mohammad proffered (and cited to prior proffers made by him on the record) that (1) he “caused a confidential . . . proposed PTA . . . to be served on Mr. Rishikof on August 15, 2017, and (2) that, while that document “did not require that the Attorney General sign the document,” it did “require that the [CA] *agree that Mr. Mohammad would not be prosecuted elsewhere.*” AE 555CC (KSM Sup), pp. 1, 5-6 (emphasis added). Even assuming those proffers to be true, they do not materially contradict AGC Castle’s testimony that he and other OGC attorneys were advised (and in fact believed) that Defense Counsel in this case would not accept a PTA absent some formal affirmation that DOJ would not prosecute. Accordingly, the Commission is not persuaded that Mr. Rishikof’s testimony is needed to resolve any perceived inconsistency between these proffers and AGC Castle’s testimony.

³⁴ Transcript 21170, 21179-80. Sometime in the fall of 2017, AGC Castle’s staff also arranged a brief introductory meeting between him and the Chief Prosecutor. Transcript 21325-26. AGC Castle ultimately met with the Chief Prosecutor “a couple of times,” and could not recall details of what was discussed, though the focus was apparently on a military commissions case other than this one. Transcript 21356-60. AGC Castle did not meet with the Chief Defense Counsel. Transcript 21360.

³⁵ Transcript 21301.

³⁶ AE 555BB (KSM AAA), pp. 29-30; AE 555CC (AAA), Attach. B, pp. 5, 10.

j. In early- to mid-October 2017, Attorney General (AG) Jeff Sessions called SecDef Mattis's office to express his position regarding the conclusion of PTAs in this case.³⁷ Secretary Mattis was called out of a meeting with high-level DoD officials (including AGC Castle) to take AG Sessions's call.³⁸ Shortly after, AGC Castle was called out to join Secretary Mattis.³⁹ AGC Castle did not know why Secretary Mattis had been called out.⁴⁰ After AGC Castle arrived in Secretary Mattis's office, the AG was connected via speakerphone.⁴¹ The SecDef had difficulty determining the nature of the AG's concerns.⁴² AG Sessions stated he wanted "no deal."⁴³ Secretary Mattis asked AGC Castle, "What is [AG Sessions] talking about?"⁴⁴ AGC Castle replied that he "didn't entirely understand what was going on."⁴⁵ However, certain at least that DoD had concluded no recent agreements that would substantially involve the AG, AGC Castle confirmed to Secretary Mattis that there was "no deal."⁴⁶ The call was very brief—about 3 or 4 minutes⁴⁷—after which the SecDef and AGC Castle returned to the original meeting.⁴⁸ They did not substantively discuss the AG's call again.⁴⁹ Though AGC Castle gleaned the AG's call was in some way related to terrorism,⁵⁰ the specific source of his consternation was sufficiently unclear that AGC Castle did not immediately understand the "deal" referred to was potential

³⁷ AE 555BB (KSM AAA), pp. 7, 31; AE 555EE (GOV), p. 7; AE 555UU (AAA), pp. 4-5, 12; AE 555WW (GOV), Government Written Memorialization of Its Intended Oral Argument, filed 27 September 2018, p. 19; AE 555ZZ (KSM), Mr. Mohammad's Response to AE 555WW (GOV) Government Written Memorialization of Its Intended Oral Argument, filed 11 October 2018, p. 3; Transcript 20803-20806, 21186-88. Secretary Mattis was SecDef throughout the course of events at issue here. Mattis Declaration para. 3; fn 2, *supra*.

³⁸ Transcript 21186-87.

³⁹ Transcript 21186-88.

⁴⁰ Transcript 21187.

⁴¹ Transcript 21315-17, 21362.

⁴² Transcript 21190.

⁴³ Transcript 21188, 21317, 21331-32, 21363.

⁴⁴ Transcript 21190, 21331.

⁴⁵ Transcript 21190.

⁴⁶ Transcript 21191-93, 21318-20, 21331-32, 21364.

⁴⁷ Transcript 21192, 21318, 21364.

⁴⁸ Transcript 21332.

⁴⁹ Transcript 21333. Secretary Mattis never communicated with Mr. Rishikof or Mr. Brown directly regarding this, or any other, matter. Rishikof & Brown Declaration 1, para. 4.

⁵⁰ Transcript 21317-18.

PTAs in this case.⁵¹ AGC Castle did not suspect this until after he returned to his office and discussed the matter with other OGC attorneys.⁵² He subsequently directed his staff to arrange a meeting with Mr. Rishikof (described in more detail below), at which he would discuss the importance of coordination within the department, but not the substance of any PTAs.⁵³

k. On or about 16 October 2017, AGC Castle and Deputy General Counsel-Legal Counsel (DGC (LC)) Robert Easton met with Messrs. Rishikof and Brown.⁵⁴ They informed Messrs. Rishikof and Brown of the call by AG Sessions to SecDef Mattis⁵⁵ and expressed concern⁵⁶ that OGC had not been informed of the CA's contacting DOJ to discuss pleas.⁵⁷ Messrs. Rishikof and Brown advised AGC Castle that they had attempted to brief him on prior occasions regarding their activities, but had been ignored.⁵⁸ AGC Castle repeatedly asked Mr. Rishikof, "Who authorized you to go over and speak to [DOJ]?"⁵⁹ Mr. Rishikof responded that DepSecDef Shanahan had authorized the contact.⁶⁰ AGC Castle stressed that "all of our ships have to be heading in [*sic*] the same place at the same time," by which he meant "we need to be properly coordinating what's going on."⁶¹ When Mr. Rishikof attempted to substantively discuss potential PTAs at the 16 October meeting, however, AGC Castle changed the subject to

⁵¹ Transcript 21191-92, 21319-20, 21364. During his testimony, AGC Castle stressed that, given the breadth of his portfolio, a "deal" between the DoD and DOJ could mean any number of things. Transcript 21191, 21320.

⁵² Transcript 21193-97, 21334-35, 21365.

⁵³ Transcript 21199-21200.

⁵⁴ AE 555BB (KSM AAA), pp. 7, 31; AE 555CC (AAA), Attach. B, pp. 5, 10, 15; AE 555UU (AAA), p. 5.

⁵⁵ AE 555BB (KSM AAA), pp. 7, 31; AE 555CC (AAA), Attach. B, p. 5, 10, 15; Transcript 20804, 21198.

⁵⁶ Apparently this concern was of a sufficient degree that Messrs. Rishikof and Brown perceived AGC Castle as being "clearly agitated" or "angry" about the incident. AE 555CC (AAA), Attach. B, pp. 5, 15; Transcript 20804.

⁵⁷ Transcript 20805-06, 20897-98, 20903; AE 555CC (AAA), Attach. B, pp. 1, 5, 11, 15 (anticipating testimony that AGC Castle "said . . . the DOD all needs to move together and the OGC needs to be informed." *Id.*) AGC Castle and Mr. Easton also expressed concern about Mr. Rishikof engaging in uncoordinated direct contact with members of Congress. AE 555CC (AAA), Attach. B, pp. 5, 10.

⁵⁸ Transcript 20805-06.

⁵⁹ Transcript 21199, 21349.

⁶⁰ Transcript 21199.

⁶¹ Transcript 21199-21200.

avoid intruding on the CA’s authority (as was his consistent practice in conversations with Mr. Rishikof when the subject arose).⁶²

l. Shortly after the 16 October 2017 meeting, AGC Castle met with DepSecDef Shanahan, and asked whether he had in fact authorized Mr. Rishikof to contact DOJ.⁶³ The DepSecDef stated that he had.⁶⁴ While AGC Castle had begun seriously considering seeking Mr. Rishikof’s termination from the CA position due to “improper coordination because of the [AG] phone call,” upon learning the DepSecDef had authorized contact with the DOJ, he decided this was not an appropriate basis for termination.⁶⁵ At Mr. Rishikof’s request, AGC Castle then arranged for a meeting between Messrs. Rishikof and Brown, the DepSecDef, and himself.⁶⁶

m. At that meeting, which occurred on or about 18 October 2017, Messrs. Rishikof and Brown briefed the DepSecDef and AGC Castle on various Commissions-related issues, to include potential pursuit of PTAs in this case.⁶⁷ Specifically, they briefed on three proposed overall courses of action (COAs) for future management of the military commissions writ large, which were: (1) resolving cases by means of PTA; (2) reorganizing various DoD entities to consolidate commissions-related functions under the authority of the CA; or (3) continuing with the status quo.⁶⁸ Before the meeting, AGC Castle advised DepSecDef Shanahan to be in “receive mode,” meaning “to not indicate approval or disapproval of anything that [Mr. Rishikof] had to

⁶² Transcript 20903-04, 21301, 21349-50, 21353, 21371-72. During this meeting, DGC (LC) Easton asserted that OGC “own[s] commissions,” a remark he would clarify and apologize for on 27 October 2018 (stating he only meant the OMC structure had been set up by OGC). AE 555BB (KSM AAA), p. 31; AE 555CC (AAA), Attach. B, pp. 5-6, 11, 15-16; Transcript 20806. (AGC Castle remembered that Mr. Easton made the “ownership” remark, but was unable to recall if it was at the 16 December 2017 meeting. Transcript 21200-01. The Commission will assume the Defense assertions in this regard are accurate.) Sometime in October 2017, Easton was replaced as DGC (LC) by Mr. Ryan Newman. AE 555 (AAA 2nd Sup), Attach. B, p. 4; AE 555R (AAA), Attach. B, p. 4.

⁶³ Transcript 21202.

⁶⁴ Transcript 21202.

⁶⁵ Transcript 21202.

⁶⁶ Transcript 21202.

⁶⁷ AE 555P (GOV), Attach. D; AE 555BB (KSM AAA), pp. 33-34; AE 555CC (AAA), Attach. B, p. 6; Transcript 21203.

⁶⁸ Transcript 21203.

say, especially when it came to [PTAs].”⁶⁹ DepSecDef Shanahan followed that advice, saying very little during the meeting.⁷⁰

n. “Sometime before Thanksgiving” of 2017, as part of internal OGC discussions regarding the management of Military Commissions as a whole, AGC Castle again began to consider whether Mr. Rishikof should be terminated.⁷¹ In Mr. Castle’s words, “all of these different . . . concerns . . . were still out there . . . dealing with fast boat [and] other issues. . . . I’m really starting to be concerned that things are not going well. So we then spun up again the possibility of . . . terminating Harvey.”⁷² AGC Castle asked his subordinate counsel to consider the issue of replacing Mr. Rishikof as CA, and the subject was discussed at a number of internal OGC meetings.⁷³

o. On 1 December 2017, Messrs. Rishikof and Brown again met with counsel for Mr. Mohammad to discuss the potential for a PTA.⁷⁴

p. On 12 December 2017, the CA’s office submitted for DepSecDef signature a memorandum, subject: “Oversight and Management of Military Commissions.”⁷⁵ The body of the memo read as follows:

⁶⁹ Transcript 21204.

⁷⁰ Transcript 21204.

⁷¹ Transcript 21207-08.

⁷² Transcript 21206.

⁷³ Transcript 21208-09.

⁷⁴ AE 555BB (KSM AAA), pp. 9, 31.

⁷⁵ AE 555P (GOV), Attach. D. Also on 12 December 2017, OCA returned charges in *U.S. v. Encep Nurmajen, a.k.a. Hambali* (hereinafter, “*U.S. v. Hambali*”), “because the transmittal package lacked the required coordination with [the Office of the Director of National Intelligence (ODNI)] and also included no supporting evidence.” AE 555P (GOV), p. 370 of 425. On 15 December 2017, the Office of the Chief Prosecutor (OCP) asked OCA to dismiss the charges without prejudice in order to allow OCP to re-prefer. AE 555P (GOV), pp. 370-371 of 425. OCP forwarded this second set of charges to OCA for referral on 19 December 2017. AE 555P (GOV), p. 393 of 425. On 21 December 2017, Messrs. Rishikof and Brown met with outgoing DGC (LC) Newman and discussed, *inter alia*, OCA’s anticipated return of the *Hambali* charges to OCP. AE 555CC (AAA), pp. 14, 19, 24 of 33. On 22 December 2017, OCA returned the *Hambali* charges to OCP “because they lacked the required ODNI coordination.” AE 555P (GOV) p. 371 of 425. On 4 January 2018, Messrs. Rishikof and Brown met with (DGC (LC)) Newman and discussed, *inter alia*, the return of the *Hambali* charges. AE 555CC (AAA), pp. 5, 19, 24 of 33.

1. In our prior meeting with you in October 2017, we discussed the three courses of action to address Military Commissions cases at [NSGB]: (1) Continue the status quo at ever-increasing costs presently over \$100M per annum; (2) Consolidate authority for more cohesive operations; (3) *Entertain guilty pleas, speeding resolution of the cases and bringing closure to the victims and families. We have continued to press ahead on COA (3) (and will update you)*, but at this point are recommending you sign the attached memorandum for COA (2), consolidating control over Military Commissions in order to significantly improve the effectiveness of the Commissions mission moving forward. See Tab 1.

2. The attached draft memorandum for your signature at Tab 1 would greatly improve the ability of Military Commissions to carry out its core functions and operate with a unity of effort and authority. This memo would restore the status quo that existed at the outset of the Commissions and is similar to memoranda issued by prior Deputy Secretaries of Defense in May 2014 and May 2008 (see Tab 2). For various reasons, the authorities have eroded over the last sixteen years. The memo for your signature addresses the areas of concern such as lack of coherent C2; growing personnel, transportation, and infrastructure costs; protracted timeline of past and future litigation; an aging and resource-demanding detainee population; ballooning prosecution and defense costs; and national security implications which both slow information flow and increase costs due to spills or unauthorized disclosures of classified information.

3. Also attached is an appendix of substantiating documentation outlining in more detail the various issues and suggestions for improvement. I look forward to discussing this issue with you. My sense is that the sooner the memorandum is executed the better for the process, given the situation we now find ourselves in.⁷⁶

The packet, which was approximately 65 pages long, contained no reference to PTAs in this case beyond the italicized language above (emphasis added by the Commission).⁷⁷ This brief mention of PTAs essentially repeated information the DepSecDef and AGC had already known for some time.⁷⁸ Provided in the packet was a memorandum for DepSecDef signature that, had it been signed, would have had immediate and substantial cross-cutting effects within DoD on supervision, coordination, manpower, resourcing, and funding related to the military

⁷⁶ AE 555P (GOV), Attach. D (emphasis added).

⁷⁷ *Id.*

⁷⁸ The DepSecDef was aware of potential PTAs as of 6 July 2017—over 5 months before the 12 Dec 2017 memorandum was signed. *See* para. 2.d, *supra*. AGC Castle's staff made him aware of potential PTAs in this case virtually on his arrival at DoD OGC—certainly not later than September 2017. *See* para. 2.g, *supra*. Calculating from mid-September 2017, AGC Castle had already known of potential PTAs in this case for nearly three months.

commissions.⁷⁹ No advance copy was provided to DoD OGC.⁸⁰ There is no indication that any substantial, formal coordination with DoD OGC and potentially affected stakeholders had taken place before the memo was submitted for signature.⁸¹ The Office of the DepSecDef returned the

⁷⁹ See AE 555P (GOV), Attach.'s D-G. For example, the proposed DepSecDef memo stated that “[a]ll DoD organizations *will provide* sufficient manpower and resourcing assistance to the Military Commissions . . . as outlined in the attached document.” *Id.* (emphasis added). The attachment was a table of recommended changes to the DoD military commissions structure writ large. AE 555P (GOV), Attach. D, Tab 3. It expressly purported to make the CA supervisor of OCP; make the CA “sole ‘owner’” of military commissions-related Detainee Affairs, Periodic Review Board, prosecution, information technology, security, and personnel functions; and directed reallocation of considerable DoD funding to military commissions efforts (to include approximately \$27 million in construction). *Id.*; see also Transcript 21244 (AGC Castle’s testimony that the memorandum would have effectuated “a whole series of changes” that amounted to “fundamentally . . . reorganiz[ing]” the OCA and related organizations). At least one longtime OCA senior staff member (the Deputy Chief of Operations) apparently recognized the profound degree of authority the memorandum would have placed under Mr. Rishikof, colloquially referring to the document as the “King Me” memo. Transcript 20813, 72, 83-84.

⁸⁰ Transcript 21246, 21351-52; Castle Declaration para. 11.a.

⁸¹ There were apparently a number of meetings between OCA and OGC in which they discussed the realignment of authorities the 12 December 2017 memo was eventually drafted to effectuate. See AE 555BB (KSM AAA) (asserting “Mr. Rishikof and/or Mr. Brown had no less than twenty-five in-person and electronic meetings with members of OGC between 28 April 2017 and the submission of the memorandum in December 2017,” and that “[m]any of these . . . addressed” the three COAs recited in the memorandum. *Id.* at pp. 32-33); AE 555CC (AAA), Attach. B, pp. 6, 11, 16 (anticipating testimony that Mr. Rishikof discussed the forthcoming memo with DoD OGC personnel in several teleconferences prior to the memorandum’s submission); Transcript 20807, 20909 (Defense investigator relaying statement by Mr. Brown that “The predominant method [OCA used] to keep [OGC] informed . . . was a weekly . . . video teleconference.” *Id.* at 20807); see also Rishikof & Brown Declarations 1 and 2 (describing weekly meetings and status reports). AGC Castle acknowledged in his testimony that Mr. Rishikof “was always talking about” and “advocating for his COAs;” that while he “[didn’t] know the specifics,” there was “constant communication” between OCA and OGC, to include weekly meetings; and that Mr. Rishikof might well have advised AGC Castle at some point that he planned to reduce those COAs to “some sort of written document.” Transcript 21205, 21243-44, 21353. There are also indications that OCA personnel discussed the proposal with at least some non-OGC stakeholders in various calls and meetings. See, e.g., AE 555BB (KSM AAA), pp. 18, 32 (noting Messrs. Rishikof and Brown discussing need for reorganization with former DepSecDef Work); AE 555CC (AAA), Attach. B, p. 12 (anticipating Mr. Brown would testify that “he discussed the changes proposed in the 13 December 2017 memorandum extensively with representatives of affected organizations.” *Id.*). However, it is notable that in the wake of the memorandum’s rejection, an OGC attorney apparently suggested to Mr. Rishikof that he begin having regular monthly meetings with stakeholders from the organizations that would have been affected by the memorandum (AE 555CC (AAA), Attach. B, pp. 7, 17 (anticipated testimony of Mr. Rishikof))—which indicates that such regular broad-based coordination had not been conducted before. Significantly, Messrs. Rishikof and Brown themselves expressly acknowledged they had not formally staffed the document, claiming they viewed it as a mere “vehicle to begin discussions” (despite the profound effects it would have had), which therefore did not require formal staffing. Rishikof & Brown Declaration 2, para. 1.b; fn 79, *supra*. In short, nothing presented materially conflicts with AGC Castle’s declarations that “Mr. Rishikof and Mr. Brown never provided DoD OGC a copy [of the 12 December 2017 memo] in advance of its submission to DepSecDef” and that they “failed to appropriately [(i.e., formally)] coordinate with any of these potentially impacted entities in advance of submitting the memorandum.” Castle Declaration, para. 11.a-b. During his testimony before the Commission, AGC Castle stressed the significance of this failing, stating uncategorically that he viewed it as a “major process foul.” See fn 187, *infra*.

memorandum unsigned, and advised AGC Castle that the CA “[had] submitted a memorandum . . . directly to the DepSecDef without prior notice to OGC.”⁸²

q. On 15 December 2017, AGC Castle drafted and signed a memorandum to the SecDef, subject: “Plan for the Disposition of Future Unprivileged Enemy Belligerent Cases.”⁸³ The document provided “a four-part plan for current and future legal actions involving unprivileged enemy belligerents.”⁸⁴ The first proposal was to replace the military commissions CA and Legal Advisor,⁸⁵ in order to “enhance the prospect for a cohesive effort for the disposition of pending cases”⁸⁶—a reference to AGC Castle’s concern regarding lack of sufficient coordination by Mr. Rishikof.⁸⁷ The proposal states that the CA “serves at the pleasure of the Secretary and can be removed at any time,” and that the CA’s legal advisor “can be removed . . . by the General Counsel.”⁸⁸ The proposal makes no apparent reference to PTAs.⁸⁹

r. On 4 January 2018, DGC (LC) Newman drafted an action memorandum for consideration by AGC Castle, recommending termination of Mr. Brown and subsequent appointment of Acting Legal Advisors.⁹⁰ The proffered rationale for the action was “[t]o effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”⁹¹

⁸² Transcript 21352; Castle Declaration para. 11; AE 555P (GOV), Attach. D, Tab 1.

⁸³ AE 555DD (GOV), Government Reply to AE 555W (WBA); AE 555X (RBS); AE 555BB (AAA, KSM) Defense Response to Government’s Motion to Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, filed 6 August 2018, Attach. L.

⁸⁴ AE 555DD (GOV), Attach. L, p. 1. The copy of this document provided by the Government is heavily redacted, based on a Government assertion that the redacted portions “are not relevant to the Unlawful Influence allegation in this case.” AE 555DD (GOV), fn 1. The Prosecution was apparently conveying an assertion of privilege made by DoD OGC, as OGC, not the Prosecution, had redacted the document based on grounds of both privilege and relevance. Transcript 21341-43.

⁸⁵ AE 555DD (GOV), Attach. L, pp. 1, 2.

⁸⁶ AE 555DD (GOV), Attach. L, p. 1.

⁸⁷ Transcript 21221.

⁸⁸ AE 555DD (GOV), Attach. L, p. 2.

⁸⁹ During his testimony, Mr. Castle answered in the affirmative when asked if “one of the provisions” of the December 15, 2017 memorandum noted “the Secretar[ial] . . . authority to take away the [PTA] power of the [CA].” Transcript 21365. This appears to have been in error, however, as no such provision is apparent in the document.

⁹⁰ AE 555D (GOV), Attach. C.

⁹¹ *Id.*

The memorandum specified that the Acting Legal Advisors “will inform and coordinate with the [DGC (LC)] on all matters of law and policy that may require the attention of the DoD [GC], except . . . those . . . that impact the Office of the [CDC].”⁹² The document does not mention PTAs.

s. By early January 2018, OGC was actively searching for an interim or successor CA.⁹³ As part of this process, AGC Castle had engaged in at least three preliminary conversations about the role with a potential candidate: RADM James E. McPherson.⁹⁴ In one of these conversations, however, AGC Castle mentioned as a concern the unexpected phone call by AG Sessions to Secretary Mattis.⁹⁵ Concerned RADM McPherson might misconstrue this comment as disagreement with Mr. Rishikof’s pursuit of PTAs (rather than his failure to notify OGC of his engagement with DOJ), AGC Castle ceased considering RADM McPherson as a candidate.⁹⁶ By 12 January 2018, AGC Castle had decided instead to recommend Mr. James M. Coyne as Mr. Rishikof’s successor.⁹⁷

t. On 12 January 2018, AGC Castle drafted an action memorandum for consideration by SecDef Mattis recommending Mr. Rishikof’s removal.⁹⁸ The memorandum recommended the Secretary rescind Mr. Rishikof’s designations as CA and Director, terminate his DoD employment, and designate Mr. Coyne to act in his stead.⁹⁹ The basis cited for the action was

⁹² *Id.*

⁹³ Transcript 21254 (AGC Castle noting that he’d engaged in conversation with at least one potential successor CA prior to 12 January 2018).

⁹⁴ Transcript 21253-54.

⁹⁵ Transcript 21240-43.

⁹⁶ Transcript 21242-43, 21337-39 (AGC Castle’s testimony that “I told [RADM McPherson] . . . why [Mr. Rishikof] was . . . talking to the Department of Justice,” but “shortly thereafter . . . realized . . . that could be misinterpreted as . . . coming down or trying to push the scales . . . one way or the other on PTAs,” such that he determined to “find somebody else.” *Id.* at 21339); AE 555DD (GOV), paras. 3.k-l.

⁹⁷ AE 555DD (GOV), Attach. D.

⁹⁸ *Id.*

⁹⁹ *Id.*

“[t]o effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”¹⁰⁰ The document did not mention PTAs.¹⁰¹ On or about that same day, however, AGC Castle withdrew this memorandum before action.¹⁰² AGC Castle directed the memorandum’s withdrawal because (1) having little or no military justice experience, his understanding of UI was limited, and (2) he “didn’t think the information [he] was getting on the law regarding UIs was complete.”¹⁰³ In order to ensure the legal footing of the proposed termination was sound, AGC Castle “created [a] panel . . . of experts” to reexamine the matter.¹⁰⁴ Two weeks later (26 January 2018), this panel would produce for AGC Castle a memorandum (discussed in greater detail below) advising that termination of Mr. Rishikof was legally supportable.¹⁰⁵ When Mr. Rishikof was ultimately terminated, AGC Castle “completely disregarded” the 12 January 2018 memorandum in recommending that action, and instead, relied solely on the 26 January 2018 “panel of experts” memorandum.¹⁰⁶ Regardless, as noted above, the 12 January 2018 memorandum makes no reference to PTAs.

u. On or about 23 January 2018, Messrs. Rishikof and Brown held a conference call with ADM Kurt W. Tidd, the then-Commander of U.S. Southern Command (CDR, USSOUTHCOM), in which they sought (among other things) more recent imagery of the Expeditionary Legal Center (ELC) at NSGB.¹⁰⁷ The most current imagery then available was 10 years old,¹⁰⁸ and

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² AE 555DD (GOV), p. 11. The Government initially asserted this to be the case “on information and belief.” *Id.* This assertion was later confirmed by AGC Castle, who testified that he “pulled down” the memo for further consideration due to concerns regarding its legal footing. Transcript 21230-36.

¹⁰³ Transcript 21228.

¹⁰⁴ Transcript 21228, 21230-33.

¹⁰⁵ AE 555DD (GOV), Attach. E. This matter is discussed in greater detail below. *See* para. 2.w, *infra*, and accompanying text.

¹⁰⁶ Transcript 21228.

¹⁰⁷ AE 555 (AAA 2nd Sup), p. 10, Attach. B, pp. 1-3, 5; AE 555R (AAA), Attach. B, pp. 1-3, 5; AE 555BB (KSM AAA), pp. 5, 37; AE 555CC (AAA), Attach. B, p. 2; AE 555UU (AAA), p. 12; Transcript 20816-24.

¹⁰⁸ Transcript 20815.

Mr. Rishikof believed having up-to-date imagery would help in his efforts to obtain additional facilities funding.¹⁰⁹ More recent imagery was not forthcoming.¹¹⁰ ADM Tidd neither prohibited Messrs. Rishikof and Brown from continuing to seek updated imagery, nor encouraged them to do so.¹¹¹ At the time of the conference call (and at present), the Regulation for Trial by Military Commission (R.T.M.C.) stated with regard to the CA's responsibilities: "Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff."¹¹² There is no indication that OCA personnel coordinated with the Office of the Chairman of the Joint Chiefs of Staff prior to initiating direct contact with CDR, USSOUTHCOM.

v. On or about 24 January 2018, Messrs. Rishikof and Brown held a conference call with Rear ADM (RADM) Kevin Lunday, U.S. Coast Guard (USCG), and requested he obtain updated ELC imagery for them.¹¹³ Mr. Rishikof made no apparent effort to determine whether there were any specific coordination or approval requirements with regard to USSOUTHCOM or CDR, NSGB; rather, he assumed "all relevant coordination [would] be handled by parties with relevant subject matter knowledge."¹¹⁴ RADM Lunday first checked whether existing current imagery of the ELC already existed within USCG and certain other U.S. Government entities; it did not.¹¹⁵ RADM Lunday then reached out to RADM Peter J. Brown, who was at that time the commander of USCG District 7 (the USCG operational subdivision containing NSGB), for assistance.¹¹⁶ On

¹⁰⁹ Transcript 20814.

¹¹⁰ AE 555 (AAA 2nd Sup), p. 10; Rishikof & Brown Declaration 2 para. 1.a; AE 555CC (AAA), Attach. B, p. 2; Transcript 20817.

¹¹¹ AE 555 (AAA 2nd Sup), p. 10; AE 555CC (AAA), Attach. B, p. 2; Transcript 20817-21.

¹¹² R.T.M.C. (2011) para. 2-3.a(16).

¹¹³ AE 555 (AAA 2nd Sup), p. 10; AE 555BB (KSM AAA), p. 5, 37-38, Attach's L-M; AE 555CC (AAA), Attach. B, p. 7; AE 555UU (AAA), pp. 12-14; Rishikof & Brown Declaration 2 para. 1.a; Transcript 20824-31, 20838-52.

¹¹⁴ AE 555CC (AAA), Attach. B, p. 7.

¹¹⁵ Transcript 20840-41.

¹¹⁶ Transcript 20842.

or about 26 January 2018, pursuant to the request made to RADM Lunday, a DoD employee aboard a USCG helicopter photographed the ELC.¹¹⁷ While it remains somewhat unclear from the record whether this action was, in fact, properly authorized,¹¹⁸ any ambiguity regarding this issue is not germane to the Commission’s ultimate analysis.¹¹⁹

w. On 26 January 2018, Mr. Chris Jenks, Special Counsel to the DoD General Counsel,¹²⁰ submitted a memorandum to AGC Castle, subject: “Legal Considerations on Potential Military Commissions Personnel Action.”¹²¹ The most salient parts of the memorandum for purposes of this matter are recited below; a comprehensive summary is not provided.

(i) The memorandum was a report of a group of legal expert consultants assembled at AGC Castle’s request.¹²² The report was “inten[ded] and expect[ed] . . . [to be] a confidential communication made for the purpose of . . . formulat[ing] legal advice.”¹²³

¹¹⁷ AE 555 (AAA 2nd Sup), p. 10; AE 555BB (KSM AAA), pp. 5, 38-40; Attach’s L-M; AE 555UU (AAA), pp. 12-14; Transcript 20824-31, 20838-52.

¹¹⁸ A Defense investigator providing a proffer of expected testimony for the Defense stated that: (a) RADM Lunday and the then-Chief of Incident Management for USCG District 7 told him the USCG had authority to conduct the flight and no USSOUTHCOM policies had been violated; (b) the then-commander of JTF-GTMO (RADM Edward Cashman) said he had been unaware of the overflight and that USSOUTHCOM would have had to authorize it; and (c) the CA’s Office apparently coordinated the action with OMC-South Security personnel and JTF-GTMO Public Affairs (who RADM Cashman acknowledged had some role in approving photography of NSGB facilities). Transcript 20826-28, 20841-42, 20844-46, 20850-52. The investigator’s notes (which were received as an exhibit during his testimony) indicate that on 25 January 2018 the Naval Station Guantanamo Bay (NAVSTA GTMO) Public Affairs Officer (PAO) notified a number of people—including a Washington Headquarters Service security representative and two USSOUTHCOM PAO personnel—of the overflight. AE 555SS (WBA), In-Court Submission (Defense Investigator’s Notes), filed 12 September 2018, p. 325 of 341. It is not clear, however, whether any of these USSOUTHCOM personnel could authorize the overflight or aerial photography of the ELC, or whether they obtained or arranged such authorization. Neither Mr. Rishikof nor Mr. Brown themselves received any complaints following the 26 January 2018 overflight. Rishikof & Brown Declaration 2, para 1.a.

¹¹⁹ See para. 5.g, *infra*.

¹²⁰ The “Special Counsel to the DoD General Counsel” is a law professor hired annually by DoD OGC as a special assistant to the GC. Transcript 21172.

¹²¹ AE 555DD (GOV), Attach. E.

¹²² AE 555DD (GOV), Attach. E, para. 1.

¹²³ AE 555DD (GOV), Attach. E, para. 1.

It provided (1) advice as to how to replace Mr. Rishikof while minimizing legal and public relations risk, and (2) an assessment of associated legal risks.¹²⁴ The report recognized that the primary potential risk of this action was “subsequent allegation of [UI],” because “there are indications [the CA] may entertain a [PTA] if offered by an accused.”¹²⁵

(ii) The report also (a) noted Mr. Rishikof had “displayed questionable judgment . . . temperament and . . . decision making” from the beginning of his tenure;¹²⁶ (b) noted AGC Castle “spoke with the CA on several occasions but did not discuss PTAs;”¹²⁷ (c) recognized the CA’s independent authority to conclude PTAs absent Secretarial withholding;¹²⁸ (d) cited failure to provide notice of engagement with DOJ, the 12 December 2017 memo, the ELC imagery request and several other instances of poorly-coordinated actions as reasons justifying the CA’s removal;¹²⁹ and (e) noted that a potential replacement CA had been dropped from consideration specifically due to concern that a conversation with AGC Castle regarding the AG Sessions phone call might be interpreted as asserting a restriction on CA authority to enter PTAs.¹³⁰

(iii) Ultimately, the report concluded that “you may appropriately recommend that the Secretary rescind Mr. Rishikoff’s [*sic*] designation . . . and designate someone else.”¹³¹ The report also cautioned, “in order to minimize . . . risk of misperceptions . . . you should . . . clarify[] to the Secretary the factors you did and did not consider . . . and . . . advise the Secretary [of] factors [he] should and should not consider.”¹³² The memo also recommended AGC Castle

¹²⁴ AE 555DD (GOV), Attach. E, para. 1.

¹²⁵ AE 555DD (GOV), Attach. E., para. 2.

¹²⁶ AE 555DD (GOV), Attach. E, para. 3.e.

¹²⁷ AE 555DD (GOV), Attach. E, para. 3.g.

¹²⁸ AE 555DD (GOV), Attach. E, para. 3.g.

¹²⁹ AE 555DD (GOV), Attach. E, paras. 3.i, 3.j(1), (3).

¹³⁰ AE 555DD (GOV), Attach. E, paras. 3.k-1. This refers to AGC Castle’s conversations with RADM McPherson, which are the subject of separate findings, above. *See* para. 2.s, *supra*.

¹³¹ AE 555DD (GOV), Attach. E, para. 2.

¹³² AE 555DD (GOV), Attach. E., para. 2.

“[c]ontinue the approach of not saying anything to [potential successor CAs] about the potential performance of judicial or quasi-judicial actions as Acting CA.”¹³³

x. On or about 2 February 2018, AGC Castle briefed DepSecDef Shanahan and the Chief of Staff (CoS) regarding his intent to (a) seek removal of the CA from SecDef, and (b) terminate Mr. Brown’s appointment as Legal Advisor.¹³⁴ In a supporting memorandum to the DepSecDef, AGC Castle cited a litany of badly-coordinated actions by the CA, including the 12 December 2017 memorandum and the ELC imagery request.¹³⁵ He primarily referenced those events in his verbal briefing to the DepSecDef and CoS.¹³⁶ In the memorandum, AGC Castle recommended Mr. Rishikof be removed “because of his escalating pattern of either not properly coordinating actions or coordinating in a manner that is needlessly disruptive,” and remarked that “[i]f we don’t replace [him], it is not a question of if he will do something that jeopardizes the conduct of the military commissions, but when.”¹³⁷ By this, AGC Castle meant that Mr. Rishikof “was a loose cannon[,]that we did not know what he was going to do, and that . . . he was not properly coordinating.”¹³⁸

y. Shortly after briefing the DepSecDef and CoS, AGC Castle submitted to the DoD Executive Secretariat an action memorandum for Secretary Mattis’s consideration,¹³⁹ subject: “Removal of Mr. Harvey Rishikof as Convening Authority for Military Commission and Designation of an Acting Convening Authority.”¹⁴⁰ AGC Castle recommended this action “[t]o

¹³³ AE 555DD (GOV), Attach. E., para. 8.a.

¹³⁴ AE 555DD (GOV), Attach. F; Transcript 21272-74.

¹³⁵ AE 555DD (GOV), Attach. G.

¹³⁶ Transcript 21276-78. AGC Castle did not have personal knowledge of the ELC imagery request and its circumstances, but relied on the reports of subordinate senior counsel regarding CAO activities. Transcript 21290-95.

¹³⁷ AE 555DD (GOV), Attach. G.

¹³⁸ Transcript 21275.

¹³⁹ AE 555DD (GOV), Attach. G; Castle Declaration para. 3; Transcript 21281.

¹⁴⁰ AE 555P (GOV), Attach. K.

effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”¹⁴¹ AGC Castle noted that, in making this recommendation, he considered Mr. Rishikof’s “professional judgment, temperament and decision-making,” but “not . . . his performance of any judicial or quasi-judicial actions.”¹⁴² In the memorandum, AGC Castle advised SecDef Mattis to do the same in deciding whether to follow that recommendation.¹⁴³ In accordance with DoD staffing procedures, the action memo was submitted for the SecDef’s signature through the Executive Secretariat, and the DepSecDef and CoS (with the benefit of AGC Castle’s earlier input) briefed Secretary Mattis and obtained his decision.¹⁴⁴ AGC Castle did not, to his recollection, personally brief the SecDef on the matter.¹⁴⁵

z. On 3 February 2018, SecDef Mattis signed memoranda removing Mr. Rishikof’s designations and replacing him with Mr. Coyne as Acting CA and Director, OCA, pending designation of a new CA.¹⁴⁶ In doing so, Secretary Mattis relied on the supporting information and advice provided by AGC Castle, as conveyed by the DepSecDef and Chief of Staff.¹⁴⁷ On 5 February 2018, AGC Castle signed the memo terminating Mr. Brown’s employment and appointment as CA’s Legal Advisor.¹⁴⁸

aa. On 5 February 2018, Messrs. Rishikof and Brown were notified of their dismissal by AGC Castle.¹⁴⁹ The notifications did not list any reasons for the terminations, nor were any

¹⁴¹ *Id.*

¹⁴² AE 555DD (GOV), Attach. G.

¹⁴³ *Id.*

¹⁴⁴ Transcript 21281.

¹⁴⁵ Transcript 21281, 21287.

¹⁴⁶ AE 555DD (GOV), p. 77-78, 92 of 117; Castle Declaration para. 3.

¹⁴⁷ Mattis Declaration para. 5-6; AE 555P (GOV), Attach. K; Transcript 21281.

¹⁴⁸ AE 555DD (GOV), p. 94 of 117. Secretary Mattis had no involvement in Mr. Brown’s termination. Mattis Declaration para. 9.

¹⁴⁹ Rishikof & Brown Declaration 1, p. 1.

recited by AGC Castle.¹⁵⁰ On the same day, Mr. Mark W. Toole was appointed acting Legal Advisor for this case.¹⁵¹

bb. There is no indication that any person in authority over either Mr. Rishikof or Mr. Brown at any point throughout their tenure discouraged them from exploring potential PTAs with Defense Counsel in this case.¹⁵²

cc. On 6 August 2018, Mr. Coyne in a sworn declaration stated:

I have had no discussions with anyone, to include personnel from the DoD Office of the General Counsel (to include the former Acting General Counsel, William Castle), the Office of Secretary of Defense (to include the Secretary of Defense), the Office of the Deputy Secretary of Defense (to include the Deputy Secretary of Defense), or personnel from the Executive Branch officials outside of DoD (to include the Attorney General of the United States), regarding the topic of entering into pre-trial agreements in any present or future Military Commission case, to include *United States v. Mohammad, et al.* When I assumed my current duties, I had no awareness of whether there had been any consideration by my predecessor of plea agreements in *United States v. Mohammad, et al.*, or any other active military commission case prior to my appointment.¹⁵³

The parties have neither asserted nor presented evidence that counsel for the Accused have approached OCA regarding potential PTAs since Messrs. Rishikof's and Brown's termination.

¹⁵⁰ AE 555DD (GOV), pp. 77, 94 of 117; Rishikof & Brown Declarations 1 and 2.

¹⁵¹ AE 555DD (GOV), p. 47 of 117.

¹⁵² See Rishikof & Brown Declaration 1 para. 2, 7 (Speculating that a long list of actions they undertook as CA and Legal Advisor, to include guilty pleas, might have been the motivation for their firing, but acknowledging that “[t]here was never any attempt made at any time to approach us about any issue concerning out duty performance during our tenure,” and that “[i]t is unknown to us if [these actions] played a role in our removal”); Rishikof & Brown Declaration 2 (stating nothing that contradicts the language quoted above); Transcript 21349 (AGC Castle noting his reluctance to “have much contact” with the CA about issues, due to concerns about UI).

¹⁵³ AE 555DD (GOV), Attach. M, para. 2. The Commission takes notice of the facts that (1) Mr. Coyne retired from his position as General Counsel for the Defense Logistics Agency (DLA) in mid-August 2018, and (2) on 9 August 2018 was replaced as CA / Director, OCA by his successor at DLA, Ms. Melinda L. Perritano. Chris Erbe, *DLA General Counsel Coyne retires after 38 years with DoD*, <http://www.dla.mil/AboutDLA/News/NewsArticleView/Article/1601330/dla-general-counsel-coyne-retires-after-38-years-with-dod/> (14 August 2018); SecDef Memorandum, Subj: Removal of Designation as Convening Authority for Military Commissions, dated 9 August 2018 (removing Mr. Coyne's designations); SecDef Memorandum, Subj: Designation of Melinda L. Perritano as Director of the Office of the Convening Authority for Military Commissions, dated 9 August 2018; SecDef Memorandum, Subj: Designation of Melinda L. Perritano as Convening Authority for Military Commissions, dated 9 August 2018.

dd. On 11 and 12 September 2018, Lieutenant Douglas R. Newman, U.S. Navy, an investigator supporting Mr. Ali's Defense Team, testified before the Commission regarding the anticipated testimony of persons he had interviewed.¹⁵⁴ Based on his demeanor and the manner and content of his testimony, the Commission found this witness to be highly credible.

ee. On 13 November 2018, AGC Castle testified before the Commission.¹⁵⁵ Based on his demeanor and the manner and content of his testimony, the Commission found this witness to be highly credible. AGC Castle expressly reaffirmed under oath the statement made in his 29 January 2018 memorandum to Secretary Mattis that, in advising Mr. Rishikof's removal, he "considered Mr. Rishikof's professional judgment, temperament, and decision-making. . . . not . . . his performance of any judicial or quasi-judicial actions."¹⁵⁶

3. Law.

a. **Burden of Proof.** Generally, a party moving the Commission for relief bears the burden of proving any prerequisite facts by a preponderance.¹⁵⁷ This applies to all motions addressed by this ruling, save for the motion to dismiss based on UI. The burden for that motion is described in the discussion of law regarding UI, below.

b. **Reconsideration.** The Commission may reconsider any ruling prior to authentication of the record of trial, except the equivalent of a finding of not guilty.¹⁵⁸ Either party may move for reconsideration, but grant of the request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed. Reconsideration may also be appropriate to

¹⁵⁴ Transcript 20768-20956.

¹⁵⁵ Transcript 21128-21377.

¹⁵⁶ Transcript 21376-77.

¹⁵⁷ R.M.C. 905(c)(1)-(2).

¹⁵⁸ R.M.C. 905(f).

correct a clear error or prevent manifest injustice.¹⁵⁹ Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and arguments the Commission has previously rejected.¹⁶⁰ Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.¹⁶¹

c. Unlawful Influence.

(i) **UI Generally.** UI is prohibited by section 949b of the Military Commissions Act of 2009 (M.C.A. 2009), which states in pertinent part: “No person may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening . . . authority with respect to their judicial acts.”¹⁶² This language mirrors that of Article 37 of the Uniform Code of Military Justice (U.C.M.J.), which addresses Unlawful Command Influence (UCI).¹⁶³ UCI is the court-martial equivalent of UI, and is substantially similar (save that UCI can only be committed by persons subject to the U.C.M.J.).¹⁶⁴ Accordingly, military UCI case law (discussed further below) provides a useful framework for analyzing UI claims.¹⁶⁵

¹⁵⁹ See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

¹⁶⁰ See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

¹⁶¹ See *Bloch*, 794 F. Supp. 2d at 19-20.

¹⁶² 10 U.S.C. § 949b(a)(2). The statute prohibits a much broader range of UI than that directed at CAs; however, the quoted language is that germane to the issues raised here. The Commission notes that, while the various Defense motions are styled as motions to dismiss based on UI of the CA *and his legal advisor*, neither party has identified any authority specifically extending UI protections to the latter. By contrast, the M.C.A. 2009 elsewhere expressly protects “the military commission [and] any member, military judge, *or counsel thereof*” from UI with regard to their functions, including any findings or sentence adjudged. 10 U.S.C. § 949b(a) (emphasis added). 10 U.S.C. § 949(a)(2)(B), on the other hand, protects “convening, approving, or reviewing authorit[ies],” but makes no reference to their counsel. At present, the Commission assumes (without so deciding) (a) that the M.C.A. 2009’s protection of CAs from UI extends equally to a CA’s primary legal advisor, or at least (b) that evidence of UI directed at the CA’s legal advisor may be evidence of UI directed at the CA.

¹⁶³ Article 37, U.C.M.J. states in pertinent part: “No person subject to [the U.C.M.J.] may attempt to coerce, or, by any unauthorized means, influence the action of . . . any convening . . . authority with respect to his judicial acts.” 10 U.S.C. § 837(a).

¹⁶⁴ *Id.*

¹⁶⁵ See 10 U.S.C. § 948b(c) (stating that military appellate precedent is persuasive authority before M.C.A. 2009 military commissions).

(ii) **UCI Generally.** UCI has long been characterized as “the mortal enemy of military justice,”¹⁶⁶ as it tends to denigrate both critical rights of the accused¹⁶⁷ and public confidence in the military justice system as a whole.¹⁶⁸ There are two overall types of UCI—actual and apparent¹⁶⁹—and the litigation framework for each differs somewhat.

(iii) **Actual UCI.** Actual UCI “occur[s] when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.”¹⁷⁰ If an accused makes a sufficient initial showing of UCI, the burden shifts to the Government to disprove the UCI, or show it to be harmless.

[T]he military judge engages in a two-stage process to permit the parties to establish the factual predicate related to any issues of unlawful command influence. The military judge initially requires the defense to carry the burden of raising an unlawful command influence issue. This threshold showing must be more than mere “command influence in the air” or speculation. But because of the congressional prohibition against unlawful command influence and its invidious impact on the public perception of a fair trial, we have stated that this threshold is low. The test is “some evidence” of 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.

If the military judge concludes that the defense has raised the issue of unlawful command influence, the burden shifts to the government to show either that there was no unlawful command influence or that the unlawful command influence did not affect the proceedings. [There are] three options available to the government: The Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.¹⁷¹

¹⁶⁶ *U.S. v. Reisbeck*, 77 M.J. 154, 166 (C.A.A.F. 2018) (quoting *U.S. v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

¹⁶⁷ *U.S. v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹⁶⁸ *U.S. v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006) (noting that “vigilan[ce] in protecting a court-martial from improper influence” was necessary to “foster public confidence in court-martial proceedings.” *Id.* at 20) (quoting *U.S. v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1976)) (internal quotation marks omitted).

¹⁶⁹ “Congress and [the Court of Appeals for the Armed Forces] are concerned not only with eliminating actual [UCI], also . . . even the appearance of [UCI] at courts-martial.” *U.S. v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *Rosser*, 6 M.J. at 271) (internal quotation marks omitted); see also *U.S. v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) (“Two types of unlawful command influence can arise in the military justice system: *actual* unlawful command influence and *the appearance of* unlawful command influence.” *Id.* at ___, *6 (slip op.)(emphasis in original)).

¹⁷⁰ *Barry*, 70 M.J. at 77 (quoting *Boyce*, 76 M.J. at 247) (alteration in original).

¹⁷¹ *Harvey*, 64 M.J. at 18 (internal footnotes omitted; some internal quotation marks omitted).

If the Government is unable to do so, the Military Judge must craft an appropriate remedy.¹⁷²

(iv) **Apparent UCI.** The litigation framework for apparent UCI is similar, but there are key differences.

[U]nlike actual unlawful command influence, where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. . . . [I]t is sufficient for an accused to demonstrate the following factors in support of a claim of an appearance of unlawful command influence: (a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an “intolerable strain” on the public’s perception of the military justice system because “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”

In light of these two factors, the following process ensues when an appellant asserts there was an appearance of unlawful command influence. The appellant initially must show “some evidence” that unlawful command influence occurred. This burden on the defense is low, but the evidence presented must consist of more than “mere allegation or speculation.”

Once an appellant presents “some evidence” of unlawful command influence, the burden then shifts to the government to rebut the allegation. Specifically, the government bears the burden of proving beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence. If the government meets its burden, the appellant’s claim of unlawful command influence will be deemed to be without merit and no further analysis will be conducted.

If the government does not meet its burden of rebutting the allegation at this initial stage, then the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place “an intolerable strain” upon the public’s perception of the military justice system and that “an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” If the government meets its evidentiary burden at this stage of the analysis, then . . . no relief [based on] appearance of unlawful command influence [is merited].¹⁷³

Again, if the Government is unable to refute the claim, the Military Judge fashions an appropriate remedy.¹⁷⁴

¹⁷² *Id.* at 21 (noting trial judge was responsible to provide an appropriate remedy for actual UI).

¹⁷³ *Boyce*, 76 M.J. at ___, *10-12.

¹⁷⁴ *Lewis*, 63 M.J. at 416.

(v) **Judicial Acts.** As with UCI, UI is actionable only “with respect to [a CA’s] judicial acts.”¹⁷⁵ With regard to the scope of the term “judicial acts,” the Commission finds the following discussion by the Court of Military Appeals (C.M.A.) instructive:

In military law, the convening authority performs a number of judicial functions. Initially, he has been authorized . . . to appoint and convene courts-martial, including the appointment of the judicial officers necessary to the conduct thereof. . . . [to] decide[] whether to refer charges to trial and the grade of courtmartial [*sic*] to which the charges should be referred. Prior to trial, any defense or objection which is capable of determination without trial of the issue may be raised by reference to the convening authority. Subsequent to trial, he is empowered to act on the findings and sentence of the court-martial, and while he may approve only such findings of guilty and the sentence, or such part or amount of the sentence, as he finds correct in law and fact, he may, in the exercise of his discretion, disapprove a finding and sentence for any reason or for no reason.¹⁷⁶

The Commission finds it appropriate to rely on this language as an instructive (though not exhaustive) list of examples of judicial acts in which a CA may engage. Mere administrative, organizational and/or resource management decisions, on the other hand, do not rise to the level of “judicial acts,” even if they may have some measure of practical impact on litigation of a particular case or cases.¹⁷⁷

¹⁷⁵ 10 U.S.C. § 949b(a)(2); 10 U.S.C. § 837(a).

¹⁷⁶ *U.S. v. Nix*, 36 C.M.R. 76, 78-79 (C.M.A. 1965)(internal cites omitted). Note that the C.M.A. also gave the court-martial CA’s grant or denial of search authorizations as an example of a “judicial act.” *Id.* This was not included in the quoted language above, however, as military commission CAs are not empowered to approve searches.

¹⁷⁷ *See, e.g., Ayestas v. Davis*, ___ U.S. ___, 138 S.Ct. 1080 (2018) (noting that “[a]dministering judicial operation[s] requires many ‘decisions’ in the ordinary sense . . . about such things as facilities, personnel, equipment, supplies, and rules of procedure,” and that it would be “absurd to suggest” that every such decision is “made in a judicial capacity.” *Id.* at ___, 1090); *see also U.S. v. Williams*, 28 C.M.R. 789 (1959) (Air Force Board of Review’s act of forwarding a request for a psychiatric examination “as an administrative matter,” where there was “no assignment or issue raised before the Board,” was “not a judicial act” of the board. *Id.* at 792). The Commission expressly declines to adopt the Defense’s proposed *Murray’s Lessee*-based definition of judicial acts (see AE 555J (AAA, KSM), Mr. al Baluchi’s and Mr. Mohammad’s Reply to Government Combined Response, filed 10 April 2018, p. 12 (citing *Den ex dem. Murray v. Hoboken Land & Improvement Co.* (“*Murray’s Lessee*”), 59 U.S. 272 (1856)). The Defense asserts that this case stands for a principle that would require treating as a judicial act any decision of the CA “that involves inquiry into the existence of facts and the application of law thereto.” Transcript 19630. This would essentially rewrite 10 U.S.C. 948b(a)(2) to reach virtually *any* act of the CA, rather than his genuinely *judicial* ones. The Commission declines to find that the statute was intended to be so broad.

d. **Discovery and Witness Production.** With regard to this subject, the Commission adopts and incorporates the discussion of law from its 23 May 2018 Order in this series (AE 555O).¹⁷⁸

4. **Analysis: Judicial Acts.**

a. Over the course of litigation, the Defense has claimed that (1) a number of decisions involving Messrs. Rishikof and/or Brown were “judicial acts;” (2) their termination was motivated by one or more of those decisions; and (3) their terminations therefore constituted UI. The Commission finds, however, that the Defense has identified here only two matters genuinely qualifying as “judicial acts:” (1) Mr. Rishikof’s discussion of the potential for PTAs in this case; and (2) his refusal to refer charges in *U.S. v Hambali*. In the Commission’s view, the other matters identified by the Defense are ancillary administrative decisions not falling within the ambit of “judicial acts” for UI purposes.

b. Regarding the *Hambali* charges, the Commission finds their rejection, while a judicial act, is not an act *in this case*—and is therefore not an appropriate basis for relief here.¹⁷⁹ The only “judicial act” forming a possible basis for a UI claim in this case is discussion of potential

¹⁷⁸ AE 555O, para. 2.

¹⁷⁹ The Defense asserts the CA’s rejection of the *Hambali* charges is relevant as potential circumstantial evidence of UI, in that it tends to show, *e.g.*, (a) animosity between OCP and Messrs. Rishikof and Brown, and/or (b) a willingness or tendency on the part of senior DoD officials to engage in improper retaliatory behavior. To the extent this may be so, the Commission will give such information the weight and consideration it is due. These considerations do not, however, transform the rejection of the *Hambali* charges into an appropriate independent basis for relief in this case. Furthermore, the Commission notes that, well before the initial return of the *Hambali* charges on 12 December 2017, OGC had been seriously considering Mr. Rishikof’s removal. *See* para. 2.n, *supra* (finding AGC Castle had tasked OGC personnel to look into the possibility, in his words, “before Thanksgiving” of 2017). As early as October 2017, AGC Castle had already expressed serious concerns regarding the CA’s poor coordination. *See* para. 2.k, *supra*. AGC Castle’s 15 December 2017 memo regarding future disposition of commissions cases, signed three days after the *Hambali* charges’ first return, makes no mention of them. AE 555DD (GOV), Attach. L. Similarly, DGC (LC) Newman’s 4 January 2018 action memo concerning removal of Mr. Brown (drafted the same day he met with Messrs. Rishikof and Brown regarding the *Hambali* charges, and only two weeks after the new charges were returned by OCA) makes no mention of *Hambali*, instead repeating the coordination-focused “cohesive effort” language of AGC Castle’s 15 December 2017 memo, and expressly stressing that the CA “will inform and coordinate with” OGC. AE 555DD (GOV), Attach. C. In short, whatever their relevance, there is no indication the *Hambali* charges factored into any decision regarding Messrs. Rishikof and Brown’s termination (or at least nothing amounting to more than speculation).

PTAs. Accordingly, the Commission concludes the Defense could not have met their initial burden of proof with regard to UI unless and until they made a sufficient showing (in light of all available information) that the termination of Mr. Rishikof and/or AGC Castle was, at least in part, due to their discussion of potential PTAs with counsel for the Accused in this case.

5. Analysis: Proof of UI.

a. Having determined that there is only one “judicial act” at issue here (potential PTA discussions), the Commission will next address whether remediable UI associated with this act has been shown. The Defense argues, in essence, that (1) Mr. Rishikof and Mr. Brown were terminated due to their having discussed potential PTAs regarding the Accused in this case, and (2) that the reasons advanced by Secretary Mattis and AGC Castle are pretextual. The evidence presented by the Defense in this regard is largely speculative. Even assuming *arguendo* that the Defense has made its required initial showing of UI, however, the full evidence before the Commission demonstrates beyond reasonable doubt that there was none.

b. Leaving aside the long, complex mesh of crisscrossing meetings, messages, and memoranda that ultimately resulted in the terminations of Messrs. Rishikof and Brown, two critical overarching facts remain: (1) Mr. Castle became aware of the pursuit of pleas in this case virtually upon his arrival at DoD (and his staff even before that);¹⁸⁰ and (2) they could at any time have simply asked the SecDef to limit or withhold the CA’s authority to conclude such agreements.¹⁸¹ Furthermore, DoD OGC was well aware that DOJ did not support the agreements,

¹⁸⁰ See para 2.g, *supra*.

¹⁸¹ R.M.C. 705(a) (“Subject to such limitations as the [SecDef] may prescribe, an accused and the [CA] may enter into a [PTA] in accordance with this rule.” *Id.* (emphasis added); R.T.M.C. para. 12-1. The Defense argues that, despite the language of R.M.C. 705(a) and R.T.M.C. para. 12-1, there is in fact no authority to withhold PTA authority from the CA, because (a) the UI provisions of the M.C.A. 2009 protect the CA’s “judicial acts” from such interference, and (b) R.T.M.C. para. 12-1 reserves PTA decisional authority to “the sole discretion of the [CA] who referred the case to trial.” AE 555BB (KSM AAA), pp. 47-49 of 467. In light of the clear language of R.M.C. 705(a) and R.T.M.C. § 12-1, the Commission finds there is no merit in these arguments. Even assuming *arguendo* that there was, it is clear AGC Castle and his subordinate counsel believed the SecDef had the power to withhold PTA

which made it highly unlikely the Defense would follow through with them (given their negotiating posture).¹⁸²

c. The Defense advances the theory that AGC Castle and other OGC attorneys wished to prevent Messrs. Rishikof and Brown from securing guilty pleas with unacceptable terms, and that to attain this end they had the duo pretextually fired. However, such a scheme would have been wholly unnecessary, given (1) the known and readily-available avenue of having the SecDef partially or entirely withhold the CA's power to enter into PTAs (which would have required action at no higher a level than firing did),¹⁸³ and (2) the strong unlikelihood of any PTA's successful conclusion, given DOJ's clear non-concurrence and the Defense's negotiating posture.¹⁸⁴

d. Given the speculative nature of the Defense's evidence of any such intent, to believe senior DoD officials would willfully violate the law, perjure themselves, and risk potentially upending a historic capital trial in this manner—when (1) a known and completely safe alternate method was readily available, and (2) the Defense's own negotiating posture already rendered the risk of unacceptable PTAs essentially nil—simply beggars credence. Viewed through this lens, the actions of AGC Castle and his associates are entirely consistent with the Government's claimed motivation, specifically: (1) that they sought termination of Messrs. Rishikof and Brown due to duty performance issues having nothing to do with PTA negotiations, while (2) taking careful steps to avoid any actual or apparent UI from arising due to their knowledge that such negotiations were ongoing.

authority. *See, e.g.*, AE 555DD (GOV), Attach. E; Transcript 21267. Accordingly, nothing Defense offers in this regard undercuts the Commission's finding that AGC Castle and his subordinates would have seen no need to pursue a high-risk avenue to prevent PTAs when, in their view, low- or no-risk methods to do so were readily available, and PTAs were highly unlikely in any event.

¹⁸² *See* paras. 2.g, j-k, *supra*.

¹⁸³ R.M.C. 705(a); R.T.M.C. para. 12-1.

¹⁸⁴ *See* paras. 2.g, j-k, *supra*.

e. The Commission is likewise unpersuaded that AG Sessions' displeasure with a proposed PTA spurred Secretary Mattis or AGC Castle to commit UI. The evidence indicates that both were initially caught off guard by AG Sessions's mid-October 2017 phone call—not knowing what the AG was referring to when he said he wanted “no deal.” Even upon learning the call related to pretrial negotiations in this case, neither Secretary Mattis nor AGC Castle gave any indication they were displeased, beyond AGC Castle expressing dissatisfaction at what he perceived as a lack of appropriate coordination. Neither AGC Castle nor any other entity took action after this October 2017 phone call to derail the pretrial negotiations; rather, AGC Castle made overt efforts to keep at arms' length from discussions with the CA on the topic. Finally, any argument that the SecDef, when presented by his senior staff with discrete, specific justifications for Mr. Rishikof's termination that were unrelated to PTAs, instead based his decision on a brief, vague telephone conversation from several months prior, raises no doubt that may be described as “reasonable.”

f. The Commission finds beyond reasonable doubt that, whatever their motivations may have been, AGC Castle and the other OGC personnel who coordinated the firing of Messrs. Rishikof and Brown were not prompted to do so by the potential for conclusion of PTAs in this case; nor did they say or do anything that Messrs. Rishikof and Brown could have misconstrued as discouraging them from pursuing such agreements.¹⁸⁵ The Commission also finds beyond reasonable doubt that SecDef Mattis's 3 February 2018 decision to terminate Mr. Rishikof was

¹⁸⁵ Messrs. Rishikof and Brown themselves had no clear idea as to why they were terminated, and claimed to have received no negative feedback or discouragement whatsoever during their tenure. Rishikof & Brown Declaration 2, para. 1.c. The only contrary indication is a Defense proffer that, if called, Messrs. Rishikof and Brown would essentially confirm Mr. Castle's testimony that, at their 16 October 2018 meeting, he expressed dissatisfaction regarding OCA's failure to coordinate with OGC regarding contact with DOJ. AE 555BB (KSM AAA), pp. 5, 15 (stating that, if called, Messrs. Rishikof and Brown would testify that “Mr. Castle was clearly agitated” about AG Sessions's call, “wanted to know why Mr. Rishikof was coordinating with people . . . in the DOJ” and “said that the DOD all needs to move together and the OGC needs to be informed.” *Id.*). The Defense investigator's testimony was consistent with this proffer. Transcript 20805-06.

based on the rationale presented to him at that time, and not on a brief, vague phone call from AG Sessions that occurred three months before. Furthermore, the Commission finds beyond reasonable doubt that no objective, disinterested observer, fully informed of the relevant facts and circumstances, would harbor any significant doubt about the fairness of these proceedings. Accordingly, neither actual nor apparent UI has been shown.

g. To the extent the Defense contests the facts underlying the incidents relied on by the SecDef and AGC Castle as the bases for termination of Messrs. Rishikof and Brown (*e.g.*, the coordination of Mr. Rishikof's 12 Dec 2017 memo and the ELC imagery request), the Commission finds that, given (1) the evidence that the terminations were not predicated on PTAs; (2) the lack of any other relevant judicial act of the CA on which UI could have been based; and (3) the equivocal (at best) evidence of any impropriety in those asserted bases (which are themselves *non-judicial acts*),¹⁸⁶ to the extent these events may be relevant, they provide no evidence of any pretext that is sufficient to warrant any differing result or further inquiry.¹⁸⁷

¹⁸⁶ See paras. 2.p, u-v, *supra*.

¹⁸⁷ The Commission finds very credible the assertions of AGC Castle that the inadequate coordination of the 12 December 2017 memo was a primary factor motivating the termination of Messrs. Rishikof and Brown. In his testimony before the Commission, Mr. Castle emphatically affirmed his statement that, informal discussion of a potential implementing document notwithstanding, given the need in DoD for thorough advance coordination of significant actions, Mr. Rishikof's failure to provide DoD OGC an advance copy of the 12 December 2017 memorandum and formally staff it with affected stakeholders was "a huge process foul." Transcript 21245-48. Messrs. Rishikof and Brown themselves expressly acknowledged that formal coordination had not occurred, claiming they thought it premature because the memorandum was just "a vehicle to begin discussions." Rishikof & Brown Declaration 2, para. 1.b; *see also* Transcript 20910. This view is neither reasonable nor credible, however, in light of the immediate, profound effects the memorandum would have had, had it been signed. *See* fn 79, *supra*. This also undercuts any assertion this memorandum would have been subject to any invitation by DepSecDef Work for Mr. Rishikof to submit "his views on paths forward in a written document" for which "no formal coordination was expected." *See* para. 2.b, *supra*. The 12 December 2017 memorandum went far beyond merely expressing "views on a path forward"—it would have immediately implemented an aggressive strategy of consolidation of authority and resources under the CA. This is further underscored by the memorandum's rejection. Furthermore, to the extent Mr. Rishikof may have been given such dispensation, AGC Castle was apparently not aware of it. Defense proffers indicate OGC was rebuffed regarding such concerns with statements that DepSecDef was the CA's direct supervisor, not by reference to any special dispensation by the DepSecDef regarding staffing. AE 555CC (AAA), Attach. B, pp. 3, 10, 14, 20. Even senior OCA staff apparently found direct, informal coordination between the CA and DepSecDef highly unusual (*See* Transcript 20815, 20875-77, 20879-82). Even assuming AGC Castle mistakenly believed Messrs. Rishikof and Brown owed OGC greater coordination than DepSecDef Work would have in fact required, any such erroneous belief would still be consistent with his asserted bases for termination. In

h. Based on evidence adduced (a significant portion of which was received after AE 555O, the Commission's interim ruling on discovery), there is no reasonable likelihood further discovery or testimony will produce information relevant and necessary to resolution of this matter. Accordingly, (1) no proper basis for any of the relief requested by the Defense exists; and (2) reconsideration of the Commission's earlier ruling in that regard is appropriate.

6. Ruling.

a. That portion of AE 555P (GOV) previously deferred is now **GRANTED**. The Commission will compel production of neither the CA's monthly status reports nor Mr. Rishikof's testimony.

b. AE 555GG (KSM) is **DENIED**. Resolution of this matter does not require the Commission to make a definitive ruling as to whether the Defense met its initial burden of production, as the evidence in any event demonstrates beyond reasonable doubt that there was no UI.

c. The relief requested in AE 555 (AAA), AE 555 (AAA 2nd Sup), AE 555R (AAA), and AE 555CC (AAA) is **DENIED**.

January 2018, when he sought the CA's termination, AGC Castle would first provide an advisory memorandum to DepSecDef Shanahan in which he listed the 12 December 2017 memo as one supporting reason—undercutting any notion AGC Castle in fact believed the DepSecDef would have been satisfied with the 12 December 2017 memorandum's coordination. AE 555DD (GOV), Attach. F. Regardless, by the time the 12 December 2017 memorandum was submitted, DepSecDef Work had been replaced by DepSecDef Shanahan, rendering Mr. Work's informal views regarding workplace coordination requirements of limited relevance. DepSecDef Shanahan's administrative staff apparently had received no instruction that the CA was empowered to submit memoranda of this nature for his signature without formal, documented staffing through OGC—as they rejected the 12 December 2017 memorandum packet without action, and alerted AGC Castle. Castle Declaration para. 11; AE 555P (GOV), Attach. D, Tab 1; Transcript at p. 21352.

d. All requests for oral argument in this series, to the extent not already granted, are **DENIED.**

So **ORDERED** this 10th day of January, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge