

THE 9/11 DETAINEES WANT HARTMANN DISQUALIFIED, TOO

In thoroughly unsurprising news, the defense attorneys for the five 9/11 High Value Detainees (including Khalid Sheikh Mohammed and Ramzi bin al-Shibh) have moved to either have the charges against their clients dismissed or, at least, have General Hartmann disqualified as Legal Advisor to the Show Trials. Here's Carol Rosenberg on that story—as well as the news that Judge Allred will delay the start of Salim Hamdan's trial until after SCOTUS rules in *Boumediene*.

This motion obviously piggy-backs on Judge Allred's decision from last week to have Hartmann disqualified in the Hamdan trial. The 9/11 defendants largely replicate the Hamdan complaint in their own motion—with one significant addition. They also argue that Hartmann illegally tried to coerce defense counsel, in addition to Colonel Morris Davis, the Chief Prosecutor. As they describe:

On January 25, 2008, a member of the Convening Authority's staff, Colonel Wendy Kelly, inadvertently emailed a draft copy of the charges against Khaleed Sheikh Mohammed and five other detainees to Mr. Michael Berrigan, the Deputy Chief Defense Counsel. The draft charges were being circulated within the Office of the Convening Authority. Mr. Berrigan immediately notified Colonel Kelly of the disclosure and ascertained it was inadvertent, but after seeking counsel from his state bar, refused to return the draft charges.

On February 1, 2008, the Legal Advisor to the Convening Authority wrote a memorandum to the Chief Defense Counsel, Colonel Steven David. General Hartmann

stated that he had contacted the professional responsibility offices for the Army, Navy, and Marine Corps and they had opined that Mr. Berrigan must return the draft charges in this case; charges which approximately two weeks later General Hartmann claimed to have just received.

[snip]

The fact that the Legal Advisor, rather than the Chief Prosecutor, sent the Memorandum to the Chief Defense Counsel illustrates the point that the Legal Advisor failed to retain the required independence from the prosecution function and maintain his ability to provide independent, neutral, and impartial advice to the Convening Authority.

The [Military Commissions Act] prohibits attempting to coerce or unlawfully influence the professional judgment of trial or defense counsel. While the Secretary of Defense has attempted to circumvent the statutory prohibition against unlawful influence of trial counsel by regulation, he has not done so for defense counsel. When unlawful influence is directed against a defense counsel, it "affects adversely on accused's right to effective assistance of counsel." [citations removed]

Now, Hartmann would argue (as he did in his memo to Colonel David) that Berrigan,

...serves in a supervisory attorney capacity and does not represent clients. To my knowledge he does not have an attorney-client relationship with any of the individuals represented in the privileged materials. Therefore, returning the privileged materials presents no conflict with any duty to

protect a client.

I'll let the lawyers present assess that argument (I would note, though, that when Hartmann made that argument, none of the six detainees in question had attorneys). Obviously, though, since Berrigan did keep the email proving that Hartmann and the Convening Authority generally were included in drafts of the charges, it utterly undercuts Hartmann's claim to independence when—in his press conference announcing the charges—he suggested he had yet to evaluate the charges.

I will evaluate the charges and all of the supporting evidence, along with the chief prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the convening authority for the Military Commissions.

Like I said, this was a thoroughly unsurprising move—when Allred disqualified Hartmann in Hamdan, whose charges Hartmann had little influence over, it particularly threatened those charges that Hartmann was closely involved in.

It makes you wonder how long Hartmann will still be involved in the Show Trials.