RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SALIM AHMED HAMDAN

ALSO KNOWN AS:

SALIM AHMAD HAMDAN
SALIM AHMED HAMDAN
SALEM AHMED SALEM HAMDAN
SAQR AL JADAWY
SAQR AL JADDAWI
KHALID BIN ABDALLAH
KHALID WL'D ABDALLAH

NO. 040004

VOLUME ___ OF ___ TOTAL VOLUMES

DEPARTMENT OF DEFENSE
LITIGATION
(REDACTED VERSION)

United States v. Salim Ahmed Hamdan, NO. 040004

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

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OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

December 10, 2004

APPOINTING AUTHORITY DIRECTIVE

IN THE MATTERS OF
UNITED STATES V. IBRAHIM AHMED MAHMOUD AL QOSI
UNITED STATS V. SALIM AHMED HAMDAN
UNITED STATES V. DAVID M. HICKS
UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Pursuant to my authority under MCO No. 1, 6(B)(4), I direct that proceedings in the above styled military commission cases be held in abeyance pending the outcome of the appeal in the case of Hamdan v. Rumsfeld, United States Court of Appeals for the District of Columbia Circuit, No. 04-5393. Oral argument in that case is presently scheduled for March 8, 2005.

The presiding officer is authorized to issue discovery orders in the commissions, hold pre-trial conferences, and/or attend to other matters that do not require convening the full commission.

This order remains in effect until revoked.

John D. Altenburg, Jr.
Appointing Authority for Military Commissions

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

344 F. Supp. 2d 152; 2004 U.S. Dist. LEXIS 22724

November 8, 2004, Decided

SUBSEQUENT HISTORY: Petition denied by Hamdan v. Rumsfeld, 2005 U.S. App. LEXIS 2474 (D.C. Cir., Feb. 11, 2005)

DISPOSITION: [1]** Hamdan's petition for habeas corpus granted in part. Defendant's cross-motion to dismiss denied.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff petitioned for a writ of habeas corpus, challenging the lawfulness of the plan by defendant, the Secretary of Defense, to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moved to dismiss.

OVERVIEW: Plaintiff, who was captured in Afghanistan during hostilities, contended that he was entitled to prisoner-of-war status under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (the Third Geneva Convention), 6 U.S.T. 3316, 74 U.N.T.S. 135, and that the government had not convened a competent tribunal to determine whether he was entitled to such status. The court held that (1) abstention was neither required nor appropriate because plaintiff did not need to exhaust remedies in a military tribunal if the military court had no jurisdiction over him; (2) insofar as it was pertinent, the Third Geneva Convention was a self-executing treaty and it was at least a matter of some doubt as to whether or not plaintiff was entitled to its protections as a prisoner of war and, therefore, he was entitled those protections until a "competent tribunal" concluded otherwise pursuant to Unif. Code Mil. Justice, art. 21, 10 U.S.C.S. § 821; and (3) at least with respect to plaintiff's right to be present, the procedures of the military commission were fatally contrary to or inconsistent with those of Unif. Code Mil. Justice art. 39(b), 10 U.S.C.S. § 839(b).

OUTCOME: The court granted plaintiff's petition to the extent that it held that, unless a competent tribunal determined that he was not entitled to prisoner of war status, he could only be tried by court-martial and that plaintiff had to be released from the pre-commission detention wing and returned to the general population of detainees. The court denied the government's motion.

CORE TERMS: military, military commission, court-martial, enemy, tribunal, combatant, convention, courts-martial, detention, competent tribunal, detainee, civilian, implementing legislation, triable, treaty, armed forces, military tribunal, offender, convened, captured,

prisoner-of-war, appointing authority, speedy trial, hostilities, appointed, detained, self-executing, habeas corpus, regulation, courtroom

COUNSEL: For CHARLES SWIFT, Lieutenant Commander, a Resident of the State of Washington, as next friend for Salim Ahmed Hamdan, military commission detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba, Plaintiff: Charles Swift, OFFICE OF CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS, Arlington, VA; Joseph M. McMillan, PERKINS COIE LLP, Seattle, WA; Neal Katyal, GEORGETOWN UNIVERSITY LAW CENTER, Washington, DC; Kelly A. Cameron, PERKINS COIE, LLP, Washington, DC.

For DONALD H. RUMSFELD, JOHN D ALTENBURG, appointing authority for military commissions, Department of Defense, THOMAS L. HEMINGWAY, Brigadier General, Legal Advisor to the appointing authority for military commissions, JAY HOOD, Brigadier General Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba, GEORGE W. BUSH, President of the United States, Defendants: Brian C. Kipnis, U.S. ATTORNEY'S OFFICE/WA, Seattle, WA; Preeya M. Noronha, Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION, Movants: David Andrew Price, WASHINGTON LEGAL FOUNDATION, Washington, **[**2]** DC.

For DAVID C. VLADECK, CARLOS M. VAZQUEZ, DAVID SLOSS, ANNE-MARIE SLAUGHTER, DAVID SCHEFFER, JUDITH RESNIK, JENNIFER S. MARTINEZ, KEVIN R. JOHNSON, DEREK JINKS, OONA HATHAWAY, RYAN GOODMAN, MARTIN S. FLAHERTY, WILLIAM S. DODGE, SARAH H. CLEVELAND, ROSA EHRENREICH BROOKS, BRUCE ACKERMAN, Movants: David C. Vladeck, Georgetown University Law Center, Institute for Public Representation, Washington, DC.

For RICHARD O'MEARA, General, JOHN D. HUTSON, Admiral, LEE F. GUNN, Admiral, DAVID M. BRAHMS, General, Movants: David H. Remes, COVINGTON & BURLING, Washington, DC.

For WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, Amicus: David Andrew Price, WASHINGTON LEGAL FOUNDATION, Washington, DC.

For 271 United Kingdom And European Parlimentarians, Amicus: Mary Jean Moltenbrey, FRESHFIELDS BRUCKHAUS DERINGER, LLP, Washington, DC.

For CENTER FOR INTERNATIONAL HUMAN RIGHTS, OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW, MARCO SASSOLI, FRITS KALSHOVEN, GUY S. GOODWIN-GILL, LOUISE DOSWALD-BECK, Amicus: David Richard Berz, WEIL, GOTSHAL & MANGES, L.L.P., Washington, DC.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINIONBY: JAMES ROBERTSON

OPINION: [*155] MEMORANDUM OPINION [3]**

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent

tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be **granted** in part. The government's motion will be **denied.** The reasons for these rulings are set forth below.

BACKGROUND

Hamdan was captured in Afghanistan in late 2001, during a time of hostilities in that country that followed the terrorist attacks in the United States on September 11, 2001 mounted by al Qaeda, a terrorist group harbored in Afghanistan. He was detained by American military forces **[**4]** and transferred sometime in 2002 to the detention facility set up by the Defense Department at Guantanamo Bay Naval Base, Cuba. On July 3, 2003, acting pursuant to the Military Order he had issued on November 13, 2001, n1 and finding "that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States," the President designated Hamdan for trial by military commission. Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), http://www.defenselink.mil/releases/2003/nr20030703-0173.html. In December 2003, Hamdan was placed in a part of the Guantanamo Bay facility known as Camp Echo, where he was held in isolation. On December 18, 2003, military counsel was appointed for him. On February 12, 2004, Hamdan's counsel filed a demand for charges and speedy trial under Article 10 of the Uniform Code of Military Justice. On February 23, 2004, the legal advisor to the Appointing Authority n2 ruled that the UCMJ did not apply to Hamdan's detention. On April 6, 2004, in the United States District Court for the Western District of Washington, Hamdan's counsel **[**5]** filed the petition for mandamus or habeas corpus that is now before this court. On July 9, 2004, Hamdan was formally charged with conspiracy to commit the **[*156]** following offenses: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Dep't of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf. Following the Supreme Court's decision on June 28, 2004, that federal district courts have jurisdiction of habeas petitions filed by Guantanamo Bay detainees, Rasul v. Bush, 159 L. Ed. 2d 548, 124 S. Ct. 2686 (2004), and the Ninth Circuit's decision on July 8, 2004, that all such cases should be heard in the District of the District of Columbia, Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004), the case was transferred here, where it was docketed on September 2, 2004. n3 Oral argument was held on October 25, 2004.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). **[**6]**

n2 The Department of Defense has implemented the President's Military Order of November 3, 2001 with a series of Military Commission Orders, Instructions, and other documents. See generally Dep't of Defense, Military Commissions (providing extensive links to background materials on the Military Commissions), at http://www.defenselink.mil/news/commissions.html. The Secretary of Defense may designate an "Appointing Authority" to issue orders establishing and regulating military commissions. Military Commission Order No. 1 (March 21, 2002), C.F.R. § 9.2,

http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Secretary Rumsfeld designated John D. Altenburg, Jr. as Appointing Authority. Press Release, Dep't of Defense, Appointing Authority Decision Made (December 30, 2003), http://www.defenselink.mil/releases/2003/nr20031230-0820.html.

n3 Hamdan's counsel, Charles Swift, initially filed the petition in this case in his own name as Hamdan's next friend. The government challenged Swift's standing to do so. At a conference on September 14, 2004, the petition was amended, by consent and nunc pro tunc, to be in Hamdan's name only.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**7]**

Hamdan's petition is stated in eight counts. It alleges the denial of Hamdan's speedy trial rights in violation of Article 10 of the Uniform Code of Military Justice, 10 U.S.C. § 810 (count 1); challenges the nature and length of Hamdan's pretrial detention as a violation of the Third Geneva Convention (count 2) and of Common Article 3 of the Geneva Conventions (count 3); challenges the order establishing the Military Commission as a violation of the separation of powers doctrine (count 4) and as purporting to invest the Military Commission with authority that exceeds the law of war (count 7); challenges the creation of the Military Commission as a violation of the equal protection guarantees of the Fifth Amendment (count 5) and of 42 U.S.C. § 1981 (count 6); and argues that the Military Order does not, on its face, apply to Hamdan (count 8).

Although Judge Lasnik (W.D. Wash.) ordered the respondents to file a "return," Order Granting Motion to Hold Petition in Abeyance (W.D. Wash. No. 04-0777) (May 11, 2004), and although the motion to dismiss now before this court is styled a "consolidated return to petition and memorandum of law in **[**8]** support of cross-motion to dismiss," no formal show cause order has issued, nor have the respondents ever filed a factual response to Hamdan's allegations. An order issued October 4, 2004 [Dkt # 26] by Judge Joyce Hens Green, who is coordinating and managing all of the Guantanamo Bay cases in this court, provided that "respondents are not required . . . to file a response addressing enemy combatant status issues . . . or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court." n4 The absence of a factual return is of no moment, however. The issues before me will be resolved as a matter of law. The only three facts that are necessary to my disposition of the petition for habeas corpus and of the cross-motion to dismiss are that Hamdan was captured in Afghanistan during hostilities after the 9/11 attacks, that he has asserted his entitlement to prisoner-of-war status under the Third Geneva Convention, and that the government has not convened a competent tribunal to determine whether Hamdan is entitled to such status. All of those propositions appear to be undisputed.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 This order was issued only for the instant case, because briefing of these motions was nearly complete and the issues they raised did not require factual returns. Factual returns must be filed in all of the other Guantanamo detainee cases pending in this court.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**9]**

[*157] ANALYSIS

1. Abstention is neither required nor appropriate.

The well-established doctrine that federal courts will "normally not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted," Schlesinger v. Councilman, 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975), is not applicable here. Councilman involved a court-martial, not a military commission. Its holding is that, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention . . . ." Id. at 758. In reaching that conclusion, the Court found it necessary to distinguish its previous decisions in United States ex rel. Toth v. Quarles, 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955) (civilian ex-serviceman not triable by court-martial for offense committed while in service), Reid v. Covert, 354 U.S. 1, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (civilian dependent not triable by court-martial for murder of service member husband overseas in peacetime), and McElroy v. United States. ex rel. Guagliardo, 361 U.S. 281, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960) **[**10]** (civilian employees of armed forces overseas not subject to court-martial jurisdiction for noncapital offenses), none of which required exhaustion. The Councilman Court also repeated its observation in Noyd v. Bond, 395 U.S. 683, 696 n.8, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969), that it is "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all." A jurisdictional argument is just what Hamdan present here.

Controlling Circuit precedent is found in New v. Cohen, 327 U.S. App. D.C. 147, 129 F.3d 639, 644 (D.C. Cir. 1997). In that case, following the Supreme Court's decision in Parisi v. Davidson, 405 U.S. 34, 31 L. Ed. 2d 17, 92 S. Ct. 815 (1972), the Court of Appeals noted that, HN1 although the abstention rule is often "'framed in terms of 'exhaustion' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.'" Id. at 642, (quoting Parisi, 405 U.S. at 40).

None of the policy factors identified by the Supreme Court as supporting the doctrine of comity is applicable here. See Parisi, 405 U.S. at 41, discussed in New, 129 F.3d at 643. **[**11]** In the context of this case, according comity to a military tribunal would not "aid[] the military judiciary in its task of maintaining order and discipline in the armed services," or "eliminate[] needless friction between the federal civilian and military judicial systems," nor does it deny "due respect to the autonomous military judicial system created by Congress," because, whatever else can be said about the Military Commission established under the President's Military Order, it is not autonomous, and it was not created by Congress. Parisi, 405 U.S. at 40.

The New case identifies an exception to the exhaustion rule that it characterizes as "quite simple: HN2 a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." New, 129 F.3d at 644. That rule, squarely based on the Supreme Court's opinions in McElroy, Reed, and Toth, supra, applies here. Even Councilman supports the proposition that a district court should at least determine whether the petitioner has "'raised substantial arguments denying the right of the military to try [him] at all.'" 420 U.S. at 763 **[**12]** (quoting Noyd v. Bond, **[*158]** 395 U.S. at 696 n.8). Having done so, and having considered Hamdan's arguments that he is not triable by military commission at all, I conclude that abstention is neither required nor appropriate as to the issues resolved by this opinion.

2. No proper determination has been made that Hamdan is an offender triable by

military tribunal under the law of war.

a. The President may establish military commissions only for offenders or offenses triable by military tribunal under the law of war.

The major premise of the government's argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, Ex parte Quirin, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), Application of Yamashita, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946), and Madsen v. Kinsella, 343 U.S. 341, 96 L. Ed. 988, 72 S. Ct. 699 (1952), has so held. In Quirin the Supreme Court located the power in Article I, § 8, emphasizing the President's executive power as commander-in-chief "to wage war which Congress **[**13]** has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." Quirin, 317 U.S. at 10, 87 L. Ed. 3, 63 S. Ct. 2 (emphasis added). Quirin stands for the proposition that HN3 the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War (a predecessor of the Uniform Code of Military Justice) by which Congress provided rules for the government of the army. Id. Thus, Congress provided for the trial by courts-martial of members of the armed forces and specific classes of persons associated with or serving with the army, id., and "the Articles [of War] also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." Id. The President's authority to prescribe procedures for military commissions was conferred by Articles 38 and 46 of the Articles of War. Id. **[**14]** The Quirin Court sustained the President's order creating a military commission, because "by his Order creating the . . . Commission [the President] has undertaken to exercise the authority conferred upon him by Congress . . . ." Id. at 11.

This sentence continues with the words ". . . and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." Id. at 11. That dangling idea is not explained -- in Quirin or in later cases. The Court expressly found it unnecessary in Quirin "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." Id.

In Yamashita, the Supreme Court noted that it had "had occasion [in Quirin] to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against **[**15]** the law of war," Yamashita, **[*159]** at 327 U.S. at 7, and noted:

We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8 Cl. 10 of the Constitution to 'define and punish . . . Offenses against the Law of Nations . . .,' of which the law of war is a part, had by the Articles of War [citation omitted] recognized the 'military commission' appointed by military command as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 7 (emphasis added). Further on, the Court noted:

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted **[**16]** the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties."

Id. at 7-8 (emphasis added). And again:

Congress, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 16 (emphasis added). Yamashita concluded that, HN4 by giving "sanction . . . to any use of the military commission contemplated by the common law of war," Congress "preserved their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War] . . . ." Id. at 20.

What was then Article 15 of the Articles of War is now Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. HN5 It **[**17]** provides:
The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Quirin and Yamashita make it clear that HN6 Article 21 represents Congressional approval of the historical, traditional, non-statutory military commission. The language of that approval, however, does not extend past "offenders or offenses that by statute or by the law of war may be tried by military commissions . . . ." 10 U.S.C. § 821.

Any additional jurisdiction for military commissions would have to come from some inherent executive authority that Quirin, Yamashita, and Madsen neither define nor directly support. If the President does have inherent power in this area, it is quite limited. Congress has the power to amend those limits and could do so tomorrow. Were the President to act outside the limits now set for military commissions by Article 21, however, his actions would **[**18]** fall into the most restricted category of cases identified by Justice **[*160]** Jackson in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,

637, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952), in which "the President takes measures incompatible with the expressed or implied will of Congress," and in which the President's power is "at its lowest ebb." n5

b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

HN7 "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

This language is from Quirin, 317 U.S. at 27-28, 87 L. Ed. 3, 63 S. Ct. 2. The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the Third Geneva Convention). Afghanistan is a party to the Geneva Conventions. n6 HN8 The Third Geneva Convention is acknowledged to be part of the law of war, 10/25/04 Tr. at 55; Military Commission **[**19]** Instruction No. 2, § (5)(G) (Apr. 30, 2003); 32 C.F.R. § 11.5(g), http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. It is applicable by its terms in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

HN9 **A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed. n7**

HN10 The Military Commission is not such a court. Its procedures are not such procedures.

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n5 For further development of this argument, see Brief Amici Curiae of Sixteen Law Professors at 9-13. **[**20]**

n6 See International Committee of the Red Cross, Treaty Database, at http://www.icrc.org/ihl.

n7 See Brief Amici Curiae of Sixteen Law Professors at 28-30.

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The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to prisoner-of-war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected. The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." See Motion to Dismiss **[*161]** at 33, Hicks v. Bush (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum from the President, to the Vice President **[**21]** et al., Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), http://www.library.law.pace.edu/research/020207_bushmemo.pdf, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, see Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l. L. 345, 349 (2002) (conflict in Afghanistan was international armed conflict in which Taliban and al Qaeda joined forces against U.S. and its Afghan allies)), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of HN11 the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. See Amicus Brief of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), General Richard **[**22]** O'Meara (ret.) (Generals and Admirals Amicus Brief) at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President P3 (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf). Thus HN12 at some level -- whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, see infra note 13 -- the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theater, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention -- they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. See also The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html. We know this, the government argues, because the President himself has determined that Hamdan **[**23]** was a member of al Qaeda or otherwise involved in terrorism against the United States. Id. Presidential determinations in this area, the government argues, are due "extraordinary deference." 10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." 10/25/04 Tr. at 12.

Article 5 of the Third Geneva Convention provides:

HN13 Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

This provision has been implemented and confirmed by Army Regulation 190-8, Enemy Prisoners of War, Retained **[*162]** Personnel, Civilian Internees and Other Detainees, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf., Hamdan has asserted his entitlement to POW status, and the Army's regulations **[**24]** provide that HN14 whenever a detainee makes such a claim his status is "in doubt." Army Regulation 190-8, § 1-6(a); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2658, 159 L. Ed. 2d 578 (Souter, J., concurring). The Army's regulation is in keeping with general international understandings of the meaning of Article 5. See generally Generals and Admirals Amicus Brief at 18-22.

Thus the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny, and neither does the government's position that, if a hearing is required by Army regulations, "it was provided," 10/25/04 Tr. at 40. There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in Hamdi, supra, to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing **[**25]** Combatant Status Review Tribunal 3 (July 7, 2003), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; see also Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, see 10/25/04 Tr. at 37. HN15 The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, **[**26]** is also rejected. n8 **[*163]** HN16 It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies "international human norms," Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), and that it sets forth the "most fundamental requirements of the law of war." Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995). The International Court of Justice has stated it plainly: "There is no doubt that, in the event of international armed conflicts . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." Nicaragua v. United States,

1986 I.C.J. 14, 114 (Judgment of June 27). The court went on to say that, "because the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether . . . [the actions **[**27]** alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict." n9 Id.

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n8 Article 3 of the Third Geneva Convention is called "Common Article 3" because it is common to all four of the 1949 Geneva Conventions. HN17 It provides:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be found to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be sickness, wounds, detention, or any other cause, shall in all circumstances by treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be commected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[28]**

n9 See also Brief Amici of Sixteen Law Professors at 33 n.32.

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The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own

ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to Hamdan, "Durant's captors would not be bound to follow the convention because they were not a 'state'". Neil McDonald & Scott Sullivan, Rational Interpretation in Irrational Times: The Third Geneva Convention and "War On Terror", 44 Harv. Int'l. L.J. 301, 310 (2003). Examples of the way other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive **[**29]** policies are set forth in Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States, at 77-80 (2003).

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court -- that, in effect, Hamdan has failed **[*164]** to state a claim upon which relief can be granted -- because the Third Geneva Convention is not "self-executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders . . . triable under the law of war." 10 U.S.C. § 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

HN18 Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2 **[**30]** . United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." The Paquete Habana, 175 U.S. 677, 708, 44 L. Ed. 320, 20 S. Ct. 290 (1900); Restatement (Third) of the Foreign Relations Law of the United States § 111. A treaty is "non-self-executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required. Id. at § 111(4). The controlling law in this Circuit on the subject of whether or not treaties are self-executing is Diggs v. Richardson, 180 U.S. App. D.C. 376, 555 F.2d 848 (D.C. Cir. 1976), a suit to prohibit the importation of seal furs from Namibia, brought by a citizen plaintiff who sought to compel United States government compliance with a United Nations Security Council resolution calling on member states to have no dealings with South Africa. The decision in that case instructs HN19 a court interpreting a treaty to look to the intent of the signatory parties as manifested by the **[**31]** language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the treaty. Id. at 851. Diggs relies on the Head Money Cases, Edye v. Robertson, 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884), which established the proposition that a "treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." Id. at 598. The Court in Diggs concluded that the provisions of the Security Council resolution were not addressed to the judicial branch of government, that they did not by their terms confer rights on individuals, and that instead the resolution clearly called upon governments to take action. Diggs, 555 F.2d at 851.

The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Moreover, as petitioner and several of the *amici* have

pointed out, see, e.g., Pet'r's Mem. Supp. of Pet. at 39 n.11, it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, **[**32]** if any, was deemed "required to give effect to the provisions contained in the four conventions," S. Rep. No. 84-9, at 30 (1955), and found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, supra, were not among them. What did require implementing legislation were Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in "grave" violations of the Conventions, such as torture, medical experiments, or "wilful" denial of Convention protections, none of which is **[*165]** involved here. Third Geneva Convention, art. 130. Judge Bork must have had those provisions in mind, together with Congress' response in enacting the War Crimes Act, 18 U.S.C. § 2441, when he found that the Third Geneva Convention was not self-executing because it required "implementing legislation." Tel-Oren v. Libyan Arab Republic, et al., 233 U.S. App. D.C. 384, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). That opinion is one of three written by a three-judge panel, none of which was joined by any other member of the panel. It is not Circuit precedent and it is, I respectfully **[**33]** suggest, erroneous. HN20 "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h. n10

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n10 The observation in Al-Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 1147 (D.C. Cir. 2003), that the Third Geneva Convention is not self-executing merely relies on the reasons stated by Judge Bork in Tel-Oren, 726 F.2d at 809. Since that observation was not essential to the outcome in Al-Odah, and since in any event Al-Odah was reversed by the Supreme Court, I am not bound by it.

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HN21 Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third **[**34]** Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty. n11 I further conclude that it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5 concludes otherwise. It follows from those conclusions that Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice.

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n11 Hamdan is a citizen of Yemen. The government has refused permission for Yemeni

diplomats to visit Hamdan at Guantanamo Bay. Decl. of Lieutenant Commander Charles Swift at 4 (May 3, 2004). It ill behooves the government to argue that enforcement of the Geneva Convention is only to be had through diplomatic channels.

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c. Abstention is appropriate with respect to Hamdan's rights under Common Article 3.

There is an argument that, even if Hamdan does not have prisoner-of-war status, Common Article 3 would be violated by trying him for his alleged war crimes in this Military Commission. Abstention is appropriate, and perhaps required, on that question, because, HN22 unlike Article 102, which unmistakably mandates trial of POW's only by general court-martial and thus implicates the jurisdiction of the Military Commission, the Common Article 3 requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed, term-of-art meaning. A substantial number of rights and procedures conferred by the UCMJ are missing from the Military Commission's rules. See infra note 12; Generals and Admirals Amicus Brief at 24. I am aware of no authority **[*166]** that defines the word "guarantees" in Common Article 3 to mean that all of these rights must be guaranteed in advance of trial. Only Hamdan's right to be present at every phase of his trial and to see all the evidence admitted against him is of immediate pretrial concern. **[**36]** That right is addressed in the next section of this opinion.

3. In at least one critical respect, the procedures of the Military Commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice.

In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence. The rules laid down by Military Commission Order No. 1, 32 C.F.R. § 9.3, provide that the defendant shall have appointed military counsel, that he may within reason choose to replace "detailed" counsel with another military officer who is a judge advocate if such officer is available, that he may retain a civilian attorney if he can afford it, that he must receive a copy of the charges in a language that he understands, that he will be presumed innocent until proven guilty, that proof of guilt must be beyond a reasonable doubt, that he must be provided with the evidence the prosecution intends to introduce at trial and with any exculpatory evidence known to the prosecution, with important exceptions discussed below, **[**37]** that he is not required to testify at trial and that the Commission may not draw an adverse inference from his silence, that he may obtain witnesses and documents for his defense to the extent necessary and reasonably available, that he may present evidence at trial and cross-examine prosecution witnesses, and that he may not be placed in jeopardy twice for any charge as to which a finding has become final. Id. at §§ 9.4 and 9.5.

The Military Commission is remarkably different from a court-martial, however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him. n12

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n12 A great many other differences are identified and discussed in David Glazier, Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2015-2020 (2003). Differences include (not an exhaustive list):

Article 16 requires that every court-martial consist of a military judge and no less than five members, as opposed to the Military Commission rules that require only three members. Military Commission Order No. 1 (4) (A); Article 10 of the UCMJ provides a speedy trial right, while the Military Commission rules provide none. Article 13 states that pre-trial detention should not be more rigorous than required to ensure defendant's presence, while the Commission rules contain no such provision and, in fact, Hamdan was held in solitary confinement in Camp Echo for over 10 months. Article 30 states that charges shall be signed by one with personal knowledge of them or who has investigated them. The Military Commission rules include no such requirement. Article 31 provides that the accused must be informed before interrogation of the nature of the accusation, his right not to make any statement, and that statements he makes may be used in proceedings against him, and further provides that statements taken from the accused in violation of these requirements may not be received in evidence at a military proceeding. The Military Commission rules provide that the accused may not be forced to testify at his own trial, but the rule does not "preclude admission of evidence of prior statements or conduct of the Accused." Military Commission Order No. 1 (5) (F). Article 33 states that the accused will receive notice of the charges against him within eight days of being arrested or confined unless written reason is given why this is not practicable. The Military Commission rules include no such requirement, and in fact, Hamdan, after being moved to Camp Echo for pre-commission detainment, was not notified of the charges against him for over 6 months. Article 38 provides the accused with certain rights before charges brought against him may be "referred" for trial, which include the right to counsel and the right to present evidence on his behalf. The Military Commission rules provide for no pre-trial referral process at all. Article 41 gives each side one peremptory challenge, while the Military Commission rules provide for none. Article 42 requires all trial participants to take an oath to perform their duties faithfully. The Military Commission rules allow witnesses to testify without taking an oath. Military Commission Order No. 1 (6) (D). Article 52 requires three-fourths concurrence to impose a life sentence. The Military Commission rules only require two-thirds concurrence of the members to impose such a sentence. Military Commission Order No. 1 (6) (F). Article 26 provides that military judges do not vote on guilt or innocence. Under the Military Commission rules, the Presiding Officer is a voting member of the trial panel. Military Commission Order No. 1 (4) (A).

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[*167] Petitioner's challenge to the first difference is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the final reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of

government -- an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of certiorari. The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. The President has appointed to that panel some of the most distinguished civilian lawyers in the country (who may receive temporary commissions to fulfill the requirement that they be "officers," see Military Commission Order No. 1 (6)(H); 32 C.F.R. 9.6(h)). n13 And, as for the President's naming himself or the Secretary of Defense as the final reviewing authority, that, after all, is what a military commission is. If Hamdan is triable by any military **[**39]** tribunal, the fact that final review of a finding of guilt would reside in the President or his designee is not "contrary to or inconsistent with" the UCMJ.

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n13 Griffin B. Bell, a former United States Circuit Judge and Attorney General; William T. Coleman, Jr., a former Secretary of Transportation; Edward George Biester, Jr., a former Congressman, former Pennsylvania Attorney General, and current Pennsylvania Judge; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. See Dep't of Defense, Military Commission Biographies, http://www.defenselink.mil/news/Aug2004/commissions_biographies.html.

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The second difference between the procedures adopted for the Miliary Commission and those applicable in a court-martial convened under the Uniform Code of Military Justice is far more troubling. That difference lies in the treatment of information that is classified; information that is otherwise "protected"; or information that might implicate the physical safety of participants, including witnesses, **[**40]** or the integrity of intelligence and law enforcement sources and methods, or "other national security interests." See Military Commission Order No. 1 (6)(B)(3); 32 C.F.R. § 9.6(b). Under the Secretary of Defense's regulations, the Military Commission must "hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." Id. Detailed military defense counsel may not be excluded from proceedings, nor may evidence be received **[*168]** that has not been presented to detailed defense counsel, Military Commission Order No. 1 (6)(B)(3), (6)(D)(5); 32 C.F.R. §§ 9.6(b)(3), (d)(5). The accused himself may be excluded from proceedings, however, and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). See id.

Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. See Military Commission **[**41]** Order No. 1

(6)(D); 32 C.F.R. § 9.6(d). The Presiding Officer or the Appointing Authority may receive it in evidence if it meets the "reasonably probative" standard but forbid it to be shown to Hamdan. See id. As counsel for Hamdan put it at oral argument, portions of Mr. Hamdan's trial can be conducted "outside his presence. He can be excluded, not for his conduct, [but] because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross examination questions from is turning to your client and saying, 'Did that really happen? Is that what happened?' I'm not permitted to do that." 10/25/04 Tr. at 97.

It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). It is also apparent that the right to trial "in one's presence" is established as a matter of international humanitarian and human rights law. **[**42]** n14 But it is unnecessary to consider whether Hamdan can rely on any American constitutional notions of fairness, or whether the nature of these proceedings really is, as counsel asserts, akin to the Star Chamber, 10/25/04 Tr. at 97 (and violative of Common Article 3), because -- HN23 at least in this critical respect -- the rules of the Military Commission are fatally "contrary to or inconsistent with" the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful.

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n14 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(d)(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75.4(e). "This includes, at a minimum, all hearings in which the prosecutor participates. E.g., Eur.Ct.H.Rts., Belziuk v. Poland, App. No. 00023103/93, Judgment of 25 March 1998, para. 39." Brief Amici Curiae of Louise Doswald-Beck et al. at 32-33 n.137. In this country, as Justice Scalia noted in Crawford v. Washington, 124 S. Ct. at 1363, the right to be present was held three years after the adoption of the Sixth Amendment to be a rule of common law "founded on natural justice" (quoting from State v. Webb, 2 N.C. 103 (1794)).

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HN24 In a general court-martial conducted under the UCMJ, the accused has the right to be present during sessions of the court:

HN25 **When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military**

judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has [*169] been detailed to the court, the military judge.

UCMJ Article 39(b), 10 U.S.C. § 839(b) (emphasis added).

HN26 Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases [44] in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (Emphasis added.)**

The government argues for procedural "flexibility" in military commission proceedings, asserting that

construing Article 36 rigidly to mean that there can be no deviation from the UCMJ . . . would have resulted in having virtually all of the UCMJ provisions apply to the military commissions, which would clearly be in conflict with historical practice, as recognized by the Supreme Court, in both Yamashita and Madsen, and also inconsistent with Congress' intent, as reflected in Articles 21 and 36, and other provisions of the UCMJ that specifically mention commissions when a particular rule applies to them.

10/25/04 Tr. 26-27. But HN27 the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial. It proscribes only procedures and modes of proof that are "contrary to or inconsistent with" the UCMJ. n15

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n15 In *Kangaroo Court or Competent Tribunal?,* supra note 14 at 2020-22, the author suggests that one possible reading of this provision would require consistency only with those nine UCMJ articles (of 158 total) that expressly refer to or recite their applicability to military commissions. A review of the articles that contain such references or recitals, however, see id. at 2014 n.23, demonstrates the implausibility of such a reading.

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As for the government's reliance on Yamashita and Madsen: Yamashita offers support for the government's position only if developments between 1946 and 2004 are ignored. In 1946, the Supreme Court held that Article 38 of the Articles of War (the predecessor of Article 36 of the UCMJ) did not provide to enemy combatants in military tribunals the procedural protections (in that case, restrictions on the use of depositions) available in courts-martial under the Articles of War. Yamashita, 327 U.S. at 18-20. The Court's holding depended upon the fact that General Yamashita, an enemy combatant, was not subject to trial by courts-martial under then Article 2 of the Articles of War (the predecessor to Article 2 of the UCMJ), which conferred courts-martial jurisdiction only over U.S. military personnel and those affiliated with them. Id. at 19-20. The Court held that Congress intended to grant court-martial protections within tribunals only to those persons who could be tried under the laws of war in either courts-martial or tribunals. See id. The UCMJ and the 1949 Geneva Conventions had not come into effect in 1946. HN28 Article 2 of the UCMJ is now **[**46]** broader than Article 2 of the Articles of War. See generally Library of Congress, Index and Legislative History of the UCMJ (1950), http://www.loc.gov/rr/frd/Military_Law/index_legHistory.html. It has been expanded to include as persons subject to court-martial, both prisoners of war, 10 U.S.C. § 802(a)(9), and "persons within an area leased by or otherwise reserved or acquired **[*170]** for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." Id. § 802(a)(12). One or both of those new categories undoubtedly applies to petitioner. For this reason, Yamashita's holding now arguably gives more support to petitioner's case than to the government's. n16

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n16 Yamashita has been undercut by history in another important respect. The Supreme Court found the guarantee of trial by court-martial for prisoners of war in the 1929 Geneva Convention inapplicable to General Yamashita because it construed that provision as applicable only to prosecutions for acts committed while in the status of prisoner of war. HN29 The Third Geneva Convention, adopted after and in light of Yamashita, made it clear that the court-martial trial provision applies as well to offenses committed by combatants while combatants. Third Geneva Convention, art. 85. See also, Glazier, supra note 12 at 2079-80.

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Madsen follows Yamashita in its general characterization of military commissions as "our commonlaw war courts" and states that "neither their procedure nor their jurisdiction has been prescribed by statute." Madsen, 343 U.S. at 346-47. It does not appear that any procedural issue was actually raised in Madsen, however, nor were the Geneva Conventions addressed in any way in that case. Madsen was an American citizen, the dependent wife of an Armed Forces member, charged with murdering her husband in the American Zone of Occupied Germany in 1947 and

tried there by the United States Court of the Allied High Commission for Germany. Her argument, which the Court rejected, was simply that the jurisdiction of military commissions over civilian offenders and non-military offenses was automatically ended by amendments to the Articles of War enacted in 1916 that extended the jurisdiction of courts-martial to persons accompanying United States forces outside the territorial jurisdiction of the United States. Id. at 351-52.

Even though Madsen presented no procedural issue, the Supreme Court did generally review the procedures applicable to Madsen's **[**48]** trial. A comparison between those procedures and the rules of the Guantanamo Military Commission is not favorable to the government's position here. In Madsen, United States Military Government Ordinance No. 2 (the analogue of the Military Commission Order in this case) provided, under "rights of accused":

Every person accused before a military government court shall be entitled . . . to be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

Id. at 358 n.24. There was no provision for the exclusion of the accused if classified information was to be introduced.

The government's best argument, drawing on language found in both Yamashita and Madsen, is that a "commonlaw war court" has been "adapted in each instance to the need that called it forth," 343 U.S. at 347-48 (citing Yamashita, 327 U.S. at 18-23). Neither the President in his findings and determinations nor the government in its briefs **[**49]** has explained what "need" calls forth the abandonment of the right Hamdan would have under the UCMJ to be present at every stage of his trial and to confront and **[*171]** cross-examine all witnesses and challenge all evidence brought against him. Presumably the problems of dealing with classified or "protected" information underlie the President's blanket finding that using the regular rules is "not practicable." The military has not found it impracticable to deal with classified material in courts-martial, however. HN30 An extensive and elaborate process for dealing with classified material has evolved in the Military Rules of Evidence. Mil. R. Evid. 505; see 10/25/04 Tr. 131-32. Alternatives to full disclosure are provided, Mil. R. Evid. 505(i)(4)(D). Ultimately, to be sure, the government has a choice to make, if the presiding military judge determines that alternatives may not be used and the government objects to disclosure of information. At that point, the conflict between the government's need to protect classified information and the defendant's right to be present becomes irreconcilable, and the only available options are to strike or preclude the testimony of a witness, or declare **[**50]** a mistrial, or find against the government on any issue as to which the evidence is relevant and material to the defense, or dismiss the charges (with or without prejudice), Mil. R. Evid. 505(i)(4)(E). The point is that

the rules of the Military Commission resolve that conflict, not in favor of the defendant, but in favor of the government.

Unlike the other procedural problems with the Commission's rules that are discussed elsewhere in this opinion, this one is neither remote nor speculative: Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process and that "the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point." 10/25/04 Tr. 132. Counsel's appropriate concern is not only for the established right of his client to be present at his trial, but also for the adequacy of the defense he can provide to his client. HN31 The relationship between the right to be present and the adequacy of defense is recognized by military courts, which have interpreted Article 39 of the UCMJ in the light of Confrontation Clause jurisprudence. The leading Supreme Court **[**51]** case is Maryland v. Craig, 497 U.S. 836, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) (one-way television viewing of witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation" -- "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of fact-finding by "reducing the risk that a witness will wrongfully implicate an innocent person." Id. at 846 (internal citations omitted).

Following Craig in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:
There [in Craig], the witness was outside the courtroom and the defendant was present. Here, the witness was in the courtroom and appellant was excluded. While appellant could observe **[**52]** J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. HN32 While Craig and [United States v. Williams, 37 M.J. 289 (C.M.A. 1993)] permit restricting an accused's face-to-face **[*172]** confrontation of a witness, they do not authorize expelling an accused from the courtroom.

United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996); see also United States v. Longstreath, 45 M.J. 366 (C.A.A.F. 1996) (defendant separated from witness by television but present in courtroom). n17

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n17 The statute Congress enacted after and in light of the Craig opinion, 18 U.S.C. § 3509, carefully protects the rights of child victims and witnesses in abuse cases but preserves the right of the accused to be present. Even if a child witness is permitted to testify by videotaped deposition, the accused must be "present" via two-way television, and the defendant must be "provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition." 18 U.S.C. § 3509(b) (2) (B) (iv).

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HN33 A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present. 10 U.S.C. § 839. HN34 A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

4. Hamdan's detention claim appears to be moot, and his speedy trial and equal protection claims need not be [54] ruled upon at this time.**

Until a few days before the oral argument on Hamdan's petition, his most urgent and striking claim was that he had been unlawfully and inhumanely held in isolation since December 2003 and that such treatment was affecting his mental and psychological health as well as his ability to assist in the preparation of his defense. Late on the Friday afternoon before the oral argument held on Monday, October 25, 2004, the government filed its "notice of a change in circumstances," advising the court that Hamdan had been moved back to Camp Delta -- a separate wing of Camp Delta, to be sure, but nevertheless an open-air part of Camp Delta where pre-commission detainees can communicate with each other, exercise, and practice their religion. 10/25/04 Tr. at 11-12. That change in status may not exactly moot Hamdan's claim about his confinement in isolation, which the government is capable of repeating and which has evaded review. The treatment Hamdan may or may not be afforded in the future, however, is not susceptible to review on a writ of habeas corpus.

The second most urgent and most important claim in Hamdan's original petition was his claim of entitlement to **[**55]** the protection of the Uniform Code of Military Justice's speedy trial rule and his assertion that he had been detained more than the maximum 90 days permitted by Article 103 of the Third Geneva

Convention. These concerns were more urgent before Hamdan was transferred out of Camp Echo and back to Camp Delta and before the Supreme Court made it clear, in Hamdi, that, whether or not Hamdan has been charged with a crime, he may be detained **[*173]** for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant. n18 HN35 The UCMJ's speedy trial requirements establish no specific number of days that will require dismissal of a suit. HN36 Article 103 of the Third Geneva Convention does bar pretrial detention exceeding 90 days, but it provides no mechanism or guidance for dealing with violations. The record does not permit a careful analysis of speedy trial issues under the test for the correlative Sixth Amendment right by Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). It is well established in any event that HN37 the critical element of prejudice is best evaluated post-trial. United States. v. MacDonald, 435 U.S. 850, 858-9, 56 L. Ed. 2d 18, 98 S. Ct. 1547 (1978).

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n18 Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court.

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It is also unnecessary for me to decide whether, by virtue of his detention at Guantanamo Bay, Hamdan has any rights at all under the United States Constitution or under 42 U.S.C. § 1981. n19

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n19 The Supreme Court's recent decision in Rasul does little to clarify the Constitutional status of Guantanamo Bay but may contain some hint that non-citizens held at Guantanamo Bay have some Constitutional protection. See Rasul, 124 S. Ct. at 2698 n.15.

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CONCLUSION

It is now clear, by virtue of the Supreme Court's decision in Hamdi, that HN38 the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code **[**57]** of Military Justice; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion from

commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some reason other than the pending charges against him requires different treatment. Hamdan's remaining claims are in abeyance.

JAMES ROBERTSON

United States District Judge

November 8, 2004

ORDER

For the reasons set forth in the accompanying memorandum opinion it is

ORDERED that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is **granted in part.** It is

FURTHER ORDERED that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is **denied.** It is

FURTHER ORDERED that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of **[**58]** Prisoners of War of August 12, 1949, he may **[*174]** not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment. And it is

FURTHER ORDERED that petitioner's remaining claims are **in abeyance,** the Court having abstained from deciding them.

JAMES ROBERTSON

United States District Judge

UNITED STATES v. SALIM AHMED HAMDAN – Case No. 04-0004	**Appointing Authority Decision on Challenges for Cause**
UNITED STATES v. DAVID MATTHEWS HICKS – Case No. 04-0001	Decision No. 2004-001 October 19, 2004

Initial hearings were held in each of the above cases at Guantanamo Bay, Cuba, on August 24 and 25, 2004, respectively, during which voir dire was conducted.[1] In both cases, counsel for both sides reviewed detailed written questionnaires completed by each commission member, conducted voir dire of the commission as a whole, and then conducted extensive individual voir dire of the presiding officer, each of the four commission members, and the one alternate member.[2] Some of the commission members were also individually questioned by counsel in closed session so that classified matters could be examined.[3] In both the *Hamdan* and *Hicks* cases, defense counsel challenged the Presiding Officer, three of the four commission members, and the alternate commission member. During the hearings, the prosecution opposed all the challenges in both cases. However, in a subsequent brief filed by the Chief Prosecutor, the prosecution modified their position and no longer opposes the challenges for cause against Colonel (COL) B (a Marine),[4] Lieutenant Colonel (LTC) T, and LTC C.

[1] The initial hearing in *United States v. al Bahlul*, Case No. 04-0003, was held on August 26, 2004, at Guantanamo Bay, Cuba. The proceedings in that case were suspended prior to voir dire to resolve the accused's request to represent himself. The initial hearing in *United States v. al Qosi*, Case No. 04-0002, was held on August 27, 2004, at Guantanamo Bay, Cuba. Voir dire in that case is scheduled to be conducted in November 2004.

[2] By comparison, in the Nazi Saboteur Military Commission conducted during World War II, defense counsel asked only two questions of the commission as a whole and conducted no individual voir dire. There were no challenges for cause. *See* Transcript of Proceedings before the Military Commissions to Try Persons Charged with Offenses Against the Law of War and the Articles of War, Washington D.C., July 8-31, 1942, transcribed by the University of Minnesota, 2004, *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm at pp. 13-14.

[3] To what extent voir dire is conducted during any military commission is a matter within the discretion of the Presiding Officer. "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate . . . [and shall ensure that] any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member." DoD Military Commission Instruction No. 8, "Administrative Procedures," paragraph 3A(2) (Aug. 31, 2004) [hereinafter MCI No. 8]. The Presiding Officer permitted extensive, wide-ranging voir dire in both of these cases. There was no objection by any counsel that the Presiding Officer impeded in any way their ability to conduct full and extensive voir dire of all the members, including the Presiding Officer.

[4] The final commission member, COL B (an Air Force officer), was not challenged by either side in either case. All further references to COL B herein refer to COL B, the Marine.

In each case, the Appointing Authority considered the trial transcript, the written briefs of the parties, the written questionnaires completed by the members, and the written recommendations of the Presiding Officer. While each case is decided on the record of trial in that case, this joint decision is provided because of the close similarities in the voir dire of the members and the arguments of counsel in both cases. Additionally, defense counsel from the *al Qosi* case has also filed a brief concerning the proper standard for the Appointing Authority to apply when deciding challenges for cause.

Military Commission Procedural Provisions on Challenges for Cause

The Appointing Authority appoints military commission members "based on competence to perform the duties involved" and may remove members for "good cause." DoD Directive No. 5105.70, "Appointing Authority for Military Commissions," paragraph 4.1.2 (Feb. 10, 2004) [hereinafter DoD Dir. 5105.70]. *See also* DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," Section 4A(3) (Mar. 21, 2002) [hereinafter MCO No. 1]; MCI No. 8 at paragraph 3A(1). To be qualified to serve as a member or an alternate member of a military commission, each person "shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty." MCO No. 1 at Section 4A(3). *Compare* Article 25(a), Uniform Code of Military Justice, 10 U.S.C. § 825(a) [hereinafter UCMJ].

The Presiding Officer may not decide challenges for cause but must "forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."[5] MCI No. 8 at paragraph 3A(3). In the *Hamdan* and *Hicks* cases, consistent with this authority, the Presiding Officer has scheduled due dates for motions, motion hearing dates, and tentative trial dates pending the Appointing Authority's decision on these challenges.

"In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission." MCI No. 8 at paragraph 3A(1).

The term "good cause" is not defined in any of these provisions but is defined in the Review Panel instruction as including, but not limited to, "physical disability, military exigency, or other circumstances that render the member unable to perform his duties."

[5] On September 15, 2004, the Appointing Authority sent the following email to the Presiding Officer: "Please forward your observations and recommendations relating to challenges for cause." That same day, the Presiding Officer provided written recommendations concerning the recommended standard for deciding challenges for cause and his recommendations on the challenges against each member in the *Hamdan* and *Hicks* cases.

DoD Military Commission Instruction No. 9, "Review of Military Commission Proceedings," paragraph 4B(2) (Dec. 26, 2003). This is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court. *See* Manual for Courts-Martial, United States, Rules for Courts-Martial 505 (2002) [hereinafter RCM].

Parties' Positions Concerning the Standard for Determining Challenges for Good Cause

At the request of the Presiding Officer, defense counsel in *Hamdan*, *Hicks*, and *al Qosi*, as well as the Chief Prosecutor, filed briefs concerning the appropriate standard for the Appointing Authority to apply when deciding challenges for "good cause." The defense briefs in *Hicks* and *al Qosi* advocate the adoption of the standard set forth in RCM 912(f) including the "implied bias" provision which states that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the [military commission] free from substantial doubt as to legality, fairness, and impartiality." RCM 912(f)(1)(N). While making some different arguments in support of their position, defense counsel in *Hicks* and *al Qosi* advocate that the RCM 912(f)(1)(N) court-martial standard should be applied without change in military commissions. Under this standard, implied bias is determined via a supposedly objective standard, the test being whether a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding. *See United States v. Strand*, 59 M.J. 455, 458-59 (2004). Defense counsel in *Hamdan* agree that the RCM 912(f)(1)(N) court-martial standard should be applied to military commissions, but argue that the reasonable member of the public must be taken from the international community.

The brief filed by the Chief Prosecutor recommends the following standard be adopted: "A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts."

The Presiding Officer recommends that a challenge for cause should be granted "if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an 'implied bias' standard in the relevant documents establishing the Commissions." (Mem. for Appointing Authority, Military Commissions at paragraph 2, Sept. 15, 2004.)

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal practice, and under international practice when deciding the appropriate challenge standard for military commissions.

Applicability of the Uniform Code of Military Justice and the Manual for Courts-Martial to Military Commissions

As explained below, while some of the provisions of the UCMJ expressly apply to military commissions, none of the provisions of the Manual for Courts-Martial, including the implied bias standard endorsed by defense counsel, apply to military commissions. Article 21 of the UCMJ provides:

> § 821. Art. 21 Jurisdiction of courts-martial not exclusive
>
> The provisions of this chapter conferring jurisdiction upon courts-marital do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[6]

UCMJ art. 21. Article 36 of the UCMJ states:

> § 836. Art. 36 President may prescribe rules
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter* [10 U.S.C. §§ 801-946].
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

UCMJ art. 36 (emphasis added). In 1990, the phrase "and shall be reported to Congress" was deleted from the end of subsection (b). *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Section 1301, 104 Stat. 1301 (1990).

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[6] As recently as November 22, 2000, less than one year before the 9/11 attacks, Congress again recognized the independent jurisdiction of military commissions. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 (adding a section entitled "Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States," 18 U.S.C. § 3261 (2000)). 18 U.S.C. § 3261(c) states that "[n]othing in this chapter [18 U.S.C. §§ 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." *Id.*

Consistent with this Congressional authority, on November 13, 2001, the President entered the following finding:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833, Section 1(f) (Nov. 16, 2001) [hereinafter President's Military Order].

Accordingly, the Manual for Courts-Martial does not apply to trials by military commissions because of the congressionally authorized finding in the President's Military Order. However, the President's statutory authority to promulgate different trial rules for military commissions is not unlimited. Military commission trial procedures must comply with two statutory conditions contained in the Uniform Code of Military Justice. First, all such rules and regulations shall be "uniform insofar as practicable." UCMJ art. 36(b).

Second, any such rule or regulation "may not be contrary to or inconsistent with" the Uniform Code of Military Justice. UCMJ art. 36(a). Most of the UCMJ's provisions specifically apply to courts-marital only, but some also expressly apply to military commissions as well. For example, Articles 21 (jurisdiction), 28 (court reporters and interpreters), 37(a) (unlawful command influence), 47 (refusal to appear or testify), 48 (contempts), 50 (admissibility of records of courts of inquiry), 104 (aiding the enemy), and 106 (spies) all expressly apply to military commissions.

Article 41 of the UCMJ discusses challenges for cause, but is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for "cause." *See* UCMJ art. 41(a)(1). Article 29 of the UCMJ provides that no member of a court-martial may be excused after the court has been assembled "unless excused as a result of a challenge, excused by the military judge *for physical disability or other good cause*, or excused by order of the convening authority for good cause." UCMJ art. 29(a) (emphasis added).

In historical military jurisprudence, a general statement or assertion of bias was not a proper challenge. The challenge had to allege specific facts and circumstances demonstrating the basis of the alleged bias. *See generally* William Winthrop, *Military Law and Precedents* 207 (Government Printing Office 1920 reprint) (1896). Challenges

"for favor," as implied bias challenges were historically known, did not, by themselves, imply bias.

> [T]he question of their sufficiency in law being wholly contingent upon the testimony, *which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality*. Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute [actual bias]; the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what . . . which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not 'in a state of neutrality' between the parties.

Id. at 216 (emphasis added). In such cases, the question of whether the member is or is not biased "is a question of *fact* to be determined by the particular circumstances in evidence." *Id.* at 216-17 (emphasis in original).

Challenges for Cause in United States Federal Courts

In federal practice, the seminal case on implied bias is *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (boldface added):

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury **capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

In an often cited concurring opinion, Justice O'Connor writes that:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the

> juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Id. at 222.

The doctrine of implied bias is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Brown v. Warden*, No. 03-2619, 2004 U.S. App. LEXIS 13944, at 3 (3rd Cir. July 6, 2004 unpublished) (quoting *Person v. Miller,* 854 F.2d 656, 664 (4th Cir. 1988)). "The implied bias doctrine is not to be lightly invoked, but 'must be reserved for those extreme and exceptional circumstances that leave serious question whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.'" *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (2d Cir. 2000) (quoting *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996)).

Military courts-martial practice also purports to follow the *Smith* Supreme Court precedent, with the highest military appellate court concluding that "implied bias should be invoked rarely." *See United States v. Warden*, 51 M.J. 78, 81 (2000); *see also United States v. Lavender*, 46 M.J. 485, 488 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). In practice, however, the U. S. Court of Appeals for the Armed Forces has been more liberal in granting implied bias challenges than the various U.S. Federal Circuit Courts of Appeals. But even in courts-martial, military appellate courts look at the "totality of the factual circumstances" when reviewing implied bias challenges. *See United States v. Strand*, 59 M.J. 455, 459 (2004).

The American Bar Association recently proposed a minimum standard for deciding challenges for good cause:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, or may be unable or unwilling to hear the subject case fairly and impartially. . . . In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

American Bar Association, Standards Relating to Jury Trials, Draft, September 2004.

International Standards for Challenges for Cause

International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159, 1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). The Rules of Evidence and Procedure of both the ICTY and ICTR state that "[a] judge may not sit on a trial . . . in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 15, U.N. Doc. IT/32/Rev. 32 (Aug. 12, 2004); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 15, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. *See* European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, art. 14, Section 1, 999 UNTS 171 (Dec. 16, 1966).

The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). In *Piersack v. Belgium*, the Court noted that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. *Id.* at para. 30(a). The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that "[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . . ." *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

In evaluating whether there is an appearance of impartiality that gives rise to a challenge of a judge or juror, the European Court of Human Rights noted that lack of impartiality includes situations where there is a "legitimate doubt" that a juror or judge can act impartially. *Piersack*, Series A, No. 53 at para. 30. Further, it is necessary to "examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury . . . ." *Gregory*, 25 Eur. H.R. Rep. at para. 45. Despite this seemingly expansive approach, the European

Court of Human Rights has ruled consistently that a judge is presumed to be impartial unless proven otherwise. *LeCompte, van Leuven and De Meyeres v. Belgium*, Series A, No. 43 (June 23, 1981). Thus, as a practical matter, it is the rare case in which the impartiality of a judge is successfully challenged on the basis of a judge's relationship to others when such relationship is not specifically enumerated as a disqualifying factor under national legislation.

The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality:

> [A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> > A. A judge is not impartial if shown that actual bias exists.
> > B. There is an unacceptable appearance of bias if:
> > i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
> > ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Prosecutor v. Furundzija, para. 189, Case No. l IT-95-17/1-A, Judgment, (July 21, 2000).

The Appeals Chamber noted that an informed observer is one who takes into account the oath, as well as any training and experience of the juror. On the basis of this test, the Appeals Chamber found no violation, holding that the judge's membership in an international organization was one of the very factors that qualified her as a judge at the Tribunal and thus such membership could not be the basis for a claim of bias. The Chamber also noted that judges may have personal convictions that do not amount to bias absent other factors. *Id.* at para. 203.

Appointing Authority Standard for Deciding Challenges for Cause

The President's Military Order establishes the trial standard that military commissions will provide "a full and fair trial, with the military commission sitting as the triers of both fact and law." President's Military Order at Section 4(c)(2). Considering all of the above, the Appointing Authority will apply the following standard, which includes a limited implied bias component, when deciding challenges for cause against any member of a military commission:

> Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

In applying this standard, a member should be excused if the record establishes a reasonable and significant doubt concerning his or her ability to act fairly and impartially. Additionally, the following factors will be considered, although the existence of any one of these factors is not necessarily an independent ground warranting the granting of a challenge and no one factor necessarily carries more weight than another. In each case the challenge will be decided based upon the above standard, taking into account any of these factors that may be applicable and considering the totality of the factual circumstances in the case.

(1) Has the moving party established a factual basis to support the challenge?

(2) Does the non-moving party oppose the challenge?

(3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).

(4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).

(5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

Examples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission; has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; has become physically disabled; or has intentionally disclosed protected information from a referred military commission case without proper authorization.

Consideration of Individual Challenges

LTC C

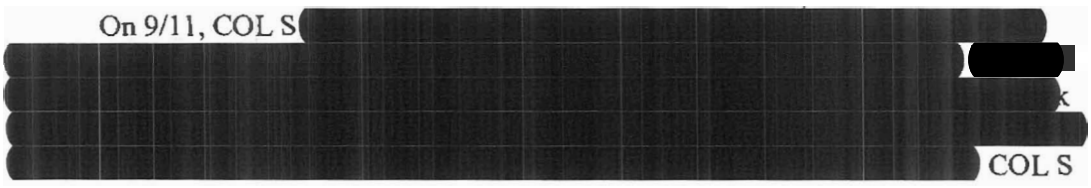
The defense challenges to LTC C are based upon his ongoing strong emotions and anger because of 9/11 and his real and present apprehension that his family may be harmed if he participates in these commissions. At trial, the prosecution opposed this challenge. However, the post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer believes that there is "some cause" to grant a challenge against LTC C because his responses would provide a reasonable person cause to doubt his ability to provide an impartial trial.

During his voir dire in *Hamdan*, LTC C acknowledged that he indicated in his written questionnaire that he had a desire to seek justice for those who perished at the hands of the terrorists, that he was very angry about the events of 9/11, and that he still had strong emotions about what happened. LTC C further stated that he believed terrorist organizations would seek out both he and his family for revenge simply because of his participation in these commissions. He also stated that at one point he held the opinion that the persons being detained at Guantanamo Bay were terrorists.

During his voir dire in *Hicks*, LTC C stated that he would try to put his emotions aside and look at the case objectively. He reaffirmed that he had participated in discussions with other soldiers where he probably stated that all of the detainees at Guantanamo Bay were terrorists, but that in retrospect that was no longer his opinion.

LTC C's past statements concerning the detainees at Guantanamo, coupled with his ongoing strong emotions concerning the 9/11 attacks, create a reasonable and significant doubt as to whether he could lay aside his emotions and judge the evidence presented in these cases in a fair and impartial manner. Accordingly, based on the totality of the factual circumstances, the challenge for cause against LTC C will be granted.

COL S



attended his funeral and met with his family. COL S also visited Ground Zero about two weeks after the attack [redacted]

The defense challenges to COL S are based upon his emotional reaction when visiting Ground Zero as well as his attendance at the funeral [redacted] The prosecution opposed this challenge at trial. The post-hearing brief filed by the Chief Prosecutor also opposes this challenge, without elaboration.

The Presiding Officer's written recommendation is that there is no cause to grant a challenge against COL S:

> His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL S [] while he was discussing the death of [redacted] he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

In the *Hamdan* record, COL S described his reaction to attending the funeral of [redacted]

> I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that -- that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

In the *Hamdan* record, COL S described his emotions while visiting Ground Zero: "It is a sad sight. A lot of destruction there. Hard to fathom what was there and what

was left. . . . I would imagine that everyone who saw it was angry." COL S stated that he did not still think about his visit to Ground Zero.

In the *Hicks* record, COL S described his emotions while visiting Ground Zero as sadness rather than anger, again noting that there was a lot of destruction and loss of life. COL S responded as follows when asked how he would separate his 9/11 feelings and personal experiences from the evidence presented at trial:

> COL S: It's separate things.
> DC: Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.
> COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.
> DC: Nothing further, thank you.

COL S's written questionnaire and his voir dire in *Hicks* both indicate that, for a non-attorney, COL S has considerable prior military legal experience. COL S stated that he had previously served as both a witness and a member (juror) in courts-martial; that he has served as a special court-martial convening authority on [redacted] different occasions; and has attended specialized military legal training in the form of Senior Officer's Legal Courses and a Law of Land Warfare Course. He also conducted numerous summary courts-marital where he made determinations of both law and fact, just as members of military commissions are required to do.

As the defense stated in their brief in the *Hicks* case, "most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks . . . ." The issue, however, is not whether a potential military commission member experienced a strong emotional reaction to events that happened over three years ago, or even whether that person candidly acknowledged such feelings, but rather is the member still experiencing those emotions such that he is unable to lay aside those feelings and render a verdict based solely on the evidence presented to the military commission. As the United States Supreme Court has stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best

> qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin, 366 U.S. at 722-23 (citations omitted) (emphasis added).

Unlike LTC C, nothing in either record demonstrates that COL S is experiencing any ongoing emotions as a result of his 9/11 experiences. The Presiding Officer's recommendation states that there was nothing in COL S's demeanor during voir dire that indicated that he was unduly affected by the death of [redacted] COL S, who has considerable legal training and experience, clearly stated that he can and will try these cases without reference to his 9/11 experiences. Nothing in either record creates a reasonable and significant doubt as to COL S's ability to decide these cases fairly and impartially, considering only evidence and arguments presented to the commissions. Accordingly, the challenge for cause against COL S will be denied.

LTC T and COL B

The defense challenged both LTC T and COL B based upon their involvement with [redacted] at the time Mr. Hamdan and Mr. Hicks were apprehended.

The defense challenged LTC T based upon his role as an [redacted] officer on the ground in [redacted] from approximately [redacted] the period during which both Mr. Hamdan and Mr. Hicks were captured and detained. At trial, the prosecution opposed this challenge. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge.

The Presiding Officer concluded that there is cause to grant a challenge against LTC T because:

> "his activities [redacted] make his participation problematic in regards to his knowledge of activities in the [redacted] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC T [] would insure [redacted] and the

modus operandi of both sides would not have an undue influence upon the deliberations of the panel."

During his voir dire in *Hamdan*, LTC T stated that he is an [redacted] officer who was assigned to a [redacted] that deployed both to [redacted] as part of [redacted] and to [redacted] as part of [redacted] with the mission to capture enemy personnel, but that he was not involved with the capture of Mr. Hamdan. He stated that it is possible that he may have seen [redacted] on Mr. Hamdan, but he has no memory of Hamdan's case. During his voir dire in *Hicks*, LTC T stated he was attached to a [redacted] as an [redacted] while deployed to [redacted]

During a closed session of trial, the *Hamdan* defense counsel challenged COL B based upon his role in transporting [redacted] In the open session, defense challenged COL B based on the appearance of unfairness because of his prior duty [redacted] During both open and closed sessions of trial, the *Hicks* defense counsel challenged COL B because his knowledge of [redacted] specifically his knowledge of the transportation of detainees, is such that he would be better suited to be a witness than a commission member, and further that his links with personnel in theater were such that he could be characterized as a victim.

At trial, the prosecution opposed the challenge against COL B. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer's opinion is that there is no cause to grant a challenge against COL B.

In his written questionnaire, COL B indicated that on 9/11 he was newly assigned as the [redacted] As a result of 9/11, he was involved in developing and executing war plans [redacted] He also indicated that he was intimately familiar with [redacted] He was physically deployed to [redacted]

During voir dire, COL B stated that he was not involved in making the determinations of what detainees were eligible for transfer to Guantanamo [redacted] He specifically remembered Mr. Hicks' name and that he was Australian. He stated that he probably knew which U.S. forces captured Mr. Hicks, but cannot currently recall that information. He also stated that in his role [redacted]

Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [redacted] in both [redacted] and [redacted] and are intimately familiar with the operations and deployments in [redacted] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

Hamdan's defense counsel challenged the Presiding Officer on four grounds:

(1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;

(2) As an attorney, he will exert improper influence over the other non-attorney members;

(3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and

(4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

Hicks' defense counsel challenged the Presiding Officer on the same four general grounds. At trial, the prosecution in both cases opposed the challenge against the Presiding Officer. In a subsequent brief, the Chief Prosecutor recommended the Presiding Officer evaluate whether he should remain on the commission in light of the implied bias standard proposed by the prosecution as previously described herein.

Presiding Officer's Judge Advocate Status

Military Commission Order No. 1 requires that the "Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." MCO No. 1 at Section 4A(4). The Presiding Officer's written questionnaire, dated August 18, 2004, indicates that he currently is, and has been, an associate member of the Virginia State Bar since 1977 and that he has never practiced law in the civilian sector.

In a written brief, Hamdan's defense counsel asserts the following:

1) All Army judge advocates are required to remain in good standing in the bar of the highest court of a state of the United States, the District of Columbia, or a Federal Court. U.S. Dep't of Army Reg. 27-1, "Judge Advocate Legal Services," para. 13-2h(2) (Sept. 30, 1996) [hereinafter AR 27-1].

2) The Virginia State Bar maintains four classes of membership: active, associate, judicial, and retired. Associate members are entitled to all the privileges of active members except that they may not practice law (in Virginia).

3) Because the Presiding Officer is only an associate member of the Virginia Bar, he is not authorized to practice law in the Army Judge Advocate General's Corps.

In Virginia, the term "good standing" applies to both associate and active members and refers to whether or not the requirements to maintain that specific level of membership have been met. *Unauthorized Practice of Law*, Virginia UPL Opinion 133 (Apr. 20, 1989), *available at* http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_Op133. "Good standing" generally means that the attorney has not been suspended or disbarred for disciplinary reasons and has complied with any applicable rules concerning payment of bar membership dues and completion of continuing legal education requirements.

As the proponent of AR 27-1, The Judge Advocate General (TJAG) of the Army is the appropriate authority to determine whether associate membership in the Virginia Bar constitutes "good standing" as contemplated in that regulation. The record establishes that the Presiding Officer's status with the Virginia Bar has not changed since he was admitted to the Virginia Bar in 1977. The record also shows that, as an associate member of the Virginia Bar, he practiced as an Army judge advocate for twenty-two years, including ten years as a military judge. Prior to his service as a military judge, the Army TJAG personally certified the Presiding Officer's qualifications to be a military judge as required by the Uniform Code of Military Justice. *See* UCMJ art. 26(b). Accordingly, this challenge is without merit.

Undue Influence over Non-attorney Members of the Commission

Under the President's Military Order, the commission members sit as "triers of both fact and law." President's Military Order at Section 4(c)(2). The defense asserts that this particular Presiding Officer will use his experience as a military trial judge and attorney to exert undue influence over the non-attorney members of the commission when deciding questions of law. In *Hamdan*, the Presiding Officer addressed this issue with the members as follows:

> Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in

> court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?
> Apparently so.
>
> Is there any member who believes that he would be required to accept, without question, my instruction on the law?
> Apparently not.

The exceptional difficulty and pressure with being the first Presiding Officer to serve on a military commission in over 60 years cannot be overstated. The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact. There is nothing in either record that remotely suggests that this Presiding Officer does not understand the delicate balance that his responsibilities require. Accordingly, the challenge on this basis is without merit.

Relationship with the Appointing Authority Creates Appearance of Unfairness

The precise factual basis for challenge on this ground was not very well articulated by counsel in either *Hamdan* or *Hicks*. In *Hamdan*, the defense counsel's entire oral argument on this ground was as follows:

> We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself, with the [A]ppointing [A]uthority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Defense counsel in *Hamdan* did not further articulate a factual basis for this challenge in their post-hearing brief.

In *Hicks*, defense counsel orally adopted the same challenge grounds as *Hamdan* including "the relationship with the appointing authority" and the "perception of the public" under the implied bias standard in RCM 912(f)(1)(N). Defense counsel in *Hicks* did not further articulate a factual basis for this challenge in their post-hearing brief, even though they individually and rather extensively discussed the factual basis for their challenges against the other four challenged members.

The gist of this challenge appears to be that defense counsel perceive that a close personal friendship exists between the Presiding Officer and the Appointing Authority,

and that the Presiding Officer will be viewed as, or act as, an agent of the Appointing Authority rather than an independent, impartial Presiding Officer. Alternately stated, the Appointing Authority will somehow appear to influence the performance of the Presiding Officer. To evaluate this challenge, it is necessary to understand the traditional social and professional relationships between a convening authority and officer members of courts-martial under the Uniform Code of Military Justice, as well as the criminal sanctions against unlawfully influencing the action of a member of a court-martial or a military commission.

In addition to duty or professional responsibilities, military officers of all grades, and often their spouses, are expected by custom and tradition to participate in a wide variety of social functions hosted by senior commanding officers or general officers. Such functions include formal New Year's Day receptions, formal Dining Ins (dinners for officers only), formal Dining Outs (dinners for officers and spouses/dates), formal Dinner Dances, Change of Command ceremonies, promotion ceremonies, award ceremonies, informal Hail and Farewell dinners (welcoming new officers and "roasting" departing officers), retirement ceremonies, and funerals of members of the unit. Because attendance at all such social functions is customary, traditional, and expected, such attendance is not indicative of close personal friendships among the participants.

In most cases, commanders who are authorized to convene general courts-martial under the UCMJ are high-ranking general or flag officers. *See generally* UCMJ art. 22. The eligible "jury pool" of officers for a general court-martial includes officers assigned or attached to the convening authority's command or courts-martial jurisdiction. The convening authority is required to select officers for courts-martial duty, who, in his personal opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2). Consequently, convening authorities frequently select as court members officers who they know well and whose judgment they trust.

To ensure that these professional and social relationships between convening authorities and court members do not affect the impartiality or fairness of trials by courts-martial or military commissions, and to maintain the neutrality of the convening authority, Congress enacted Article 37(a), UCMJ, "Unlawfully influencing action of court."[7] This is one of the UCMJ articles that expressly applies to military commissions. This statute prohibits any "attempt to coerce, or by any authorized means, influence the

[7] UCMJ art. 37(a) states in pertinent part (emphasis added):

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal or any member thereof*, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

action of [a] . . . military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ art. 37(a). Additionally, the knowing and intentional violation of the procedural protection afforded by Article 37(a), UCMJ, is a criminal offense in that any person subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter [10 U.S.C. §§ 801-946] regulating the proceedings before, during, or after trial of an accused" may be punished as directed by a court-martial. UCMJ art. 98(2). The Presiding Officer, as a retired Regular Army officer recalled to active duty, and the Appointing Authority, as a retired member of the Regular Army, are both persons subject to trial by court-martial under the UCMJ. *See* UCMJ art. 2(a)(1),(4).

Article 37(a), UCMJ, protects not only the impartiality of courts-martial and military commissions, but also the judicial acts of a convening authority (appointing authority). "A convening authority must be impartial and independent in exercising his authority . . . . The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong." *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A., 1987) (Sullivan, J., concurring) (citations omitted). Even though a convening authority decides which cases go to trial, he or she must remain neutral throughout the trial process. *See, e.g. United States v. Davis*, 58 M.J. 100, 101, 103 (C.A.A.F. 2003) (stating that a convicted servicemember is entitled to individualized consideration of his case post-trial by a neutral convening authority). The Appointing Authority for Military Commissions, as an officer of the United States appointed by the Secretary of Defense pursuant to the Constitution and Title 10, United States Code, has a legal and moral obligation to execute the President's Military Order in a fair and impartial manner, consistent with existing statutory and regulatory guidance.

In his written questionnaire for counsel, the Presiding Officer stated the following about his relationship with the Appointing Authority (emphasis added):

> b. Mr. Altenburg:
>
> 1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.
>
> 2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ M [], was the Chief of Administrative Law in the SJA office from 1992 to 1994. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children – depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. *Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.*

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I was at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once--in May of 1997, I attended a farewell [ceremony] hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. *Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his.* From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe) 2002, I attended his son's wedding in Orlando, Florida [near the Presiding Officer's home].

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. *To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.*

The voir dire in *Hamdan* did not pursue the nature of any personal relationship between the Presiding Officer and the Appointing Authority. During his voir dire in *Hicks*, the Presiding Officer stated the following concerning his relationship with the Appointing Authority (emphasis added):

DC: Now, I want to explore your relationship with the appointing authority.
PO: Okay.
DC: You have known Mr. Altenburg [since] 1977, 1978?
PO: Yes, sometime in that frame.
DC: And you had a professional affiliation for a period of time?
PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.
DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?
PO: Right, at the JAG school.
DC: And he was also the primary speaker at a roast in your honor that evening?
PO: Yes.
DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.
DC: And you also attended his son's wedding in sometime in the fall of 2002?
PO: In Orlando, yeah.
DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?
PO: Right, I did.
DC: And you are aware that there were other candidates for the position of presiding officer?
PO: Yeah, uh-huh.
DC: Thirty-three others, in fact?
PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.
DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?
PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

. . . .

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*
PO: *No.* You want to ask what I think Mr. Altenburg wants from me?
P: Do you know, sir?
PO: No, I asked would you like to ask me what I think he wants?
P: Yes, sir.
PO: Okay. *I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*
P: Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?
PO: You all went to law school; right?
P: Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?
P: Yes, sir.
PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.
P: Yes, sir. Nothing further, sir.

There is no factual basis in either record to support granting a challenge against the Presiding Officer on this ground. The records establish no actual bias by the Presiding Officer as a result of his former, routine, social and professional relationships with the Appointing Authority, nor do the parties advocate any such actual bias. Even on an implied bias basis, no well-informed member of the public who understands the traditional social relationships among military officers and the criminal prohibitions against the Appointing Authority attempting to influence the Presiding Officer's actions would have any reasonable or significant doubt that this Presiding Officer's fairness or impartiality will be affected by his prior social contacts with the Appointing Authority.

Such a finding is consistent with federal cases reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge. *See, e.g., Bailey v. Broder*, No. 94 Civ. 2394 (S.D.N.Y. Feb. 20, 1997) (holding that a showing of a friendship between a judge and a party appearing before him, without a factual allegation of bias or prejudice, is insufficient to warrant recusal); *In re Cooke*, 160 B.R. 701, 706-08 (Bankr. D. Conn. 1993) (stating that a "judge's friendship with counsel appearing before him or her does not alone mandate disqualification."); *United States v. Kehlbeck*, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (stating "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness."); *United States v. Murphy*, 768 F. 2d 1518, 1537 (7th Cir. 1985, cert. denied, 475 U.S. 1012 (1986) ("In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable."); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (holding that recusal was not required in extortion trial of former democratic state senator whose committee, fifteen years ago, had investigated former republican governor when the judge had been chief legal counsel for the governor); and *Parrish v. Board of Commissioners,* 524 F.2d. 98 (5th Cir. 1975) (en banc) (holding that recusal was not required in class action case where judge was friends with some of the defendants and where judge stated his friendship would not affect his handing of the case).

Predisposition on Speedy Trial Motion

The fourth basis for challenge is that the Presiding Officer has formed an opinion, which he expressed at a July 15, 2004, meeting with counsel, that an accused has no right to a speedy trial in a military commission. Below are the pertinent portions of the voir dire in *Hamdan* on this issue (emphasis added).

DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?
PO: No, I didn't.
DC: I wasn't at the meeting, but I was told that you did. I don't --
PO: Thank you.
DC: Did you mention speedy trial at all?
PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.
DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?
PO: No. I didn't have any motions or anything.

. . . .

P: *Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?*
PO: *No.*

The following exchange occurred in the *Hamdan* commission after all voir dire had been completed and challenges made and the Presiding Officer was about to recess the commission until the Appointing Authority made a decision on the challenges:

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.
PO: And why would you like that?
DC: To go toward the idea of whether you have an opinion or not, sir.
PO: On the questions of?
DC: Speedy trial, sir.
PO: Okay. And the tape goes to show what?
DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.
PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.
DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.
PO: Do you think that's correct or do you think that's in reference to Article 10?
DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.
PO: Okay. Why don't you ask me if I am predisposed on that.
DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.
DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.
PO: I don't want to see it.
DC: Yes, sir.
PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?
DC: No, sir.
PO: How about you?
P: No objection to the tape being sent, sir.

Neither defense counsel nor the prosecution in the *Hicks* case asked any questions of the Presiding Officer concerning a possible predisposition on speedy trial.

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording[8] of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial?
Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.
DC (al Qosi): I don't think it is appropriate either sir.
Chief Prosecutor: We need to stay away from that.
DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--
PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

[8] Counsel are reminded that audio recording of Commission proceedings is prohibited unless authorized by the Presiding Officer and that compliance with the Military Commission Orders and Instructions is a professional responsibility obligation for the practice of law within the Department of Defense. *See* MCO No. 1 at Section 6B(3); MCI No. 1 at paragraphs 4B,C.

Neither defense team cited any case law from any jurisdiction to support their argument that these facts warrant removal of the Presiding Officer. Generally speaking, "[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'" *United States v. Howard,* 218 F.3d 556, 566 (6th Cir. 2000) (quoting *United States v. Liteky*, 510 U.S. 540, 551 (1994)). Furthermore, "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir., 1976) (citing *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974)).

The transcripts reveal that on occasion, as in this instance, the Presiding Officer was too casual with his remarks. Some of the detainees at Guantanamo have been there for almost three years. Understandably, they and their attorneys recognize that the determination of what, if any, speedy trial rules apply to military commissions is an important preliminary matter that must be resolved by the members of the military commissions after considering evidence and arguments presented by the parties.

Although not artfully done, the Presiding Officer was trying to tell counsel at the July 15, 2004, meeting that there are gaps in the commission trial procedures that he and counsel will have to address. Prior to the Presiding Officer's comments about arraignment and speedy trial, counsel were advised that the Presiding Officer would be issuing written guidance addressing how to handle some of the gaps in the commission procedures. As the Presiding Officer stated at that meeting, there are no published commission procedures concerning the subjects of arraignment or speedy trial. He was using arraignment and speedy trial as examples of traditional military procedures that were not mentioned in military commission orders or instructions, and that he and the parties would have to address. In fact, just four days after this meeting, the Presiding Officer issued the first three memoranda in a series of Presiding Officer Memoranda, in the nature of rules of court, to address issues not fully covered by military commission orders or instructions.[9] There are currently ten Presiding Officer Memoranda addressing topics such as motions practice, judicial notice, access to evidence and notice provisions, trial exhibits, obtaining protective orders and requests for limited disclosure, witness requests, requests to depose a witness, alternatives to live witnesses, and spectators to military commissions.

During voir dire, the Presiding Officer expressly stated that he had formed no predisposition concerning how he would rule on speedy trial motions. Considering all of the above, the record fails to establish that the Presiding Officer's spontaneous remarks in an informal meeting demonstrates a clear inability to render a fair and impartial ruling on speedy trial motions or otherwise disqualifies him from performing duties as a Presiding Officer.

[9] Current versions of all Presiding Officer Memoranda may be found on the Military Commission web site, *available at* http://www.defenselink.mil/news/commissions.html.

DECISION

The challenges for cause against the Presiding Officer and COL S are denied. Effective immediately, the challenges for cause against COL B (the Marine), LTC T, and LTC C are granted and each of these members is hereby permanently excused from all future proceedings for all military commissions. The country is grateful for the professional, dedicated, and selfless service of these exceptional officers in this sensitive and important matter.

A military commission composed of the Presiding Officer, COL S, and COL B (the Air Force officer) will proceed, at the call of the Presiding Officer, in the cases of *United States v. Hamdan* and *United States v. Hicks*. No additional members or alternate members will be appointed. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

Official orders appointing replacement commission members for the cases of *United States v. al Qosi* and *United States v. al Bahlul* will be issued at a future date. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

There is no classified annex to this decision.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Office of the Presiding Officer
Military Commission

September 15, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

Subject: Presiding Officer Recommendations on Challenges -- United States v. Hicks

1. Pursuant to your request of 15 September 2004, I have listed below my recommendations concerning the challenges in the case of United States v. Hicks.

2. I note that the standard to be used in challenges is under some dispute. Based on my review of the applicable material, I believe that a person should be relieved from duty as a member if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an "implied bias" standard in the relevant documents establishing the Commissions.

3. In my opinion, there is no cause to grant a challenge against COL [redacted]. His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL [redacted] while he was discussing the death of one of his Marines, he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

4. In my opinion, there is no cause to grant a challenge against COL [redacted]. His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. COL [redacted] was asked many questions during open and closed session and he responded carefully and succinctly to all of them. When he knew an answer, he provided it - if he didn't know an answer, he stated the reason therefore. He has a sharp mind and the ability to understand and evaluate difficult situations. COL [redacted] is exactly the sort of person who can provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. His "knowledge" of the matters involved in this case was that of a busy [redacted] He had no knowledge concerning the offenses with which Mr.

Hicks has been charged, and his only involvement in the background of this case was insuring that there was transportation for all detainees. He also has no knowledge of or any specific information about why any specific detainee was being transported, or what actions or offenses any detainee may have been engaged in.

5. In my opinion, there is no cause to grant a challenge against COL [redacted] His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases.

6. In my opinion, there is cause to grant a challenge against LTC [redacted] While his voir dire revealed that he could provide a full and fair trial, [redacted] make his participation problematic in regards to his knowledge of activities in the [redacted] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC [redacted] would insure that a person who was, in many ways, intimately familiar with the battlefield and the modus operandi of both sides would not have an undue influence upon the deliberations of the panel. While I believe that LTC [redacted] would provide a full and fair trial, I recommend that he be removed from the trial.

7. In my opinion, there is some cause to grant a challenge against LTC [redacted] His comments during voir dire and on his member question sheet could be seen as providing a reasonable person cause to doubt his ability to provide an impartial trial. Specifically, his comments that the detainees in Cuba were terrorists, or words to that effect, might cause some to believe that he has prejudged the cases. While I believe that LTC [redacted] would provide a full and fair trial, in an abundance of caution, I recommend that he be removed from the trial.

8. As I stated previously, I do not believe that it is appropriate for me to provide a recommendation on any challenge made against me. However, in paragraph 3 of the Prosecution Response to the Defense Brief on Standard for Good Cause Challenge of Commission Members, the Prosecution requested that you closely evaluate the facts elicited during voir dire to determine my suitability to serve using the standard which the Prosecution proposed. I had already done that, and it may be helpful to you for me to provide the evaluation that I used. To the best of my knowledge, there was not any item brought forth in voir dire which might cause a reasonable person to believe that I could not provide a full or fair trial or to show that my impartiality might reasonably be questioned. As I understand the matters involved, it is submitted that I know the Appointing Authority, and that I therefore will do whatever the Appointing Authority wants. As I stated on the record in US v. Hicks, and as I wrote in my Questionnaire, I have not discussed these cases with the Appointing Authority. Based on my knowledge of the Appointing Authority, I believe that he wants me to provide a full and fair trial. Neither of these matters was challenged by the defense or the prosecution during voir dire. The second aspect of the assertion was resolved in this case by my answers to CDC

during voir dire (ROT 12) about my relationship with the Appointing Authority when he was the Staff Judge Advocate at XVIII Airborne Corps. Both sides learned, and neither side followed up to challenge the matter, that the Appointing Authority and I disagreed many times when he was the XVIII SJA, but I always did what I thought was right, and the Appointing Authority always did what he thought was right.

Peter E. Brownback III
COL, JA
Presiding Officer

Carter, Kevin, Mr, DoD OGC

From: Altenburg, John, Mr, DoD OGC
Sent: Monday, September 20, 2004 12:26
To: [redacted]
Subject: FW: Challenges

Kevin,

In one of his memos, the presiding officer indicated he would forward his written observations and recommendations re: challenges of the other members. I subsequently sent the email below. a

-----Original Message-----
From: Altenburg, John, Mr, DoD OGC
Sent: Wednesday, September 15, 2004 12:27
To: 'Pete Brownback'
Subject: Challenges

Please forward your observations and recommendations relating to challenges for cause. a

UNITED STATES OF AMERICA	)	
	)	**Prosecution Reply: Prosecution Challenge for Cause Submission**
v.	)	
	)	13 September 2004
DAVID M. HICKS	)	

The Prosecution in the case of the *United States v. David M. Hicks* replies to the Defense Response to our Challenge for Cause Submission as follows:

1. The Defense misunderstands our position regarding their challenges for cause of Colonel Brownback and Lieutenant Colonel [redacted] We did not challenge them; they did, and as the moving party, they retain the burden of persuasion to convince the Appointing Authority that they should be removed for cause.

2. Regarding Lieutenant Colonel [redacted] the Prosecution does not concede that his removal is necessary under Commission Law; we merely lodged no objection to the Defense challenge. Not objecting does not shift the burden to us, so we are under no obligation to explain why we chose to object to the removal of one member but not the other.

3. Hence, the merits of whether Colonel [redacted] should be removed must be considered individually, and the attempt to compare him to a member to whose removal we did not object is unhelpful. Specifically considering Colonel [redacted] the record reveals that he would, in fact, make a fair and impartial member. The attacks of September 11, 2001 affected millions, if not all, Americans. We should be loathe to disqualify an otherwise supremely well-qualified officer simply because he knew or worked with a victim of those brutal attacks or visited the site of one of the crime scenes in the weeks following the attacks.

//Signed//

[redacted]
Prosecutor

UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**Defense Response to Prosecution Challenge for Cause Submission** 9 September 2004

The Defense in the case of the *United States v. David M. Hicks* forwards to the Appointing Authority our response to the prosecution's filing of 8 September 2004, [Prosecution response to Defense Brief on Standard for Good Cause Challenge of Commission Members]

Discussion:

This response replies to the Prosecution's Response to Mr. Hicks' submission setting forth the proposed standard for cause challenges to Commission members. The Prosecution consents to Mr. Hicks's challenge to three members – Col. [redacted] Col. [redacted] and Lt. Col. [redacted] – while opposing the challenge to Col. [redacted] and sidestepping any position with respect to the Presiding Officer (other than requesting that the Appointing Authority review that challenge pursuant to the Prosecution's proposed standard).

However, the Prosecution, in acceding to the challenge to Lt. Col. [redacted] which was based on his prior statements and his emotional response to the events of September 11, 2001, fails to make any distinction between Lt. Col. [redacted] and Col. [redacted] who also revealed an intense emotional connection to those same events – [redacted] Col. [redacted] attended that [redacted] funeral; and Col [redacted] visited the World Trade Center site two weeks after September 11, 2001, at a time when the damage and destruction wrought by the events of that day were still demonstrably vivid. *See* Transcript, August 25, 2004 (Hicks *Voir Dire*).

Indeed, the same factors that impair Lt. Col. [redacted] ability to maintain impartiality as a judge and juror will have the same impact on Col. [redacted] Col. [redacted] protestations to the contrary, even assuming they were made in good faith, are not a substitute for a judge and juror unaffected by important events related to the charges against Mr. Hicks. Even a good-faith attempt to separate the emotions generated by reference to September 11, 2001, cannot prepare a first-time, untrained judge, and a juror, for the series of choices and decisions that must be made dispassionately.

The Prosecution apparently recognizes that with respect to Lt. Col. [redacted] Yet Col [redacted] is in precisely the same position, and the Prosecution has not offered any rationale for treating him any differently.

Regarding Col. Brownback, the Presiding Officer, the standard enunciated by the Prosecution clearly disqualifies him. The potential appearance of bias – a standard which applies to all of the Commission members due to their status as judges for these proceedings – is manifest: Col. Brownback's close personal and professional relationship with the Appointing Authority [*See* Transcript, August 25, 2004 (Hicks *Voir Dire*)], simply presents too great a danger that a reasonable observer would conclude that Col. Brownback was chosen as PO not for his independence and/or qualifications, but for exactly the opposite reason: his close connection to the Appointing Authority.

Relief Requested:

It is respectfully submitted that the challenge to Col. [redacted] and Col. Brownback must be granted as well.

M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

IN THE UNITED STATES MILITARY COMMISSION AT GUANTANAMO BAY NAVAL BASE, CUBA

UNITED STATES OF AMERICA	)	**DEFENSE BRIEF ON**
	)	**"GOOD CAUSE"**
v	)	**STANDARD FOR**
	)	**REMOVAL OF**
IBRAHIM AHMED MAHMOUD AL QOSI	)	**COMMISSION MEMBERS**

COMES NOW THE ACCUSED, Ibrahim Ahmed Mahmoud al Qosi, by and through his detailed defense counsel, and provides the following brief concerning the "good cause" standard for removal of commission members as provided for in DOD Directive 5105.70, paragraph 4.1.2, dated 10 February 2004 and Military Commission Order (MCO) #1, paragraph 4A(3), dated 21 March 2002.

SUGGESTED FINDINGS OF FACT

During the week of 23 -27 August 2004, four military commission hearings were conducted regarding four detainees being held at Guantanamo Bay Naval Base, Cuba. The stated purpose for said hearings was to conduct voir dire of the members appointed to the commissions and to take up any preliminary issues on motions, etc. Voir dire was ultimately completed in two of the four cases.

In the voir dire hearings, there was much confusion and debate over the meaning and standard to be applied in determining whether "good cause" exists to remove commission members from cases. The Presiding Officer, Colonel Brownback, ultimately decided that since there was no clear understanding of the standard, the parties should brief the Appointing Authority on their respective positions regarding the "good cause" standard. While voir dire was not conducted in Mr. al Qosi's case, detailed defense counsel was also invited to brief on the subject at issue.

LEGAL ANALYSIS

> *The Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused...To that end it has constantly stressed that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view.* European Court of Human Rights, ECHR 22299/93, 25 February 1997.

DOD Directive 5105.70, dated 10 February 2004, establishes the Appointing Authority for Military Commissions. Under paragraph 4.1.2, the Appointing Authority shall appoint military commission members and alternate members, based on competence to perform the duties involved. The Appointing Authority shall remove members and alternate members for **good cause** pursuant to Military Commission Instruction (MCI) #8 (emphasis added). See also MCO #1, paragraph 4A(3), dated 21 March 2002.

According to MCI #8, paragraph 3A(2), dated 30 April 2003, "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal." In addition, "The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with [MCO #1], any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member."

Paragraph 3A(3) of MCI #8 also provides, "From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause."

In military practice, Rule for Courts-Martial (R.C.M.) 912 governs challenges of members selected for court-martial duty. Under R.C.M. 912(f), there are numerous enumerated reasons for challenges and removal of members for cause. R.C.M. 912(f)(1)(N) states that a member "shall be excused for cause whenever it appears that the member...should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

Under our system, challenges for cause are to be liberally granted, and the case law is pretty clear that challenges for cause encompass both **actual** and **implied** bias. See **United States v Armstrong**, 54 M.J. 51 (CAAF 2000). In **United States v Miles**, 58 M.J. 192 (CAAF 2003), the Court noted that R.C.M. 912(f)(1)(N) – excusal for cause – includes actual bias as well as implied bias. "Actual bias and implied bias are separate tests, but not separate grounds for challenge." page 4, citing **Armstrong, ibid**. As the Court noted in **United States v Smart**, 21 M.J. 15 (CMA 1985) "The focus of this rule is on the perception or appearance of fairness of the military justice system." page 20.

As the courts have noted, actual bias usually concerns a question of a member's credibility and is determined through a subjective determination viewed through the eyes of the Military Judge. Implied bias, on the other hand, is determined via an objective standard, the issue being would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceeding. In other words, implied bias is viewed through the eyes of the public, focusing on the appearance of fairness. **Miles, ibid**, page 4. See also **United States v Strand**, 59 M.J. 455 (CAAF 2004).

International courts have also addressed challenges for cause in jury selection. In **Gregory v United Kingdom**, ECHR 22299/93, 1997, the European Court of Human

Rights noted that jury service is an important civic duty, governed by the Juries Act of 1974. Under the Juries Act, two types of challenges are recognized; to the array, or whole panel and; to the polls, or individual jurors. page 5 of opinion. Any challenges to the polls are for cause only. Under the Juries Act of 1974, challenges for cause "include presumed or actual partiality."[1] page 6 of opinion. "Any challenge for cause must be decided by the judge before whom the accused is to be tried. The challenging party must provide prima facie evidence of good cause for this purpose". page 6 of opinion.

In **Williams v R (File no 25375)**, Supreme Court of Canada, 1998, the Court held, "A right to challenge for cause was established where the accused demonstrated that there was a realistic potential that some members of the jury pool might be biased against him. The challenge for cause was an essential safeguard of the right under the Charter of Rights and Freedoms to a fair trial and an impartial jury. For that right to be respected, guarantees, as opposed to presumptions, or impartiality were required. Where doubts were raised as to jury partiality, therefore, it was better to err on the side of caution and permit prejudices to be examined." page 1 of opinion.

CONCLUSION

It is well established in our military justice system as well as in the international arena that challenges for cause or "good cause" encompasses both actual and implied bias. While there is no doubt that both types of bias require different tests, they are nonetheless, both included within the overall question of "cause". Even the Legal Advisor to the Appointing Authority, Brigadier General Hemingway, acknowledged this standard in a Defense Department Briefing on Preliminary Hearing for Guantanamo Detainees on 26 August 2004. General Hemingway was asked, "Is there a way to challenge commission members at this point? Or is there no question as to their ability to serve?" General Hemingway responded, "It's my understanding that challenges have been made by counsel in each of the cases to date, and those challenges will have to be considered by the Appointing Authority, based on recommendation from his staff, whether or not those people should be replaced, whether or not there is indication that somebody else should be there. **Understanding, of course, that we're interested not only in whether there's bias, but whether there's the perception that somebody wouldn't be as objective as we would like to have.**" (Emphasis added).[2]

The standard for removal of commission members for "good cause" must include the factors set forth under R.C.M. 912, and more particularly, R.C.M. 912(f)(1)(N). Members should be removed for cause, to include actual or implied bias, in the "interest

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[1] Partiality in Webster's New World Dictionary means favoring one person, biased, prejudiced.

[2] It is interesting to note that the only other mention in the R.C.M.s for removal of court members is found in R.C.M. 505. This rule addresses the Convening Authority's power to remove members for "good cause". "Good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. Surely this is not the standard envisioned by the Appointing Authority in removing commission members for "good cause".

of having the [commission] free from substantial doubt as to legality, fairness, and impartiality."

SHARON A. SHAFFER, Lt Colonel, USAF
Defense Counsel

BRIAN M. THOMPSON, Captain, USAF
Assistant Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 7 Sept 2004, I served this brief on the standard for "good cause" removal of commission members on the Appointing Authority's office, with a copy to the prosecutor. Copies were sent via e-mail to the Presiding Officer and the legal assistant to the Presiding Officer.

SHARON A. SHAFFER, Lt Colonel, USAF
Defense Counsel

UNITED STATES OF AMERICA	
v.	PROSECUTION RESPONSE TO DEFENSE MOTION TO CHALLENGE FOR CAUSE
SALIM AHMED HAMDAN	7 September 2004

1. Timeliness. This Prosecution response is filed within the timeframe and guidance set by the Presiding Officer on the record at the hearing held on 24 August 2004.

2. Relief Sought. The Prosecution respectfully requests that the standard outlined below be adopted as Commission Law regarding disqualification for good cause of potential Military Commission members. We further request that the transcript of both the classified and unclassified voir dire conducted in the case of *United States v. Hicks* be made a part of the record in *United States v. Hamdan* and that it be considered in assessing whether good cause grounds exist for challenge. In light of the Prosecution's proposed standard, the Prosecution in the above-captioned case does not object to the Defense challenges for good cause of Colone[redacted] Lieutenant Colonel[redacted] and Lieutenant Colonel[redacted] The Prosecution requests that the Defense challenge for cause of Colonel[redacted]e denied.

With respect to the Presiding Officer, Colonel Brownback, we request that he closely evaluate his own suitability to serve as the Presiding Officer in light of the Prosecution's proposed standard below with particular attention focused on whether his impartiality might reasonably be questioned based upon articulable facts. We further request that he exercise his authority pursuant to Section 3(A) (3) of Military Commission Instruction No. 8 and forward a recommendation to the Appointing Authority as to whether good cause exists for his removal.

2. Statement of Facts. The Prosecution alleges the facts contained in the current record, specifically all testimony taken during both classified and unclassified *voir dire* of the members, and the memorandum and questionnaires filled out by Presiding Officer and other Commission Members that were made a part of the record. The Prosecution also reiterates its request above to append to the record a transcript of the classified and unclassified *voir dire* of the members taken in the case of *United States v. Hicks* on 25 August 2004.

3. Proposed Standard. For the reasons stated in the Prosecution's memorandum of law regarding an appropriate standard for challenges for cause filed on 7 September 2004, the Prosecution respectfully requests that the following standard be adopted and established as Commission law:

> A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts.

Robert L. Swann

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor

CERTIFICATE OF SERVICE

I certify that the above Prosecution response was served in person on Defense Counsel for the Accused this 11th day of September 2004.

Robert L. Swann

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor

UNITED STATES OF AMERICA	)	
v.	)	PROSECUTION MEMORANDUM OF LAW (Standard re Challenges for Cause)
SALIM AHMED HAMDAN	)	
DAVID MATTHEW HICKS	)	7 September 2004
IBRAHIM AHMED MAHMOUD AL QOSI	)	

1. Issue. What standard applies when resolving a challenge for cause to remove a Military Commission panel member?

2. Legal Authority and Discussion. Military Commission Order Number 1 (hereinafter "MCO No. 1") paragraph 4A(3) states that "The Appointing Authority may remove members and alternates for good cause."[1] "Good cause" is defined as a "legally sufficient ground or reason," and has been described as "a relative and highly abstract term [whose] meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures involved in type of case presented." BLACK'S LAW DICTIONARY 692 (6th ed. 1990).

In order to determine what "good cause" means in relation to challenges for cause of Commission members, there are three sources of law that should be considered: military law, federal law, and international law. In that the members of a Military Commission are charged with deciding both questions of law and fact, the standards for disqualification of both judges and jurors in each source of law should be considered. Using these three sources of law, this memorandum of law will briefly discuss the pertinent standards for disqualification of judges,

[1] Both DoD Directive 5105.70, paragraph 4.1.2, and Military Commission Instruction Number 8, paragraph 3A, refer to this provision of MCO No. 1 regarding challenges for cause.

disqualification of jurors, and appearance of fairness, and propose the following standard be adopted for Military Commissions:

> A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts.

Disqualification of Judges

Under Rule for Courts-Martial (RCM) 902(a), a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might "reasonably be questioned."[2] A military judge shall also disqualify himself if specific grounds exist where the military judge has a personal bias or prejudice concerning a party; personal knowledge of disputed evidentiary facts concerning the proceeding; where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally; or where the military judge has expressed an opinion concerning the guilt or innocence of the accused. RCM 902(b). A military judge shall, upon motion of any party or *sua sponte*, decide whether he is disqualified. RCM 902(d).

This standard closely parallels 28 U.S.C. §455, which requires a federal civilian judge to disqualify himself in any proceeding "in which his impartiality might reasonably be questioned;" and under such circumstances "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Appellate military courts consider the standards developed in the federal civilian courts, as well as military justice case law, when addressing disqualification issues arising under RCM 902. *United States v. Wright*, 52 M.J. 136, 140-41 (1999). In short, RCM 902, like 28 USC § 455, requires

[2] Article 41(a) of the UCMJ (10 U.S.C. §841) discusses only the procedure for challenges for cause and quorum considerations, but not specific grounds for disqualification of either judges or jurors.

consideration of disqualification under a two-step analysis. The first step asks whether disqualification is required under the specific circumstances listed in RCM 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.

A similar standard for disqualification of judges under international law is found under Rule 15(A) in both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR):

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.

Disqualification of Members[3]

Under military law, court-martial members shall be excused for cause whenever it appears that a member has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged, or should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. RCM 912(f)(1)(M) and (N). Examples of matters which may be grounds for challenge are that the member has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged. *United States v. Velez*, 48 M.J. 220, 223 (1998) (citing Discussion, RCM 912(f)(1)(N)).

Federal law recognizes that a jury trial guarantees a criminally accused "a fair trial by a panel of impartial, 'indifferent' jurors," and that the "failure to accord an accused a fair hearing

[3] In that the triers of fact in the ICTY and ITCR are all judges, there is no separate standard for disqualification of jurors under their rules of procedure.

violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(citations omitted). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Id* (citing *Reynolds v. United States*, 98 U.S. 145, 155 (1878)). The general test for bias is whether a juror has such fixed opinions that they can not judge impartially the guilt of the defendant. *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) (citing *Irvin*, 366 U.S. at 723). It is not required, however, that the jurors be totally ignorant of the facts and issues involved:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-723 (1961) (citations omitted). "But while one of an unpopular minority group must be accorded that solicitude which properly accompanies an accused person, he is not entitled to unusual protection or exception." *Dennis v. United States*, 339 U.S. 162, 168 (1950).

Appearance of Fairness

The requirement that an accused receive a full and fair trial under the President's Military Order of November 13, 2001, section 4(c)(2), and MCO No. 1, paragraphs 1 and 6B(1), mandates that any standard for the qualification of Commission members must emphasize **fairness**. Similarly, the requirement for **impartiality** by a trier of law and fact is consistent with MCO No. 1, paragraph 6B(2), RCM 902(a), 28 U.S.C. §455, as well as Rule 15(A) utilized by

both ICTY and ICTR. Therefore, the terms "fairness" and "impartiality" are indispensable to any standard for disqualification.

The standards of the other forums discussed above have in common general prohibitions against personal interest, bias, prejudice, knowledge of disputed evidentiary facts, and expressed opinions as to the guilt or innocence of the accused. In short, these prohibitions seek to remove any actual or implied bias on the part of a member from the deliberative process of the tribunal, and are essential for fairness and impartiality in its verdict. Therefore, any standard for disqualification of a member should include some means to assess the *voir dire* answers of potential members in order to determine their fitness for service on a Commission. In that the qualification standard of "good cause" required by MCO No. 1, paragraph 4A(3) is abstract, a "test" should be incorporated in the standard for qualification that advises the parties whether good cause really exists to believe that the member can fulfill his or her duty. This "test" is tantamount to a standard of appearance that the proceedings are fair and impartial.

Both military and federal law recognize the necessity for a standard to ensure the appearance of fairness of their respective systems. The appearance standard is designed to enhance public confidence in the integrity of the judicial system, and "serves to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality may be so thin as to be indiscernible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988)). "Justice must satisfy the appearance of justice." *United States v. Butcher*, 56 M.J. 87, 94 (2001) (Baker, J. concurring, citing *Liljeberg*, 486 U.S. at 864.)

Such a recognized "appearance standard" is found in both RCM 902(a) and 28 U.S.C. §455(a) which requires a judge to disqualify himself if his "impartiality might reasonably be

questioned." See *Cheney v. United States Dist. Court for D.C.*, 541 U.S. ___ (2004) (Memorandum of Justice Scalia), and *Butcher*, 56 M.J. at 90.

Similarly, an appearance standard applicable to court-martial members is found in RCM 912(f)(1)(N), which requires the excusal for cause whenever it appears that a member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as legality, fairness, and impartiality." The focus of RCM 912(f)(1)(N) is on the "perception or appearance of fairness" and "reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality." *United States v. Strand*, 59 M.J. 455, 458 (2004) (citing *United States v. Dale*, 42 M.J. 384, 386 (1995); and *United States v. Minyard*, 46 M.J. 229, 231 (1997)).

To properly apply an appearance standard test, the facts alleged by the challenger must be articulable. Under military law, a judge should carefully consider whether any of the grounds for disqualification exist in each case, and broadly construe grounds for challenge, but should not step down from a case unnecessarily. Discussion, RCM 902(d). Federal case law suggests that the challenger must be able to show specific evidence that a juror is, in fact, impartial:

> The affirmative of the issue is upon the challenger. Unless he shows the *actual existence* of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed."

Irvin v. Dowd, 366 U.S. at 723 (emphasis added).

Proposed Standard

The standard for challenge must emphasize fairness and impartiality. The standard should also include some objective test to determine whether a particular member can be fair and impartial, recognizing that the test is based upon specific facts rather than baseless assertions of partiality. Considering the appearance standard (*i.e.* "reasonably be questioned" verbiage)

expressed in both RCM 902(a) and 28 U.S.C. §455, and given "the interest of having the (proceeding) free from substantial doubt as legality, fairness, and impartiality" required by RCM 912(f)(1)(N), it is prudent that the standard for challenge applicable to Military Commissions should include such an objective test. *See Butcher*, 56 M.J. at 91.

Accordingly, the Prosecution proposes the following standard for challenges for cause of Military Commission members be adopted:

> **A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts.**

3. Citations to Legal Authority. The Prosecution cites the following legal authority in support of this memorandum of law:

a. Military Commission Order No. 1

b. BLACK'S LAW DICTIONARY (6th ed. 1990)

c. DoD Directive 5105.70

d. Rule for Courts-Martial (RCM) 902, Manual for Courts-Martial (2000 ed.)

e. 28 U.S.C. §455

f. Article 41(a) of the UCMJ (10 U.S.C. §841)

g. *United States v. Wright*, 52 M.J. 136 (1999)

h. Rule 15(A), International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)

i. RCM 912, MCM (2000 ed.)

j. *United States v. Velez*, 48 M.J. 220, 223 (1998)

✓ k. *Irvin v. Dowd*, 366 U.S. 717 (1961)

l. *Patton v. Yount*, 467 U.S. 1025 (1984)

m. *Dennis v. United States*, 339 U.S. 162 (1950)

n. President's Military Order of November 13, 2001

o. *United States v. Butcher*, 56 M.J. 87 (2001)

p. *Cheney v. United States Dist. Court for D.C.*, 541 U.S. ___ (2004)

q. *United States v. Strand*, 59 M.J. 455 (2004)

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor

CERTIFICATE OF SERVICE

I certify that the above Prosecution memorandum of law was served in person on Defense Counsel for the Accused this 7th day of September 2004.

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor

UNITED STATES OF AMERICA	)	
	)	**Defense Brief on Standard for Good Cause Challenge of Commission Members**
v.	)	
	)	7 September 2004
DAVID M. HICKS	)	

Introduction:

The Presiding Officer has asked the parties to provide a brief to the Appointing Authority on the subject of what standard applies to challenges for "good cause" under MCO 1 Sec. 4 A(3). The answer to this question can be found by examining the requirements and provisions of MCO 1, determining how they can best fulfill the President's directive that the military commission proceedings be "full and fair," and comparing them to the requirements and provisions of UCMJ Art. 25, RCM 912 f, as well as corresponding principles applicable in the U.S. criminal justice system, along with the case law flowing from these several jurisprudential systems and provisions.

Review of the provisions of MCO 1 and the UCMJ, as well as the U.S. Constitution and relevant criminal justice system authority, demonstrates that the requirements and provisions of MCO 1 as to "good cause" challenges, if not actually derived from the UCMJ and RCM, and/or the parallel criminal justice concepts, are nonetheless substantially similar, both in language and intent. Accordingly, the standard to be applied for "good cause" challenges under MCO 1 Sec. 4, should be the same as that set forth in RCM 912 f, and should be consistent as well with constitutional and criminal law principles. Any other standard for "good cause" challenges under MCO 1 Sec. 4 would ignore its plain meaning and the intent of the President, expressed in the President's Military Order, to ensure that trials by military commission are "full and fair."

In addition, a brief review of the results of the *voir dire* performed during the Commission proceedings conducted August 23-26, 2004, at the U.S. Naval Station, Guantanamo Bay, Cuba, further demonstrates the need for a standard for "good cause" that incorporates UCMJ 912 f and the appearance of bias or partiality.

Discussion:

A. ***The Military Justice System***

The requirements for persons serving as members of court-martial panels are virtually identical to the requirements for serving as a member of a military commission. The requirements under UCMJ Art. 25 for service as a court-martial panel member are

that the person be a commissioned officer on active duty,[1] and that the convening authority select those that in his or her opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.[2] Similarly, the only requirement to serve as a member of a military commission is that a member of the panel be a "commissioned officer of the United States armed forces" on active duty who is "competent to perform the duties involved."[3]

While MCO 1 Sec. 4 A(3) does not explicitly require the Appointing Authority to use the UCMJ Art. 25 criteria for the selection of commission members, the memorandum the Appointing Authority's office sent to the various services requesting nominees for military commission members reflected UCMJ Art. 25's requirements.[4]

Under RCM 912 f, courts-martial members may be challenged and removed from service on a panel for "cause." Similarly, MCO 1 Sec. 4 A(3) allows the appointing authority to remove members for "good cause."

Given the similarities between the selection and removal criteria for the two systems, it is evident that the expressed goals of the two systems are similar—to provide a fair trial for the accused. This fact is borne out in pronouncements by the Court of Appeals for the Armed Forces (CAAF), and by the orders put forth by the DoD for the conduct of military commissions.

The CAAF has stated that an accused has a right to a fair and impartial panel.[5] Similarly, MCO 1 Sec. 6 B sets forth the primary duties of military commission panels as

(1) Providing a full and fair trial;

(2) Proceeding **impartially** and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence (emphasis added); and

(3) Holding open proceedings (with certain exceptions for security reasons).[6]

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[1] UCMJ Art. 25 also has provisions for placing warrant officers and enlisted personnel on courts-martial panels. The requirements for warrant officer and enlisted persons to sit as members of courts-martial are the same as those for commissioned officers. However, these personnel may only sit on courts-martial of certain personnel.

[2] See UCMJ Art. 25. UCMJ Art. 25 excludes certain classes of people involved in a case, namely the accuser, witnesses, and those that investigated the case, from sitting on a case in which they were involved.

[3] MCO 1 Sec. 4 A(3).

[4] In a memorandum dated 20 December 2002, Mr. William Haynes II of the DoD General Counsel's Office requested that the various Secretaries of the Military Departments provide nominees to serve as commission members and presiding officers. Among the criteria listed were that the nominees should be O-4 and above, have a reputation for integrity and good judgment, have combat or operational experience, and command experience.

[5] *United States v. Strand*, 59 M.J. 455, 458 (CAAF 2004).

According to the CAAF, there is only one way to ensure an accused gets an impartial panel—by allowing challenges for cause set forth in RCM 912(f) to be applied. In *United States v. Strand*, CAAF stated:

> This Court has held that an accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." Thus, "Rule for Courts-martial 912(f)(1)(N) . . . requires that a member be excused for cause whenever it appears that the member 'should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.'" While this rule applies to both actual and implied bias, the thrust of this rule is implied bias. Moreover, "the focus of this rule is on the perception or appearance of fairness of the military justice system[,]" since "the rule 'reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality.'" [citations omitted][7]

The President's Military Order requires that Mr. Hicks receive a full and fair trial. The provisions of MCO 1 Sec. 6 B must therefore be read in a manner that fully effectuate the letter and spirit of that purpose. Besides explicitly directing the members to provide a "full and fair" trial, MCO 1 Sec. 6 B requires all sessions to be held in the open. This particular provision is designed to allow public access to the proceedings to provide the maximum measure of transparency in the system.

MCO No. 1's concern for transparency in the system, manifested in Sec. 6 B thereof, is the same as that expressed by the President regarding the military justice system under the UCMJ – specifically, the President's concern with avoiding even the appearance of bias, predisposition, or partiality. Just as allowing public access to the hearings addresses this concern, using the standards set forth in RCM 912 f for challenge and removal of commission members is critical to avoiding such perceptions in the military commissions process. Otherwise, the integrity of the military commissions will have been fatally compromised at its core.

B. *The Civilian Criminal Justice System*

The Sixth Amendment to the United States Constitution guarantees a "speedy and public trial, by an impartial jury." As the Supreme Court articulated in *Irvin v. Dowd*, "the right to [a] jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." 366 U.S. 717, 722 (1959).

In civilian criminal trials, through the exercise of peremptory challenges and challenges for cause, counsel for both sides seek to inject fairness into the trial process by

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[6] MCO 1 Sec. 6 B.

[7] United States v. Strand, 59 M.J. 455, 458 (CAAF 2004).

impaneling as impartial a jury as possible, excusing prospective jurors who appear to harbor opinions or bias predisposed to a specific outcome. Typically, a trial court judge hears argument on a challenge for cause, and if that judge refuses to excuse the juror for cause, counsel may strike the juror with a peremptory challenge. Thus, in the average civilian criminal trial, counsel has two opportunities to eliminate potential bias from infecting the jury.

Although the military commission at issue herein challenges for cause, the system under which it is constituted does not allow for peremptory challenges. Since counsel, therefore, has only one chance to protect the jury from the taint of bias, the standard for evaluating challenges for cause must be broad, and at least as expansive as the standard established through case law in civilian criminal cases.

Thus, the appearance of bias or impartiality must be incorporated within the definition of "good cause." So, too, must the principle that some prospective jurors have either too much exposure to the facts of the case, or possess emotions that are too intense, to permit them to sit in judgment – their protestations of impartiality and commitment to adherence to their duty notwithstanding.

Any beliefs so strongly held as to create doubt as to a juror's open mind disqualify a prospective juror from serving – even if such a juror proclaims a sincere belief in his ability to go forward impartially. As the Supreme Court recognized in *Morgan v. Illinois*, "it may be that a juror could, *in good conscience*, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs . . . would prevent him or her from doing so." 504 U.S. 719, 735 (emphasis added). Consequently, some prospective jurors, despite their declarations to the contrary, are beyond rehabilitation.

C. *The* Voir Dire *of the Commission Members*

During voir dire, each member of the military commission, who act as the prospective jurors in Mr. Hicks' trial, revealed individual bias towards the accused that plainly cannot be overcome with rehabilitation. In spite of their individual protestations that each could follow the law, these prospective jurors have been exposed to material facts in the case, carry personal interest in the outcome of the case, and face overwhelming pressure in the public eye and in the gaze of their military superiors to deny any potential bias that may be carried, regardless of their individual promises of "good conscience."

Colonel [redacted] and Lieutenant Colonel [redacted] cannot be impaneled as impartial jurors because each is a fact witness to the case. Each possesses abundant and detailed personal knowledge of the case, of the players, of the process, and neither can be expected to filter what he once knew from what he will hear during trial. As military personnel involved in the war in [redacted] over a prolonged period of time in their individual capacity, both officers carry detailed independent knowledge about the field of combat. Mr. Hicks stands accused of actions arising on that very same field of combat.

During voir dire, Colonel [redacted] confirmed that he '[redacted]

Further, he described responsibilities to include the coordination of detainee movement[9] and disclosed his exposure to [redacted] briefings on al Qaeda and the Taliban.[10] He confessed that he came across the name "David Hicks" while performing his duties, and, more importantly, he remembers this moment of initial exposure.[11] While the prosecution suggests that the presence of Mr. Hicks' name on a list that crossed Colonel [redacted] desk should be given minimal weight, Colonel [redacted] testified that he not only knew Mr. Hicks' name was on the list but that he also knew the relevant criteria that had to be satisfied in order for Mr. Hicks's name to appear on that list.

Colonel [redacted] understood that Mr. Hicks' name was included on a list of detainees because Mr. Hicks, like all detainees named on that list, had been screened and had been found to be a threat after preliminary investigation.[12] Given the detailed background knowledge that Colonel [redacted] carries, he simply knows too much to be impartial. Indeed, he is more appropriately characterized as a potential *witness* in the case.

Lieutenant Colonel [redacted] admitted to similar responsibility and exposure to [redacted]

Although Lieutenant Colonel [redacted] does not recall working directly on Mr. Hicks' case prior to the convening of this tribunal, as an intelligence officer who was in [redacted] with the command to capture enemy fighters at the time Mr. Hicks was taken into custody, Lt. Col. [redacted] certainly was at the same place, at the same time, as [redacted] officers who would have had direct contact with Mr. Hicks. Lieutenant Colonel [redacted] may, without his express knowledge, have assisted indirectly with Mr. Hicks' detention – and, given this very real possibility, he cannot be impaneled to sit in impartial judgment of Mr. Hicks.

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[8] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.64.
[9] *Id.* at p.62.
[10] *Id.* at 65.
[11] *See* transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.56. It is also important to note that Colonel [redacted] did not recognize other detainee names because, as he phrased it, he could not pronounce them. Given the uniqueness of Mr. Hicks' name, his identity was much more easily recognized and remembered.
[12] *See* transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.68. Further reference can be found in closed session transcripts.
[13] *Id.* at 77.
[14] *Id.* at 79.

Moreover, Lieutenant Colonel [redacted] is not only more properly suited to be a witness than a juror/commissioner (as is Col. [redacted], but he is also, by reason of his presence in theatre in [redacted] a potential *victim* of the offenses alleged against Mr. Hicks. Thus, he cannot serve on the commission that presides over Mr. Hicks's case.

In a civilian criminal case, a police officer from the same precinct as the arresting officer in a trial – much less an officer involved in the same investigation or task force – would never be allowed to sit as a juror in that trial, even if that police officer knew nothing at all about the specific case or the arresting officer. Nor would a person who was a member of a finite class of potential victims within a prescribed geographical space and/or temporal period. Such a possibility shocks the conscience in the civilian context, and the same must hold true in the military one.

Although Colonel [redacted] and Lieutenant Colonel [redacted] both assured defense counsel of their ability to maintain impartiality, these officers and Mr. Hicks are too intertwined with each other to disentangle sufficiently to guarantee a fair trial. Recently, in *Madrigal v. Bagley*,[15] a federal district court in Ohio held that a trial court properly excused a prospective juror for cause because that juror previously had been convicted of a felony by the same prosecutor and detective as were involved in defendant's case. According to the reviewing court,

> The trial court's focus was on [the juror]'s experience with the prosecutor and testifying officer during [the juror]'s prior felony case . . . Even if [the juror] had received a pardon, restoring his right to sit on a jury, the court would still have excused him for cause based on his previous involvement with the prosecutor and the detective. Further, the trial court's failure to question [the juror] about his bias toward the prosecutor and police officer is not an abuse of its discretion.[16]

Clearly, the issue in *Madrigal* was not the juror's prior conviction, or even his implied bias due to prosecution, but instead the juror's mere experience with the prosecutor and the detective triggers a proper excusal. The central question when impaneling a jury is one of impartiality – and the reviewing court in *Madrigal* recognized that personal, prior experience by a juror with any of those involved in the proceeding would corrupt due process.

Both Colonel [redacted] and Lieutenant Colonel [redacted] admit to substantial responsibility in the [redacted] operation and both remember significant events (and the discussion surrounding these events) such as the arrest of a young Australian man named David Hicks. Although both men insist on their limited knowledge of the alleged facts leading to Mr. Hicks' detention, neither man denies his experience with other military officers or with matters involving other detainees in [redacted] contemporaneous with Mr. Hicks' investigation.

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[15] 276 F.Supp.2d 744 (2003).
[16] *Id* at 778.

Under commission rules, these military officers must act not only as jurors in the process; however, these specific military officers should not be impaneled. Despite their most valiant effort towards erasing their rather intense and lasting personal recollections of their service, these particular military officers cannot be required to forget their extensive personal experiences in order to deliberate fairly or to overrule decisions made by their superiors, and under both Col. [redacted] and Lt. Col [redacted] operated faithfully during their service in the conflict in [redacted].

Col. [redacted] and Lt. Col [redacted] both were operating under a variety of commands during their service with respect to the conflict in [redacted] including (but not limited to) Rules of Engagement, applicability of the Geneva Convention(s), designation of detainees for transportation out of [redacted] and distinguishing the [redacted] As members of the military commission hearing Mr. Hicks's case, they would now be asked to review and, in many instances, repudiate those very commands under which they operated with such dedication. That places them in an impossible position, and creates a situation in which Mr. Hicks cannot receive a hearing from an impartial jury as that concept is defined under any established and legitimate legal process.

Furthermore, the tribunal cannot expect impartiality when Colonel [redacted] and Lieutenant Colonel [redacted] have independent personal knowledge of material facts that may not be admissible in court. Exposure to inadmissible evidence automatically creates bias, automatically generating predisposition to an opinion that forces the evidence actually presented in court to work that much harder to overcome the initially preconceived ideas. This effectively shifts the burden onto the defense to prove innocence, stripping the defendant of his presumption of innocence.

Ultimately, it is impossible to sift through and marshal information according to what one hears through testimony and what one knows through prior experience. It is unfathomable to expect a juror, in the throes of difficult deliberation in a highly public and intensely emotional case, to separate what he knows into two categories: what he knows from the courtroom and what he knows from life. Expecting such is not only unrealistic but also violates due process in the most fundamental way.

As Justice Frankfurter explained in his concurring opinion in *Irvin v. Dowd*:

> One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure . . . How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated . . ?[17]

Nor is devotion to duty – in this case, to adjudicate Mr. Hicks's trial fairly and impartially – a substitute for a jury that is not tainted by personal knowledge and/or too

[17] 366 U.S. 717, 729 – 30 (1961).

much emotional involvement in a case. Out of intense desire to do the "right" thing in the eyes of the world, commission members will say whatever needs to be said in order to uphold the appearance of fairness, and not shirk their assignment to the commission. As Justice Stevens wrote in dissent in *Patton v. Yount*, with Justice Brennan joining, "some veniremen might have been tempted to understate their recollection of the case because they felt they had a duty to their neighbors 'to follow through.'"[18]

An officer's professional commitment to the task which he has been ordered to perform, or even the very real human inclination to please those who may be watching and scrutinizing, cannot be ignored – not when the stakes are so high with a man's liberty at stake and the tribunal's entire legitimacy in question. *See Murphy v. Florida*, 421 U.S. 794 (1975) (recognizing the prejudicial effect the setting of a trial may have on juror impartiality and the inference of actual prejudice that may be drawn from the jury selection process when most jurors admit to bias but others refuse it "too" adamantly). *See also Morgan v. Illinois*, 504 U.S. 719 n. 9 (1992) (citing an exchange between a trial judge and a prospective juror in which the juror claimed to be able to follow the law as it is given to her but simultaneously admitted that she could not impose the death penalty, emphasizing the natural tendency to want to please an authority figure despite holding strong beliefs that would prevent one from doing so).

Here, Colonel [redacted] with honorable candor, spoke of his intense emotional reaction to Ground Zero only two weeks after the terrorist attack, [redacted].[19] While the Colonel explains that in his twenty-eight years in the service he has lost a number of men, he also admits that with each loss he feels deep sadness. And, in the case of the September 11th attacks, he felt deep anger as well.[20] Though most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks, those military men who openly confess their deep emotional connection to the tragedy should not be invited to participate in the adjudicatory process.

In a civilian criminal case, a prospective juror who was impacted personally by a crime would not be allowed to sit on the jury trying the person accused of committing that crime. The very notion of such a possibility conjures images of "mob justice" – not due process. Colonel [redacted] outstanding career history with the Marines is inspiring; however, his honest words cannot be overlooked or underestimated.

Alternate-juror Lieutenant Colonel [redacted] echoed Col. [redacted] strong emotional reaction,[21] and Lt. Col. [redacted] also confessed to total inexperience with the juror deliberation process.[22] Every other member of the commission has had some type of

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[18] 467 U.S. 1025, 1044 (1984).

[19] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.57. Colonel [redacted] also admits to attending the fallen Marine's funeral and speaking with his family, illustrating the close bond the colonel shared with this man. See also transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.48.

[20] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.58.

[21] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.84 – 85, 88.

[22] See transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.82 – 83.

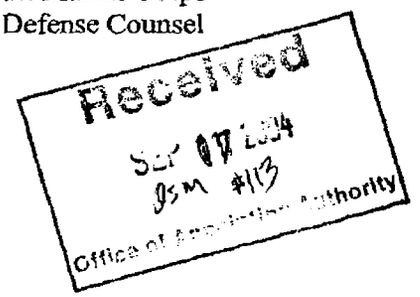
prior exposure to the internal struggle created through deliberation; and, given the highly emotional nature of the charges against Mr. Hicks and the overwhelming public scrutiny accompanying the tribunals,[23] the typical internal dilemmas will only be exacerbated during Mr. Hicks's case.

At moments of intense stress and uncertainty, every person becomes more vulnerable to the effects of strong emotion as well as the desire to please on-lookers, whether consciously or unconsciously. And, Lieutenant Colonel [redacted] candid response about his emotional state in the context of the Septembe[redacted]attacks, as well as the "strong apprehension"[24] he feels as a result of his participation on the commission, cannot be ignored in good faith. The mere threat that these emotions may influence his ability to hear evidence with an open mind precludes his inclusion as an alternate juror on Mr. Hicks' commission.

Conclusion:

The word "fair" has only one meaning. A fair trial in the military justice system under the UCMJ requires the use of the RCM 912 f standard for challenges for cause. A full and fair trial in the military commissions system requires the same standard for challenges of commission members. Accordingly, Mr. Hicks requests that the Appointing Authority apply the RCM 912 f standard to Mr. Hicks' good cause challenges to the members of the commission.

By: _____
M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel



[23] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.85, 88 – 89. Lieutenant Colonel [redacted] expresses considerable concern over the amount and type of media attention the tribunals had been receiving, and he voiced "strong apprehension" about the repercussions he and his family might face due to his involvement. Clearly, Lt. Col. [redacted] feels very vulnerable as a member of the commission and therefore is more prone to deliberating in a way to protect both himself and his family.
[24] *Id.* at 89.

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 7, 2004

MEMORANDUM FOR Lieutenant Commander Charles D. Swift, JAGC, USN, Detailed Defense Counsel for *Salem Ahmed Salem Hamdan*

SUBJECT: *United States v. Hamdan*: Powers of the Presiding Officer

I reviewed your memorandum, dated August 10, 2004, which we received October 6, 2004 regarding Military Commission proceedings conducted by the Presiding Officer outside the presence of the other commission members. You objected to "the Assistant to the Presiding Officer's request to the Appointing Authority on behalf of the Presiding Officer for revision of Military Commission Instruction No. 8" and you recommended that the Appointing Authority "clarify that all sessions of the Military Commission shall be attended by all members of the commission." Further, you recommended "that the Appointing Authority relieve the line officers appointed to serve as members of the commission and appoint in the alternative active or reserve Judge Advocates who are qualified to serve as military judges."

I invite your attention to the changes in Military Commission Instruction (MCI) No. 8, Sections 4 and 5, signed on August 31, 2004. However, the Military Commission Orders and Instructions do not provide the Prosecution or Defense Counsel an avenue through which to raise objections or file motions directly with the Appointing Authority. Military Commission Instruction (MCI) No. 8, Section 4(A) provides the only proper mechanism for consideration of such motions after the case has been referred to a Military Commission. Section 4(A) states that "the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate." Accordingly, your objection to the composition of the Commission must first be heard by the Presiding Officer.

Therefore, your request will not be considered by the Appointing Authority at this time.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor
Presiding Officer
CDR [redacted]

10 Aug 2004

MEMORANDUM FOR THE OFFICE OF THE APPOINTING AUTHORITY

FROM: Lieutenant Commander Charles D. Swift, JAGC, USN, Detailed Defense Counsel, *United States v. Hamdan*

SUBJECT: Powers of the Presiding Officer

Purpose: The purpose of this memorandum is to inform the Appointing Authority of Detailed Defense Counsel's objections regarding the Assistant to the Presiding Officer's request to the Appointing Authority on behalf of the Presiding Officer for revision of Military Commission Instruction No. 8 (attached). This memorandum seeks to cognizance the Presiding Officer's purported authority to exercise de facto powers of a military judge in contravention of the powers prescribed under Commission rules, historical precedence, and promotion of a full and fair trial. In addition to alerting the Appointing Authority to Detailed Defense Counsel's objections, this memorandum proposes alternative solutions in regards to the commission of Salim Ahmed Hamdan. Objections and recommendations raised in this memorandum are solely that of Detailed Defense Counsel in Military Commission preceedings in conjunction with Salim Ahmed Hamdan and do not represent the position of the Chief Defense Counsel or the Defense teams, military or civilian, in any other Commission.

Issue: Under the President's Military Order, subsequent military orders and instructions, and legal president, do Military Commission preceedings conducted outside the presence of the other commission members constitute a lawfully constituted tribunal, when the preceedings are conducted by the Presiding Officer for the purpose of resolving legal motions, witness and evidentiary issues?

Discussion: The Presiding Officer's proposed actions contrast with the President's Military Order of November 13, 2001, dictating that the Military Commission provide "a full and fair trial with the Military Commission sitting as triers of both law and fact," and Military Commission Order No. 1, Section 4.A.1, that states "members shall attend all sessions of the Commission." The Presiding Officer's power under MCO No. 1 is administrative rather than substantive (e.g. limited to the preliminary admission of evidence, subject to review of panel members, maintaining the discipline of preceedings, ensuring qualifications of attorneys, scheduling, certifying interlocutory questions[1], determining the availability of witnesses, etc.) See sections 4.A, 5.H, 6.A.5, and 6.D.1, 6.D.5. Nothing in the powers set out in either the President's Military Order or the MCO No. 1 suggest that the Presiding Officer's powers extend to that of a military judge, capable of holding independent sessions.

[1] The requirement under Section 4.A.(5)(d) of MCO 1, that the Presiding officer certify all dispositive motions to the Appointing Authority conflicts with the plain language of the Presidential order that the Commission be the "triers of law and fact" and is likely invalid under section 7.B. of MCO 1.

In creating the present Military Commissions the government has relied on the legal and historical principles set out *in re Quirin.* The Quirin Commission, however, was conducted for all sessions with the Military Commissions as a whole, hearing all questions of law and fact. These included questions of the Commissions including questions of whether counsel had the right to preemptory challenge, jurisdiction, lawfulness of the Presidential order, and lawfulness of the charges. (See pages 15-18, 23-39, and 46-60 of Transcript of Preceedings Before the Military Commissions to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942, University of Minnesota, 2004, Editors, Joel Samaha, Sam Root, and Paul Sexton). Indeed the Detailed Defense Counsel has been able to find no previous Military Commission that was conducted in the manner proposed by the Presiding Officer.

The conduct of Military Commission sessions outside the presence of all members does not comport with the overriding objective that the Commission provide a full and fair trial. By acting as a de facto military judge in these preceedings, the Presiding Officer runs a high risk in prejudicing the panel as a whole. In essence what the Presiding Officer proposes is that he alone will make determinations regarding legal motions, such as but not limited to the legality of the Commission, the elements of the charges, issues of voluntariness of confessions, relevance of witnesses and those facts that are not subject to contention. In order to make these determinations the Presiding Officer will necessarily have to make findings of fact in addition to determining the law. By assuming the role of an independent fact finder and law giver, the Presiding Officer elevates his status relative to the other members to a point that it cannot be reasonably expected that his opinions will not be given undue weight by the other members during deliberations. It cannot be reasonably expected that after the Presiding Officer has independently heard evidence, determined the law, and conducted a portion of the preceedings outside the presence of the other members that they will not subsequently defer to his judgment during deliberations. Such a system is not in keeping with the requirement that the preceedings be full and fair. For the process to be full and fair, each member must have an equal voice. The Presiding Officer, however, in the name of expediency proposes to make himself first among equals.

Even if the Appointing Authority agrees with the Presiding Officer's position regarding alteration of MCI No. 8, Detailed Defense Counsel objects to any alterations to military instructions without the concurrence of Mr. Hamdan and his Defense Counsel as an expos facto alteration of the procedures for trial after charges have been referred to Commission, thereby commencing preceedings.

Detailed Defense Counsel is not unmindful of the difficulties associated with the use of members to make all of these determinations. The Presiding Officer's assistant in his ex parte memorandum to the Legal Advisor to the Appointing Authority, points out that the use of members to make determinations on all issues substantially mirrors the court-martial process prior to the institution of the Uniform Code of Military Justice. Although this process was abandoned with the advent of the Uniform Code of Military Justice for Courts-martial, there is no authority for abandoning it with respect to Military

Commissions. Nothing in the President's order indicated that he tended to deviate from the past process; rather the portion of the President's Military Order of November 13, 2001, dealing with Military Commissions, is an almost word for word that of President Roosevelt's orders regarding the Quirin Commission.

Mr. Hodges' memo justifies the departure from historical precedent on the grounds that requiring line officers to vote on complex issues few lawyers can articulate jeopardizes efficient trials and potentially prejudices the preceedings. Detailed Defense Counsel agree that line officers will be confronted with extremely complex issues, but does not agree that the solution lies in granting judicial powers to the Presiding Officer in a hearing that is distinctly separate from a courts-martial or federal trail

Recommendation: Detailed Defense Counsel proposes in the alternative that recent procedures used in international tribunals for war crimes provide the solution. In both the former Yugoslavia and Rwandan tribunals, the war crimes tribunals have been composed of international judges. Detailed Defense counsel recommends that the Appointing Authority reject the Presiding Officers interpretation of his powers and clarify that all sessions of the Military Commission shall be attended by all members of the commission. Further, Defense Counsel recommends that the Appointing Authority relieve the line officers appointed to serve as members of the commission and appoint in the alternative active or reserve Judge Advocates who are qualified to serve as military judges. Appointment of a panel of judge advocates does not require a change in the Military Commission rules as there is no requirement that a commission member be anything beyond a commissioned officer. Appointment of judge advocates to the commissions will permit careful consideration of the legal issues, expedite necessary legal research into these issues, avoid prejudice created by ex parte preceedings, and mirror international process.

LCDR Charles D. Swift, JAGC, USN
Detailed Defense Counsel
Office of Military Commissions

Cc:
Chief Defense Counsel
Chief Prosecutor
Presiding Officer
CDR Lang, Detailed Prosecutor in *U.S. v. Hamdan*
Legal Advisor to the Appointing Authority
Legal Advisor to the Presiding Officer

MEMORANDUM FOR LEGAL ADVISOR TO THE APPOINTING AUTHORITY

SUBJECT: Need for MCO Instructions or Decision

1. On July 27, 2004, I sent you the document embedded below as an Attachment to an email concerning the method by which you and I could properly discuss the possible need for a Military Commission Regulation. After I sent the Attachment, you invited me to send this memorandum that I had previously prepared.

2. Before I begin the substance of my concerns, permit me to assure you that I fully appreciate that Military Commissions and trials in US courts or by courts-martial are different. While there are some similarities, the procedures for Military Commission and the authority of those involved in Military Commission, is affected by important, national concerns which have been recognized for centuries. I do fully appreciate that Military Commissions have some substantially different rules to address issues involving, but certainly not limited to: Protected Information; classified information; availability of witnesses; security; confrontation; access to evidence; alternatives to live witness testimony, and the like. I do not want to make Military Commissions something they are not – trial in District Court or a court-martial – but I do want for Military Commission practice to be efficient, as well as full and fair. None of my recommendations will change the nature of Military Commissions – but they will make them run smoother.

2. Perhaps the major concern is the language in the Presidential Military Order that provides there shall be a "full and fair trial, with the military commission sitting as *the triers of both fact and law*." This apparently simply phrase might be misinterpreted by others in determining the role of the Presiding Officers vis-à-vis the other Commission Members. Specifically, this phrase and some provisions in the MCOs and MCIs (notwithstanding MCI 8, Section 5) taken together may make it unclear which pretrial functions a Presiding Officer may perform without involvement by the other Commission Members.

3. I interpret the "both fact and law" phrase to mean this:

a. The Commission consists of the Presiding Officer and other members. Because the Presiding Officer is going to instruct the other Members (he is the source of law), and also participate with the other Members in deciding a verdict, the Commission as a whole (the Presiding Officer plus the other members) are "triers of both fact and law." In other words, members of the same body will *collectively* be the source of the law and the facts. This is to be distinguished from a member court-martial or District Court trial where one body determines the facts (jury/members) and a separate body the law (the judge.)

b. I believe that a Presiding Officer's function has many of the same characteristics as judge in a U.S. trial. The President has, however, made a specific exception to this by providing that the other Members may in essence overrule the Presiding Officer on the issue of whether to admit evidence (the probative value provision.)

c. The probative value provision also reinforces the "law and fact" interpretation in paragraph 3a above. If it were true that all the members were equals on deciding questions of law, then all members would automatically be involved in deciding issues of admissibility. If that in turn were true, the probative value language would not be necessary, and then logic tells us it wouldn't have been included.

d. If this interpretation is correct - and I believe it is - the Presiding Officer should, under Military Commission law as it exists, have all the powers of a traditional judge in deciding *pretrial* issues and issues of law without the participation of the members, or being subject to being overruled by them.

4. If my interpretation is incorrect, however, then the result is radically different. "Law and fact" would then mean that we have more than one "judge," and all the members would be required to vote on whether to grant a pure law motion, possibly whether a witness shall be produced, alternatives to testimony, and the like. While some may say that that process somewhat resembles court-martial practice under pre-UCMJ procedures, it is certainly not workable for Commission cases. It would require line officers to vote on complex issues few lawyers can articulate, and be a process foreign to efficient trials. I would also suggest such a process is a danger to a fair trial if Commission members, untrained in the law, should grant or deny a prosecution or defense pretrial motion upon which the Presiding Officer had previously and properly ruled.

5. Another concern involves motions practice. I have no doubt that the Presiding Officer can properly direct motions practice, require briefs and responses, and otherwise frame issues and posture the litigation so that the motion can be efficiently decided. However, in order for the Presiding Officer to hear evidence on a motion, or where necessary, argument, there must be a reporter, counsel must be present, and the accused will be present (subject to Protected Information or classified evidence situations.). Such a pretrial session is part of the trial, and it should not be held, in my view, unless the Commission is formally convened. This raises the question whether all the Members must be present in order to convene the Commission? The law of Military Commissions is incomplete on this point; the draft Trial Guide indicates that *all* Commission members are present when the Commission is convened. (I appreciate the Presiding Officer is not required to follow the Trial Guide.). The answer to this question has a substantial effect on how the current trials are to proceed. It seems illogical to have all Commission members present in order to convene the Commission, allow voir dire (if any), and then send them home so the Presiding Officer can dispose of motions. In order to move any trials along, it would be best to allow the Presiding Officer to:

a. Convene the Commission with the accused and counsel but without the other members and ensure the accused has the charges;

b. Hold the pretrial motions session without the other members, have the Presiding Officer undergo any voir dire, take evidence, hear argument, and dispose of motions. (Until motions are finally disposed of, counsel often don't know what witness

and other arrangements need to be made, what evidence they have access to, and other aspects to properly trial their cases.).

c. When trial of the merits is to begin, have all the Commission members present to reconvene the Commission, undergo voir dire (if any,) and then proceed with the trial.

This very efficient practice is how non-Commission trials are conducted not only because a body of law says so, but because it is efficient. To have all Members come together just to convene the Commission, and then depart until the trial is ready to proceed, seems very inefficient and not conducive to a full and fair trial.

6. Witness production litigation.

a. The law of Military Commissions is somewhat complex when it comes to deciding what witnesses will be produced. I anticipate that deciding witness production may be a major issue, and unless it is litigated in an efficient way, we can expect inordinate delays, incur major and unnecessary expenses in producing witness that will turn out to be unnecessary, and create claims that counsel cannot prepare their cases until they know what witnesses are to be produced. Here are the major provisions on production of witnesses:

(1). MCO 1, Section 5H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent **necessary and reasonably available as determined by the Presiding Officer.**

(2). MCO 1, Section 6A(5). "The **Commission shall have power to: (a) Summons witnesses.**" "The Presiding Officer shall exercise these powers on behalf of the Commission ... ." In this provision, the Presiding Officer's authority on behalf of the Commission is to issue the process. But it is the Commission (all the Commission, or just the Presiding Officer?) that has the power to summons.

(3). MCO 1, Section 6D(2)(a). "Production of witnesses. The Prosecution or the Defense **may request the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means**; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given the testimony of witnesses."

b. Issues these provisions raise:

(1). Can the Presiding Officer alone resolve a motion to produce a witness? If so, can the full Commission later at trial decide to "reverse" the ruling the Presiding Officer made earlier?

(2). Whether testimony is "cumulative" is often a question of relevance or probative value because the question is whether the substance of the testimony has already been sufficiently presented by another witness or witnesses. As such, does the determination of whether a witness is cumulative fall within the probative value rule in the President's Military Order making the determination subject to ultimate member determination? If so, it would appear that the Presiding Officer should not attempt to make witness production decisions until the full Commission is present.

(4). If a witness request or motion is dependent, in part, on whether that testimony is admissible, does that trigger the probative value rule making all witness requests subject to full Commission consideration from the outset?

(5). Is the full Commission the only authority that may permit an alternative to live testimony? If so, it appears that a Presiding Officer could not decide a witness production request by directing the witness's testimony be allowed, but in a form other than in person at trial.

c. Given this state of the rules in MCO 1, one could submit that the full Commission is the only body that decides witness production issues, and therefore there should be no attempt to resolve them until the full Commission is present. If that is the rule, the very predictable result is truly unworkable.

(1). Counsel would appear at trial not knowing what witnesses are to be called.

(2). The Government might bring witnesses in the event they believed the Commission might order their production – thereby spending money on witnesses that might not be called.

(3). On the other hand, the Government might elect not to bring a witness believing the full Commission will deny the witness request, but then having to request a delay for the time to produce a witness the full Commission orders to be produced in person.

d. Instead of what I posited in paragraph 6c above, I believe that the legally correct, logical, and fairer interpretation of these provisions and the President's Military Order is:

(1). The Presiding Officer alone through motions practice determines whether a witness is necessary and reasonably available.

(2). If the witness is determined to be either unnecessary or not reasonably available, the witness will not be produced for the trial.

(3). If the witness is both necessary and reasonably available, but the probative value of the witness is in question, the Presiding Officer can direct the witness to be

produced, not be produced, or produced so the probative value can be determined by the full Commission when the full Commission is present.

(4). After the full Commission is convened, the full Commission may determine the admissibility of witness testimony when the Presiding Officer ruled in accordance with paragraph 6d(3) above.

(5). The Commission can always decide by majority vote – during the trial if they wish –to call a witness. In so doing, the Commission may decide not to hear the witness' live testimony, but receive it by alternate means, or perhaps as "other evidence" under MCO 1, Section 6D(3).

7. Sir, I believe a complete solution to all these issues is rather straight forward.

a. Of course I do not ask that the Presidential Order be modified.

b. DoD Directive 5105.70 need not be modified.

c. MCI 8, Section 5 may have to be addressed.

d. The Appointing Authority under the provisions of Commission Law should prepare and issue Military Commission Regulations which will clearly:

(1). Authorize the Presiding Officer to convene the Commission without the other members present to receive evidence on pretrial motions, hear argument, and rule on motions. (Only if all Commission members are present could the Commission hear evidence that would be used on the merits or sentencing, if sentencing proceedings are required.).

(2). Provide that in hearing evidence on a *motion*, the Presiding Officer alone makes the determination whether evidence is admissible. (In other words, the law/fact rule applies to what evidence is admissible on the verdict or sentence. It does not affect what the Presiding Officer may hear on a *motion*. If that was not the rule, then all Commission members would have to be present during the entirety of motions practice.).

(3) Interpret Military Commission Order # 1, section 6D(4) to allow the Presiding Officer to take conclusive notice of a fact on behalf of the Commission. (If the Commission had to wait until trial when all members are present to do this, the one requesting conclusive notice would still have to be prepared to prove the fact in the event the Commission voted not to allow conclusive notice.).

(4) Authorize the Presiding Officer alone to determine whether an alternative to evidence shall be allowed (This may require a modification or interpretation of MCO 1, Section6 D(3).). This authorization would not apply to witnesses called by the full Commission after trial on the merits begins.

(5). Establish the authority of the Presiding Officer alone to take evidence on, and rule upon, all pretrial motions and requests of either party, and that all such rulings are final (except certified interlocutory matters) and not subject to full Commission consideration or reconsideration with the following exceptions:

(a). The ruling involves the admissibility of evidence on the merits, or during sentencing proceedings, on the question of whether the evidence is probative in which case MCO 1, Section 6D(1) applies.

(b). A majority of the Commission members decides to hear the testimony of a witness because it is admissible and not cumulative as provided, and subject to, MCO 1, 6D(2)(a).

(c). The providing of investigatory and other resources as provided in MCO 1, Section 5H.

11. If you agree with me, I urge rapid action. If you need a draft of the actual regulation, please advise.

Keith H. Hodges
28 Jul 2004

Attachment

Dear BG Hemingway,

1. It will be beneficial for us to discuss with you as soon as we are able methods to best ensure that Military Commission Presiding Officers conduct full, fair, and efficient trials. We have made a lot of progress in establishing procedures, motions practice, docketing requests, and other items to prepare for Commission sessions, but we are at the point now that without some clarification on procedure, the Presiding Officer may be unable to require counsel to respond to his desires in getting motions litigated and trial dates established. In essence, the Presiding Officer needs to get counsel before him in a session, but I first wish to ensure my interpretation of that procedure is correct.

2. As I understand, and am performing, my duties, I have two distinct roles. The first, and arguably lesser, role is to assist COL Brownback to try cases to which he has been detailed the Presiding Officer. In preparing the agreement detailing me to OMC, we ensured that I would have the authority to advise the "Presiding Officer in the performance of his adjudicative functions." This is language borrowed from the ABA Model Canons of Judicial Conduct, and it was included to allow me to provide Presiding Officers ex parte advice. It is not this function I wish to address.

3. Rather, I believe we need to discuss processes and systems to make *all* trials by military commissions full, fair, and efficient. This is my second role - to develop a system to help not only the current Presiding Officer, but all future Presiding Officers. This role is distinct from the one mentioned above. I believe that if I see a way to improve Commission proceedings – to include clarifying Military Commission Orders (MCO) or Instructions (MCI) – it will best ensure full and fair trials. In this role, I believe that contact with you is perfectly permissible, and expected, because you are the Legal Advisor to the Appointing Authority, and the Appointing Authority is empowered to publish regulations consistent with the Presidential Military Order and DoD Directive 5105.70, or request the DoD General Counsel to issue an MCI. At this point, if you believe such communications are not proper, please so advise. On the same topic, generally, is the question of whether our discussions on this matter may be viewed in some manner to be an improper ex parte communication. My opinion is that since nothing we discuss will affects the decisions that a Presiding Officer may make in a particular case, then any discussion between us is not a forbidden ex parte communication. However, if you believe, as I do, that our discussions are permissible, but that it would reduce any possibility of misperception, then, I suggest it would be best to conduct all our discussions in writing (email) so that we can make a clear record of what was discussed and to CC the Chief Prosecutor and Chief Defense Counsel on all such emails.

4. I am ready now to send you a list of the issues, my interpretation of them, and the solution to memorialize these interpretations. Before I send that along, may I recommend that we first decide if and how these matters can or should be discussed.

V/R. [redacted]
28 JUL 2004

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Authority Submitted as "Interlocutory Question 1"

On August 31, 2004 you forwarded "Interlocutory Question 1" to me for decision, requesting authority to hold closed sessions of the Commission, from which the accused has been properly excluded, at a location within the Continental United States.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I will consider your question as a request for me to exercise the authority vested in the Appointing Authority by MCO Number 1, Section 6(B)(4), to authorize holding closed sessions of the Commission at a place other than Guantanamo Bay, Cuba. The request is denied. All sessions of the Commission shall be conducted at Guantanamo Bay.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Office of the Presiding Officer
Military Commission

August 31, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 1 – Location of Closed Sessions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." "Closed sessions" as used in this document are those sessions of the Commission in which the accused does not have the right to be present because of the nature of the information presented.

2. An accused is not allowed to be present during closed sessions making it unnecessary to hold such sessions at GTMO. The Presiding Officer does not believe that any Commission Law requires that a closed session be held in the same general locale that the accused is located. The Commission is considering scheduling and holding – when and if possible – closed sessions in CONUS with the following arrangements:

a. All necessary parties will be assembled at a facility where the necessary security arrangements can be made.

b. No other business may be conducted or addressed other than the presentation of closed session evidence which the accused is not permitted to hear, or arguments on motions or objections based solely on closed session matters.

3. May the Commission proceed as indicated in paragraph 2 above?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Authority Submitted as "Interlocutory Question 2"

On September 1, 2004 you forwarded "Interlocutory Question 2" to me for decision, requesting authority to hold closed conferences of the Commission, to discuss and decide motions, questions, and other matters that do not require the presence of counsel or the accused, at either (1) a location within the Continental United States, (2) by telephonic conference call or (3) by electronic mail.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I will consider your question as a request for me to exercise the authority vested in the Appointing Authority by MCO Number 1, Section 6(B)(4), to authorize holding closed deliberations of the Commission at a place other than Guantanamo Bay, Cuba, and by a means other than direct face-to face discussion. The request is denied. All deliberations of the Commission shall be conducted at Guantanamo Bay, and all members and alternates shall be physically present.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Office of the Presiding Officer
Military Commission

September 1, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 2 - Closed Conferences

1. These Interlocutory Questions are presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." In presenting these questions, the Presiding Officer presumes that the proposed modification to paragraphs 4 and 5 of Military Commission Instruction # 8, forwarded by email on 23 August 2004, is in effect.

2. Military Commission Order #1, paragraph 6B(4) provides that "Members of the Commission may meet in closed conference at any time."

a. Is there any reason why the members can not meet together to hold a closed conference in CONUS to discuss and decide motions, questions, and other matters that do not require the presence of counsel or the accused?

b. Can the closed conference be done by conference call with all members - given a situation where all the members have the necessary documents to resolve a motion or question?

c. Can the closed conference be done by email - given a situation where all the members have the necessary documents to resolve a motion or question ensuring that all members receive and respond to all emails?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 3"

On September 3, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed procedures for certifying interlocutory questions to me.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding the procedure for certifying interlocutory questions to me. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

September 9, 2004

MEMORANDUM FOR Appointing Authority for Military Commissions

SUBJECT: Interlocutory Question # 3 and the power of the Appointing Authority to decide Interlocutory questions

In response to the Presiding Officer's Interlocutory Question #3, the defense in *U.S. v. Hicks* objects to the Appointing Authority being connected in any way with any decision of law in the military commission assigned to Mr. Hicks's pending case.

The President's Military Order of 13 November 2001 is clear; the military commission sits "as the triers of both law and fact." As for the procedures outlined in ¶ 2 of IQ #3, there is not any basis in the PMO for such procedures. They are, just like so much else in the Commission system, merely a creature of the PO or Appointing Authority, and not part of any codified, predictable, or viable legal system. As such, they are *ultra vires*.

All language found in any Military Commission Order or Instruction attempting to authorize interlocutory questions of law to be forwarded to and decided by the Appointing Authority violates the President's Military Order and denies Mr. Hicks the fundamental guarantees of due process. The Appointing Authority is not an independent judicial officer, and referring matters to him as if he were only further de-legitimizes the entire commission system. It also, of course, further illustrates a fundamental problem with the commission system: the absence of independent review, appellate or otherwise.

More specifically,

(a) regarding the procedures in ¶ 3(b), we restate our objections to publishing official Commission decisions via e-mail;

(b) regarding the procedures proposed in ¶ 3(c), there should not be any editing with respect to what "documentary or other materials" are forwarded to the Appointing Authority once the PO has certified a question. All materials either presented by a party, or generated at a hearing, or deliberative session of the Commission, should be forwarded to the Appointing Authority in the event of certification of a particular issue or motion; and

(c) regarding ¶ 4, all formal findings of fact and/or conclusions of law should, as a requirement, be made in writing by the Commission.

Furthermore, as a threshold matter, we do not believe any amendments should be made to MCO's or MCI's (upon which IQ's #1 & 2 are based) that adversely affect any detainee. Such

changes not only constitute *ex post facto* provisions, but also further aggravate a critical defect in the commission system: that there is an absence of the notice and/or continuity that are hallmarks of a fair adjudicative system. The prospect of further amendments to MCO's and MCI's, without any symmetrical procedure for doing so (or contesting them beforehand) merely enhances the intractable problems inherent in the commission system as presently constituted.

If you have any questions regarding the memorandum, please contact me at (703) 607-1521.

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

[redacted] LTC, DoD OGC

From: Pete Brownback [abnmj@cfl.rr.com]
Sent: Thursday, September 02, 2004 09:37
To: OMC - Appt Auth
Cc: OMC - [redacted]

Subject: Re: Interlocutory Question # 3

Mr. Altenburg,

Enclosed is Interlocutory Question # 3 for your consideration.

COL Brownback

All Counsel in Al Bahlul, Al Qosi, Hamden, and Hicks,

If you wish to brief this issue to the Appointing Authority, feel free to do so. Please CF me on any briefs sent. I do not know what, if any, time line he will be working on.

COL Brownback

----- Original Message -----
From: Pete Brownback
To: OMC - Appt Auth
Cc: OMC [redacted]

Subject: Interlocutory Question # 2

9/8/2004

Office of the Presiding Officer
Military Commission

September 2, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question - #3 - Process for Deciding Motions and the Procedure for Forwarding Mandatory/Discretionary Interlocutory Questions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." In presenting this question, the Presiding Officer presumes that the proposed modification to paragraphs 4 and 5 of Military Commission Instruction # 8, forwarded by email on 23 August 2004, is in effect.

2. If a motion or question is presented to the Commission that **would** effect the termination of the proceedings with respect to a charge **if granted**, is the below procedure correct?

a. The motion or question is heard by the Commission and evidence is gathered. The Commission hears oral argument, if requested and necessary. The Commission does not make any findings of fact, does not rule on the motion, and does not make any recommendation on the disposition of the motion.

b. The Presiding Officer will determine what documentary or other materials shall be forwarded to the appointing authority - counsel for either side may forward any other materials NLT than a specific announced date.

c. If the members will not decide or recommend a decision on a motion, and no evidence is required to decide the question, is it necessary for the members to be meet in open session or closed conference, or may the Commission simply arrange to send the motions and written argument to the Appointing Authority?

3. If a motion or question is presented to the Commission that **would not** effect the termination of the proceedings with respect to a charge **if granted**, is the below procedure correct?

a. The motion is received by the Commission and evidence is gathered. The Commission hears oral argument, if requested and necessary.

b. In a closed conference, the members decide the motion or question, and the decision is announced in an open session, or, if classified or protected, a closed session, or by a published decision in writing or email.

c. The Presiding Officer may, in his or her discretion, certify the question to the Appointing Authority and if that is done, will determine what documentary or other materials shall be forwarded to the appointing authority. He will only forward the question after the Commission has completed the process in 3a and 3b above.

4. If a motion or question is presented to the Commission that **would not** effect the termination of the proceedings with respect to a charge, whether **granted or not,** is the Commission required to prepare formal and written findings of fact and/or conclusions of law?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

OFFICE OF THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
INTERNAL ROUTING AND TRANSMITTAL FORM

THRU:	**SUSPENSE:** 9/20/04
FOR:	**ACTION** [redacted]
SUBJECT: Interlocutory Questions #3 and the power of the Appointing Authority to decide Interlocutory questions	**ACTION OFFICER PHONE:**
COPY PROVIDED TO: _____for info only _____for info and comment	**TASKER NO: 123**

PURPOSE: CC Swann Gunn

DISCUSSION:

RECOMMENDATION:

APPROVED ____ DISAPPROVED____ SEE ME ____

COORDINATION

NAME	PHONE	CONCUR/NONCONCUR COMMENTS	INITIALS	DATE

DATE RECEIVED BY OAA:	**ELECTRONIC FILE LOCATION:** M:/MCAA/

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 4"

On September 2, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed parameters for the Presiding Officer instructing Commission Members during motions, on the merits of the case, and at sentencing.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding trial procedures and rules of evidence. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 4 – Necessary Instructions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate."

2. Paragraph 5, MCI #8 states that the implied duties of the Presiding Officer includes the function of "providing necessary instructions to other commission members."

3. Thus far, I have provided the members with instructions on the record during open sessions of the Commission. I have also provided members, as indicated in Review Exhibits, certain preliminary instructions in writing before the Commission met or assembled. In my opinion those instructions were necessary -- so the members could understand their role, could understand various matters which occurred on the record (e.g., voir dire), could prevent being unnecessarily tainted by contact or publicity, and could foresee, generally, how the process was going to work.

4. In the Commission process, the members have the unique role of deciding questions of both fact and law. In this situation, the question of which instructions are necessary may appear to some to be unclear. The basic problem is should the Presiding Officer instruct the members on what the law is when the members are empowered to decide the law for themselves? Another way of phrasing the question is, does the Presiding Officer provide necessary instructions to the members, or does he provide the members advice on his opinion of what the law is?

5. Instructions on Merits.

a. Is the Presiding Officer expected to instruct the members on the merits with respect to the elements of the offenses, defenses, evidentiary matters, and the like as would a Military Judge in a courts-martial?

b. If the Presiding Officer is to instruct on the merits as indicated above:

(1). Must the instructions be provided in open court in the presence of the parties? If so, may they be provided to the members in writing or must they be given orally?

(2). If instructions on the matter are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

6. Instructions on Motions

a. Is the Presiding Officer expected to instruct the members on the law associated with a motion?

b. If the Presiding Officer is to instruct on the law of a motion:

(1). Must the instructions be provided in open court in the presence of the parties? If so, can they be provided in writing?

(2). If instructions on the motion are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

(7). In the case involving a motion which would effect a termination of the proceedings, are instructions in any form necessary?

7. Instructions on sentencing.

a. Is the Presiding Officer expected to instruct the members on the law associated with sentencing?

b. If the Presiding Officer is to instruct on the law in sentencing?

(1). Must the instructions be provided in open court in the presence of the parties? If so, may they be provided to the members in writing or must they be given orally?

(2). If instructions on sentencing are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

Motions and Trial Calendar - US v. Hicks v.2					
#	Date	"Event"	Action by		Comments
			Pros	Def	
1	7 Sep	**MOTIONS:** Separate motions that address the structure of the panel and any selection of members issue to include: A. The structure of the Commission to include, *inter alia*, that there is only one lawyer who is a Commission member. B. Whether there is an implied bias standard for member challenges and what that standard is or should be. C. The lawfulness of having the Presiding Officer advise or instruct the other members on the law; D. The panel should be disqualified because of a lack of legal training. E. No panel member should hear more than one case. F. Whether there should be a judge advocate member on the panel at all;		X	R. 9, R. 21; R. 109-110; R.112
2	10 Sep	Response to motions in item # 1.	X		R. 22
2A	15 Sep	Objections to POMs		X	R.21
3	1 Oct	**MOTIONS:** A. Whether the Assistant may provide legal or other advice to the Presiding Officer. B. Motion to dismiss for lack of jurisdiction; C. Motion to dismiss because the Appointing Authority is not authorized to appoint or convene a Military Commission. D. Motion to dismiss because the Commission lacks jurisdiction to convene at Guantanamo Bay; E. The President's order creating the Commission is invalid; F. Lack of jurisdiction because the charges are not law of war violations or other crimes triable by military commission. G. Lack of jurisdiction because the Commission fails to provide the required protections for an accused in a criminal trial under international law; H. Lack of jurisdiction because of a violation of equal		X	R. 9, R. 21; R. 109-110; R.112 R. 117-119.

		protection under the U.S. Constitution and international law as it applies to only non-U.S. citizens. I. Lack of jurisdiction because it is not an independent tribunal. J. Motion to dismiss for failure to state an offense. K. Lack of jurisdiction over conduct occurring before the beginning of armed conflict. L. Lack of personal jurisdiction over the accused. M. Motion to dismiss for lack of speedy trial. N. Motion to dismiss for imposition of pretrial punishment. O. Motion to dismiss for lack of jurisdiction because the accused is entitled to the presumption and status as a POW and must be tried by courts-martial. P. Motion to dismiss for unlawful command influence. Q. Motion to dismiss for improper referral of the charges as members below the pay grade of 0-4 are systematically excluded from the member Commission process.			
4	15 Sep	Motion for a bill of particulars.		X	
5	15 Sep	Objections to POMs, if any		X	R. 121
6	29 Sep	Pros reply to motion for a bill of particulars	X		
7	1 Oct	Def response to motion for a bill of particulars		X	
8	1 Oct	Briefs by both sides on what motions does the Commission have to be certify to the Appointing Authority with regard to whether all interlocutory questions that could terminate the proceedings have to be certified, or just the ones in which the Commission's ruling is about to terminate the proceedings.	X	X	
9	15 Oct	Pros response to def motions in item 3	X		
10	22 Oct	Def reply to Pros response on motions in item 3.		X	
11	2 Nov	Motions hearing on all motions	X	X	R. 122
12	10 Jan 05	Trial on the merits	X	X	R. 121

[redacted] CPT, DoD OGC

From: Mori, Michael, MAJ, DoD OGC
Sent: Thursday, September 09, 2004 13:06
To: [redacted] CPT, DoD OGC
Subject: RE: Document - Defense Objection to the Presiding Officer or his Assistant Instructing Providing Advice to the Commisison on the Law

[redacted]

It is submitted in response to the PO asking us to brief the PO as legal advisor to the commission and IQ#4, as both issues are interrelated.
s/f
Dan

Major Michael D. Mori, U.S. Marine Corps

Department of Defense, Office of the General Counsel

Office of Military Commissions, Office of the Chief Defense Counsel

1851 S. Bell Street, Arlington, VA 22202

Office (703) 607-1521 ext. 193

Mobile (808) 392-9199

-----Original Message-----
From: [redacted] CPT, DoD OGC
Sent: Thursday, September 09, 2004 12:49
To: Mori, Michael, MAJ, DoD OGC
Subject: Document - Defense Objection to the Presiding Officer or his Assistant Instructing Providing Advice to the Commisison on the Law

Sir:

Is this document that you delivered to the Office of the Appointing Authority on 7 September 2004 submitted in response to the PO's email, SUBJECT: Interlocutory #4?

Thanks,
[redacted]

[redacted] CPT, DoD OGC

From: Pete Brownback [abnmj@cfl.rr.com]
Sent: Thursday, September 02, 2004 10:09
To: OMC - Appt Auth
Cc: OMC - [redacted]

Subject: Interlocutory Question # 4

Mr. Altenburg,

Enclosed is Interlocutory Question # 4 for your consideration.

Defense Counsel in US v. Hicks announced on the record that they wished to brief this issue. The defense brief is due on 7 September and the prosecution response is due on 10 September. (See Item 1c and 2 in the attached US v. Hicks Trial Calendar.)

COL Brownback

All Counsel in Al Bahlul, Al Qosi, and Hamden,

If you wish to brief this issue to the Appointing Authority, feel free to do so. Please CF me on any briefs sent. I do not know what, if any, time line he will be working on.

COL Brownback

9/9/2004

Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 5 – Role of the Alternate Member

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate."

2. Is the instruction at enclosure 1, concerning the participation of the alternate member, correct?

3. Is the instruction (in bold and underlined) at enclosure 2, concerning whether an alternate member may ask questions, correct?

4. Is the law in the instruction at enclosure 3, concerning an alternate member who becomes a member, correct?

5. If an alternate member is not permitted to ask questions or have others do so on his behalf, and the alternate later becomes a member, may this member then recall previous witnesses for the sole purpose of asking questions he could have, but was not allowed to, ask while an alternate member?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

3 Encls
1. Participation of an Alternate Member
2. Questions by an Alternate Member
3. Alternate Member Becomes Member

Enclosure 1

Note 1: Military Commission Order #1, Paragraph 4A(1) provides in pertinent part: "The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the appointing authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds."

Note 2: Federal Rule of Criminal Procedure Rule 24 (c)(3) provides: "Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

(Name of alternate member(s)), you have been designated an alternate member of this Commission, and will become a member should there become a vacancy on the Commission that needs to be filled. As an alternate member, you will attend all open and closed sessions, however you will not be present for any closed conferences or deliberations, and you may not vote on any matter unless your status changes from member to alternate member. Should your status change from alternate member to member, you will be given further instructions.

Enclosure 2

Members of the Commission, when counsel have finished asking questions of any witness, there may be questions which you want asked. However, please keep two things in mind:

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

If you do want questions asked, we'll proceed in one of two ways:

a. You may question the witness by yourself. In so doing, you must remember that your questions are subject to objection, or,

b. I will question the witness for you. If you want me to do so, you will either write the general nature of your question on one of the Member Question Sheets which you have been given or say to me out loud something such as, "Does this witness know what happened?" I will ask the question of the witness until your question is answered or until we discover that it cannot be answered by the witness.

(Name of alternate member), you may not ask questions yourself. If, however, you have a question, you may use one of the printed forms to write your question, and if any member of the Commission wishes to ask that question, that member may ask it.

Enclosure 3

(Name of former alternate member), you have been designated as a member by (the Appointing Authority) (me) under the provisions of MCO #1 and MCI #8. As such, you will now take full part in all closed conferences and deliberations. No current member of the Commission will reveal to you what occurred or was said in past deliberations, and Commission deliberations about issues or charges that have not yet been decided will begin anew. You will have a full voice and vote along with all other members in all questions which are put to a vote in the future or have yet to be decided.

Members, we will NOT put to a vote or revote any matter which has already been decided by a vote of the Commission.

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 5"

On September 2, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed instructions to alternate members of the Commission.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding trial procedures and rules of evidence. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 5 – Role of the Alternate Member

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate."

2. Is the instruction at enclosure 1, concerning the participation of the alternate member, correct?

3. Is the instruction (in bold and underlined) at enclosure 2, concerning whether an alternate member may ask questions, correct?

4. Is the law in the instruction at enclosure 3, concerning an alternate member who becomes a member, correct?

5. If an alternate member is not permitted to ask questions or have others do so on his behalf, and the alternate later becomes a member, may this member then recall previous witnesses for the sole purpose of asking questions he could have, but was not allowed to, ask while an alternate member?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

3 Encls
1. Participation of an Alternate Member
2. Questions by an Alternate Member
3. Alternate Member Becomes Member

Enclosure 1

Note 1: Military Commission Order #1, Paragraph 4A(1) provides in pertinent part: "The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the appointing authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds."

Note 2: Federal Rule of Criminal Procedure Rule 24 (c)(3) provides: "Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

(Name of alternate member(s)), you have been designated an alternate member of this Commission, and will become a member should there become a vacancy on the Commission that needs to be filled. As an alternate member, you will attend all open and closed sessions, however you will not be present for any closed conferences or deliberations, and you may not vote on any matter unless your status changes from member to alternate member. Should your status change from alternate member to member, you will be given further instructions.

Enclosure 2

Members of the Commission, when counsel have finished asking questions of any witness, there may be questions which you want asked. However, please keep two things in mind:

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Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

If you do want questions asked, we'll proceed in one of two ways:

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b. I will question the witness for you. If you want me to do so, you will either write the general nature of your question on one of the Member Question Sheets which you have been given or say to me out loud something such as, "Does this witness know what happened?" I will ask the question of the witness until your question is answered or until we discover that it cannot be answered by the witness.

(Name of alternate member), you may not ask questions yourself. If, however, you have a question, you may use one of the printed forms to write your question, and if any member of the Commission wishes to ask that question, that member may ask it.

Enclosure 3

(Name of former alternate member), you have been designated as a member by (the Appointing Authority) (me) under the provisions of MCO #1 and MCI #8. As such, you will now take full part in all closed conferences and deliberations. No current member of the Commission will reveal to you what occurred or was said in past deliberations, and Commission deliberations about issues or charges that have not yet been decided will begin anew. You will have a full voice and vote along with all other members in all questions which are put to a vote in the future or have yet to be decided.

Members, we will NOT put to a vote or revote any matter which has already been decided by a vote of the Commission.

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

JUN 14 2005

MEMORANDUM FOR CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

Mr. Ali Hamza Ahmad Suliman al Bahlul's request for self-representation is denied. Military Commission Order (MCO) No. 1, paragraph 4(C)(4) states, "The accused shall be represented at all relevant times by Detailed Defense Counsel." After consideration of the attached materials, I do not support the request to change MCO No. 1.

Self-representation at a commission is impracticable. An unrepresented accused will be unable to investigate his case adequately because of national security concerns. An accused confined at Guantanamo, Cuba, who is unfamiliar with applicable substantive law, rules of evidence and procedure will not be able to present an adequate defense. An accused may not be sufficiently fluent in English to understand the nuances of the law. Translation requirements will be exponentially magnified. MCO No. 1, paragraph 6(B)(3) permits the exclusion of the accused from a hearing because classified or other protected information may be presented. Self-representation under these unique commission circumstances would be ineffective representation, and result in an unfair proceeding.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Attachments:
1. Memorandum DepSecDef, December 10, 2004 (1 page)
2. Defense Answers to PO Questions, October 25, 2004 (5 pages)
3. Email Detailed Defense Counsel, October 14, 2004 (6 pages)
4. Prosecution Motion, October 1, 2004 (10 pages)
5. Email Detailed Defense Counsel, May 11, 2004 with memorandum by Detailed Defense Counsel, May 11, 2004 (4 pages)

6. Memorandum Chief Defense Counsel, April 26, 2004 (2 pages)
7. Memorandum Detailed Defense Counsel, April 20, 2004 (1 page)

cc:
Presiding Officer
Chief Prosecutor for Military Commissions

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

DEC 10 2004

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
LEGAL ADVISOR TO THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR FOR MILITARY COMMISSIONS
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

I have reviewed the attached request by Lieutenant Commander Philip Sundel, United States Navy and Major Mark Bridges, United States Army, Defense Counsel for Mr. Ali Hamza Ahmed Suliman al Bahlul, that Secretary Rumsfeld change *Military Commission Order No. 1*, to allow for self-representation by persons brought before a military commission. I am returning this request without taking action. This Memorandum shall serve as guidance for similar requests in the future.

Following the issuance of a Reason to Believe (RTB) memorandum by the President, all questions concerning the Military Commission process, its rules and issues applicable to a given case shall be addressed to and decided by the Appointing Authority. After a referral of charges and detailing of a Presiding Officer to a case, all questions shall be addressed first to the Presiding Officer unless a process specifically set forth in any commission rule provides otherwise.

Paul Wolfowitz

Attachments:
As stated

OSD 19463-04

[redacted]CPT, DoD OGC

From: Sundel, Philip, LCDR, DoD OGC
Sent: Tuesday, May 11, 2004 11:10
To: Altenburg, John, Mr, DoD OGC
Cc: [redacted]Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] Hemingway, Thomas, BG, DoD OGC
Subject: Request for Modification of Rules

Sir,

Attached please find an electronic copy of a request by the al Bahlul Defense Team for a modification of the rules governing military commissions. A hard copy will be provided.

This request is also directed to the Secretary of Defense and the General Counsel. We have previously requested the opportunity to meet with you on this and another matter which has been a long-term impediment to our ability to perform our assigned duties (see e-mail, below), and would still prefer to do so prior to forwarding this request to the other named parties. We will delay delivery of this request to the other parties until Monday, 17 May in hopes of receiving a response to our request for a meeting.

Thank you for your consideration.

V/r
LCDR Sundel

-----Original Message-----
From: Sundel, Philip, LCDR, DoD OGC
Sent: Tuesday, April 27, 2004 15:07
To: Altenburg, John, Mr, DoD OGC
Cc: [redacted]Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] DoD OGC; Hemingway, Thomas, BG, DoD OGC
Subject: Request for meeting

Sir,

Major Bridges and I respectfully request a meeting with you at your convenience. We'd like the opportunity to discuss two issues with you:

1. The expediting of our request (of 3 March 2004) that Professor Anna Wuerth be retained as our permanent Arabic-Yemeni interpreter; and

2. The submission of a written request to you, the Secretary of Defense, and the General Counsel that the rules governing military commissions be modified to allow withdrawal by detailed defense counsel and self-representation by accused. With respect to this matter, I believe that you have received a copy of the Chief Defense Counsel's 26 April 2004, denial of our request to withdraw as detailed counsel.

For your scheduling consideration, Major Bridges will be out of the office this Friday (30 April), and I will be out next Friday morning (7 May).

Thank you.

V/r
LCDR Sundel

5/11/2004

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

11 May 2004

MEMORANDUM FOR SECRETARY OF DEFENSE; GENERAL COUNSEL, DEPARTMENT OF DEFENSE; AND APPOINTING AUTHORITY

SUBJECT: Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*

1. Lieutenant Commander Philip Sundel, JAGC, USN, and Major Mark Bridges, USA, were detailed by the Chief Defense Counsel, Office of Military Commissions on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission. Detailed counsel met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meetings Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. On 20 April 2004, detailed counsel requested permission of the Chief Defense Counsel to withdraw as Mr. al Bahlul's detailed counsel (enclosure 1). On 26 April 2004, based on his view that the rules governing military commissions precluded self-representation, the Chief Defense Counsel denied our request (enclosure 2).

3. Pursuant to section 4(b) of the President's Military Order of November 13, 2001, section 7(A) of Military Commission Order Number 1, dated March 21, 2002, and paragraph 6.3 of Department of Defense Directive 5105.70 of February 10, 2004, respectively, each of you has the authority to modify or supplement the rules governing military commissions as necessary to facilitate the conduct of proceedings by military commissions.

4. Given the view of the Chief Defense Counsel regarding the restrictive nature of the rules governing military commissions, we respectfully request that each of you exercise his authority to modify or supplement those rules so as to allow withdrawal by detailed defense counsel and recognize the right of persons to represent themselves before military commissions.

5. In acting on this request, we ask that you consider the fact that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] Further, while the rules governing military commissions presently do not appear to have provided a mechanism for such, we invite you to consider the significant difficulties that will arise if counsel are required to represent accused who wish to represent themselves.

---

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).

6. As this matter involves ongoing litigation, we anticipate pursuing other avenues of redress if this request is not acted on by 11 June 2004. Thank you for your consideration of this request.

Very respectfully,

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

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

26 April 2004

MEMORANDUM FOR MAJOR MARK BRIDGES AND LCDR PHILIP SUNDEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel, *United States v. al Bahlul*

1. I have reviewed your memorandum dated 20 April 2004 in which you informed me of your client's desire to represent himself in any military commission proceedings. In the same memorandum you requested permission to withdraw as Mr. al Bahlul's detailed defense counsel. In my opinion, I do not have the authority to decide whether Mr. al Bahlul can represent himself in military commission proceedings. I see that as a question for the Appointing Authority and/or for a military commission. As a result, I will not decide that issue.

2. While I lack the authority to decide whether Mr. al Bahlul can represent himself before military commissions, as Chief Defense Counsel, I do have the authority pursuant to Military Commission Order (MCO) No. 1 and Military Commission Instruction (MCI) No. 4 to make a decision on your request to withdraw as Mr. al Bahlul's defense counsel. Your request to withdraw is denied.

3. The procedures for military commissions as currently drafted envision a central role for Detailed Defense Counsel. Accordingly, several provisions of MCO No. 1 and MCI No. 4 convince me that it would be inappropriate to approve your request to withdraw as Detailed Defense Counsel. These provisions include: paragraph 4C(4) of MCO No. 1 which states that "the Accused must be represented at all relevant times by Detailed Defense Counsel;" paragraph 5D of MCO No. 1 which states that at least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense *and until any findings and sentence become final in accordance with Section 6(H)(2)*" (emphasis added); paragraph 6B(3) of MCO No. 1 which allows an Accused to be excluded from commission proceedings but provides that Detailed Defense Counsel can never be excluded; and paragraph 6B(5)(b) of MCO No. 1 which sets out procedures for handling Protected Information during commission proceedings and provides that such information can never be admitted into evidence if not presented to Detailed Defense Counsel.

4. Paragraph 3C(2) of MCI No. 4 speaks directly to the point of whether or not Detailed Defense Counsel can be relieved of the responsibility of representing an Accused before a Military Commission. This paragraph provides that "Detailed Defense Counsel shall represent the Accused before military commissions" and that counsel "*shall so serve notwithstanding any intention expressed by the Accused to represent himself.* (Emphasis added)."

5. You are to continue to represent Mr. al Bahlul consistent with my letter (dated 3 February 2004) detailing you to represent him. In the event, your client decides to exercise other options with respect to representation by Detailed Defense Counsel, please notify me so that I can consider his request. I am copying the Appointing Authority and the Legal Advisor to the Appointing Authority on this memorandum and I invite you to appeal to the Appointing Authority if you disagree with my decisions on these matters.

WILL A. GUNN, Colonel, USAF
Chief Defense Counsel

cc:
Appointing Authority
Legal Advisor to the Appointing Authority

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

20 April 2004

MEMORANDUM FOR CHIEF DEFENSE COUNSEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel, *United States v. al Bahlul*

1. Undersigned counsel, detailed by you on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission, met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meeting Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. Consequently, pursuant to the authority granted you in Section 4C of Military Commission Order No. 1, dated March 21, 2002, we respectfully request permission to withdraw as Mr. al Bahlul's detailed defense counsel.

3. To assist you in acting on this request, we note that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] The rules governing the military commissions, however, do not appear to have provided a mechanism for such.[3]

4. Thank you for your consideration of this request.

Major Mark A. Bridges, USA
Defense Counsel
Office of Military Commissions

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).
[3] *See* Section 4C(4), Military Commission Order No. 1; Section 3B(11), Military Commission Instruction No. 4.

	)	DETAILED DEFENSE
UNITED STATES OF AMERICA	)	COUNSEL'S ANSWERS
	)	TO PRESIDING
v.	)	OFFICER'S QUESTIONS
	)	ON THE ISSUE OF
	)	SELF-REPRESENTATION
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	25 October 2004

1. Pursuant to direction of the Presiding Officer of 18 October 2004, detailed defense counsel provide the following responses to the questions presented.

2. Letters correspond to that proceeding each question posed in the 18 October message:

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

It is our understanding that detailed defense counsel have not yet received all of the evidence in this case. Additionally, we have not interviewed any potential witnesses, have not begun a pretrial investigation, and do not know what evidence the Prosecution intends to present at trial. Further, defense counsel have no way of predicating what trial evidence will ultimately be considered "protected," and what if any "protected information" will be limited to closed sessions. Consequently, at this stage it is impossible for counsel to know whether any closed sessions will be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

A regularly constituted court providing fundamental due process is structured so as to give it competence to address preliminary questions such as an accused's right to self-representation or representation by counsel of his own choice. Mr. al Bahlul's military commission must address his right to represent himself or be represented by counsel of his choosing before it can proceed with any other matters, including voir dire and challenges. Whether military commissions have been structured in a way to allow Mr. al Bahlul's to do so is a matter that may not be answered until long after the commission proceedings have been completed.

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. aL Bahul?

The Appointing Authority has already acted on this issue.

d. Is self-representation required in order to provide Mr. Al Bahul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

Yes, self-representation and representation by counsel of one's choosing are fundamental rights recognized in both domestic and international law as being essential parts of a fair criminal proceeding. Any military commission rule, instruction, or order to the contrary must be considered invalid and unenforceable as it would require a process which, by definition, would violate due process and the President's mandate that military commissions be full and fair. Further discussion of this matter can be found in the Memorandum of Law filed by detailed defense counsel on 2 September and 21 October 2004, and the Reply brief filed on 8 October 2004.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Current detailed defense counsel are in a very difficult position with respect to what actions they may take on Mr. al Bahlul's behalf. While counsel are detailed to represent Mr. al Bahlul, they have never been accepted by him as his representative. Mr. al Bahlul has both instructed counsel and stated in open court that counsel are to take no actions on his behalf. Under applicable rules of professional responsibility, counsel would appear to be precluded from arguing the issue of self-representation on Mr. al Bahlul's behalf.

At the same time, there appears to be no mechanism for counsel to argue an issue to the military commission in any capacity other than as representatives of an accused.

Finally, however, Mr. al Bahlul has been denied the means to effectively address this matter himself. Mr. al Bahlul has no access to legal or research material. Further, the majority of orders, instructions, and rules relevant to military commissions have not been translated into Arabic, nor have any of the numerous documents and electronic messages that have been generated on various substantive aspects of military commissions. Finally, Mr. al Bahlul has not been kept apprised of any discussions or developments that have occurred since the 26 August 2004 hearing, and expressions of concern voiced both by detailed defense counsel and the Chief Defense Counsel that Mr. al Bahlul has been unfairly frozen out of military commission matters have resulted only in assurances by the Appointing Authority that everything is fine, and that he would continue to monitor the situation.

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

Mr. al Bahlul has a fundamental right to represent himself if he so chooses. As the United States Supreme Court recognized in *Faretta v. California*, the question is not whether others think that self-representation is the right choice, only whether an accused whishes to exercise that right.

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

The right of self-representation and the right to fundamental due process in a full and fair proceeding are not interchangeable, and they cannot be mutually exclusive. If Mr. al Bahlul's choice to exercise his right to represent himself means that he will be denied a fair proceeding then the military commission process must be changed. Mr. al Bahlul cannot be denied one fundamental right because the structure of military commissions would then result in the denial of another fundamental right.

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

Fundamental due process as well as domestic and international notions of fairness require that Mr. al Bahlul be present and allowed to represent himself during all proceedings, particularly those involving the presentation of evidence. Mr. al Bahlul chooses to exercise his right to represent himself, thus no one is available to act on his behalf in either open or closed sessions. While sessions from which the media and general public are excluded are permissible, there can be no sessions from which Mr. al Bahlul is excluded.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

While there is presently no mechanism in place for the appointment of standby counsel, presumably the Appointing Authority, the General Counsel of the Department of Defense, or the Secretary of Defense would create a mechanism if the military commission directed such an appointment. Standby counsel could communicate with Mr. al Bahlul via the same interpreters and during similar face-to-face meetings as have previously been utilized.

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

Mr. al Bahlul must be allowed access to evidence. It would presumably be the responsibility of JTF-GTMO to create the mechanism for his reviewing, storing and handling such evidence in a way that does not interfere with his ability to represent himself.

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

Pursuant to MCO No. 1 Mr. al Bahlul is entitled to have the proceedings and any documentary evidence translated into Arabic. In order to provide him a fair trial, Mr. al Bahlul is also entitled to have translated into Arabic any other matters necessary to allow him to represent himself.

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

In order to provide a fair process that comports with fundamental due process, Mr. al Bahlul must be allowed access to any information necessary to allow him to represent himself. He must also be allowed to be present during any military commission proceeding.

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahul is not a witness?

Since Mr. al Bahlul will not be testifying under oath while representing himself, nothing he says while doing so should be admissible as evidence against him.

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

The methods by which Mr. al Bahlul will be allowed to control his notes and other working documents must be determined by JTF-GTMO and implemented in such a way as to not interfere with his ability to represent himself.

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Detailed defense counsel have no thoughts on other issues that might arise from recognizing Mr. al Bahlul's right to represent himself.

/s/
Philip Sundel
LCDR. JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

	)	MEMORANDUM OF LAW:
UNITED STATES OF AMERICA	)	
	)	RIGHT TO SELF-
v.	)	REPRESENTATION;
	)	RIGHT TO CHOICE OF
	)	COUNSEL
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	2 September 2004

1. Purpose of Memorandum.

On 26 August 2004, the Presiding Officer of Mr. al Bahlul's military commission directed the undersigned, detailed defense counsel, to address the issues of an accused's right to self-representation and counsel of his own choice in the context of military commissions. This Memorandum is provided in accordance with that direction.

2. Facts.

During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him. Instead, he stated that he intended to represent himself before the commission. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel. The Chief Defense Counsel denied the request to withdraw on 26 April 2004. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2). See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*"). The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18. Mr. al Bahlul went on to state that if he is prohibited

from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

3. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings. ICCPR, Article 14(3)(d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct

his own defense."[1] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[2]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

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[1] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure. Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

[2] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm).

Id. at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." The Law of Lawyering, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d);

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[3] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[4]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States.[5] Furthermore, the President has

[3] Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 1, infra.
[4] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 2, infra.
[5] http://www.unhchr.ch/pdf/report.pdf

ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, 2002 edition, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

4. Attached Files.

A. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

UNITED STATES	)	
	)	ANSWERS TO THE PRESIDING
v.	)	OFFICER'S QUESTIONS ON THE ISSUE
	)	OF SELF-REPRESENTATION
ALI HAMZA SULEIMAN AL BAHLUL	)	
	)	
	)	October 25, 2004

The following is the Prosecution's responses to the Presiding Officer's questions concerning self-representation.

a. **A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.**

In our proposed Protective Order, the Accused is entitled to see FOUO and Law Enforcement Sensitive information that is considered protected information. We intend to introduce a lot of this form of protected information, but it should not create any issues with respect to the Accused's access and preparation.

Depending on the Accused's theory of the case, the Prosecution may introduce a limited amount of classified (and thereby protected information) in either the case in chief or in rebuttal. The Accused would not be entitled to see unsanitized versions of this information.

b. **The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)**

LCDR Sundel and Major Bridges are the counsel detailed to this Commission. Until relieved by competent authority, they are to continue to represent the Accused to include during any voir dire. They have previously asked to be relieved by competent authority (Chief Defense Counsel), and that request was denied.

To ensure that ethics issues are not problematic, the Presiding Officer and or Commission as a whole should order that LCDR Sundel and Major Bridges represent the Accused through voir dire and other preliminary matters. This is consistent with Navy JAGINST 5803.1B Rule 1.16(c) which states that "when ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation." This is consistent with the ABA Model Rules.

Our situation is unique as the Commission as a whole is the finder of fact and law. In a traditional situation, the Accused is represented by detailed counsel during the colloquy used to determine if the accused qualifies for self-representation. This colloquy is normally only conducted in the presence of the judge.

The Prosecution believes that Detailed Defense Counsel should represent the Accused during voir dire and through the colloquy. At that point, the Commission can decide if they desire to certify this issue as an interlocutory question. If they decide not to, then current Commission Law prevails and the Accused is not entitled to represent himself. If the question is certified as an interlocutory question, and if rules are amended to permit self-representation, the Accused should be provided the opportunity to conduct additional voir dire in his capacity as a pro se defendant.

It is noteworthy that "the right to self-representation complements the right to counsel and is not meant as a substitute thereof." M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 283 (1993).

c. **Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. al Bahlul?**

This issues appears either moot or at a minimum not yet ripe for discussion. The Appointing Authority has already stated his position that "official orders appointing replacement commission members for the cases of . . . United States v. al Bahlul will be issued at a future date." We desire to reserve comment until these official orders are issued.

d. **Is self-representation required in order to provide Mr. Al Bahlul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?**

The Prosecution's position is that current Commission Law does not permit self-representation. The sole basis for certifying this as an interlocutory issue is the requirement that a full and fair trial be provided. Based upon the case law identified in the submissions of both the Prosecution and the Defense, there appears to be no precedent for denying the opportunity to represent oneself (where standby counsel are also appointed), and therefore we believe self-representation is necessary for a full and fair trial unless and until the Accused forfeits this opportunity.

e. **Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?**

Yes. As previously discussed, these detailed counsel are to represent the Accused until relieved by an appropriate authority. Even in cases where pro se representation is permitted, the detailed counsel remain on the case until the colloquy is conducted where the accused demonstrates that he is capable of self representation.

As it is the Prosecution's position that a colloquy should also be conducted, the Accused will be provided an opportunity to put on the record his position as to whether he desires to engage in self-representation and this will be part of what is forwarded to the Appointing Authority should it be certified.

The discussion of McKaskle v. Wiggins below demonstrates the active role that a standby counsel can engage in even against the wishes of the accused. More on point is the case of Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel, (ICTY Order of May 9, 2003). In this case, the Trial Chamber held that things are examined on a case by case basis and that even in the case of an accused desiring no assistance and wanting to proceed pro se (accused was a qualified lawyer), it was appropriate to assign counsel in the interest of justice. Id. at para 20. Permitting counsel to represent such an accused in some capacity may be necessary for a "fair trial which is not only a fundamental right of the accused, but also a fundamental interest of the Tribunal related to its own legitimacy." Id. at para 21. Similarly, Detailed Defense Counsel in this case should zealously represent this Accused unless the Accused is permitted to engage in some form of self-representation. Absent this requirement, the Prosecution contends that a full and fair trial for the Accused may be jeopardized.

f. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?**

Until this issue is formally resolved either through a Commission decision, or the certification of an interlocutory question, the Detailed Defense counsel should argue for self-representation on the Accused's behalf. Examining ABA Defense Counsel Standard 4-5.2, while not specifically mentioned, the desire to engage in self-representation appears to be the type of decision that belongs to the Accused and is not a strategic or tactical decision that belongs to counsel. Furthermore Rule 1.2(c)of the Rules of Professional Responsibility states that a "covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, **choice of counsel**, forum, pleas, whether to testify, and settlements.

g. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?**

The hypothetical is not the situation at hand. Detailed Defense Counsel have been filing correspondence for months stating that they believe the Accused is entitled to represent himself.

It is recommended that the Commission should not exceed the scope of the question with regard to these particular facts in resolving this issue.

h. **Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.**

At the outset, the Accused must be told that there may be closed sessions involving classified information and that he will not be able to be present at these sessions. Absent an affirmative understanding and acknowledgement of this condition, the Accused should not be permitted to represent himself. Furthermore, he should be reminded of his decision to engage in self-representation and its impact each time we going into a protected session where the Accused cannot be present.

While not directly applicable, under the Classified Information Procedures Act (CIPA), court sessions involving classified information are routinely held outside the presence of the accused. 18 U.S.C. app. 3 (1980); United States v. bin Laden, 2001 U.S. Dist Lexis 719 (S.D.N.Y. 2001). In the bin Laden case the defendants were not given security clearances and were denied access to the relevant classified information in the case.

Standby counsel in this case should be required to represent the Accused's interests at any closed session where the Accused is not present. Part of this representation should include advocating for redacted or sanitized versions of the classified documents that can then be provided to the Accused. To the extent not requiring the disclosure of classified information, the Accused should also be involved in this process. In bin Laden, a defendant argued that his Sixth Amendment right was violated because his attorneys could not effectively confront the evidence against him without his input. Id. The court held that mere speculation on this issue would not override the compelling interest to protect classified information. Id. The Prosecution can state in good faith that it does not intend to introduce more than a few pages of classified information against the Accused, and depending on the Accused's strategy, there may be no need to introduce any classified information.

The Moussaoui case demonstrates that such closed sessions can be held with the absence of a pro se defendant who is not being cooperative with his standby counsel. In the context of an al Qaida member charged with a conspiracy to commit acts of terrorism transcending national boundaries, it was held that the interest of the United States in protecting national security information outweighed the pro se accused's desire to review the information. United States v. Moussaoui, 2002 U.S. Dist. Lexis 16530 (E.D. Va. August 23, 2002)

i. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how would they communicate with Mr. Al Bahlul?**

The Commission could rule that standby counsel are required and could order the Chief Defense Counsel to appoint standby counsel. The Commission is permitted great discretion in defining the role of standby counsel. A starting point would be to ask the Accused how he

prefers to communicate with standby counsel. Regardless, standby counsel would need to be present at all stages in the proceedings and available to perform any and all functions the Commission deems appropriate for a full and fair trial mindful of the fact that the Accused be permitted to represent himself both in fact and in appearance.

The Military Commission is unique in having the entire panel as finders of fact and law. Throughout any commission trial, they will be exposed to a variety of evidence they would not ordinarily see and arguments they would not ordinarily hear if solely finders of fact. While it is true that the greater role of standby counsel is at times justified because they perform actions outside the presence of the jury, the Commission system is built around experienced, proven officers who must be entrusted to maintain the perspective that the Accused is making his own trial decisions. Furthermore, the Supreme Court has ruled that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary. McKaskle v. Wiggins, 465 U.S. 168, 181 (1984)

In McKaskle, standby counsel were quite active as they frequently expressed their views to the judge, made motions, dictated proposed strategies into the record, and registered objections to the prosecution's evidence. Id at180. There were even open disagreements between the accused and his standby counsel. Id. at 181. However, the trial judge cautiously and correctly was quick to opine that any conflicts between the tactical calls of the accused and standby counsel would be resolved in favor of the accused. Id.

In McKaskle, the Supreme Court saw a more active role for standby counsel as needed for a just trial. The Court specifically reversed the judgment of a lower court that had held that "standby counsel is to be seen and not heard" and that his "presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Id. at 173.

The Supreme Court specifically said that there is no infringement of pro se rights when standby counsel assists in: (1) helping to overcome routine procedural or evidentiary obstacles; (2) assisting in the introduction of evidence; (3) helping to object to evidence the accused clearly does not want admitted; and (4) ensuring the accused complies with basic courtroom protocol and procedure. Id. at 183. What is clear is that the accused's lack of desire for standby counsel is not a "free pass" for standby counsel to abandon playing an important and significant role in the trial.

The Seselj Trial Chamber has provided excellent guidance on the role of standby counsel that should be the Commission's starting point in defining this role. It includes requiring standby counsel to:

(1) assist the accused in pretrial preparation when requested by the accused;

(2) assist the accused in presentation of the trial case when the accused requests;

(3) receive copies of all court filings and discovery;

(4) be present in the courtroom for all proceedings;

(5) be actively engaged in substantive preparation of the case;

(6) address the Court when requested by the accused or Trial Chamber;

(7) offer advice or suggestions to the accused when they see fit;

(8) question protected or sensitive witnesses when so ordered; and

(9) take over representation if accused forfeits ability to proceed pro se.

j. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?**

The majority of the evidence is FOUO or Law Enforcement sensitive and the Accused is entitled to see this evidence. If it is classified, the Standby counsel would have to view it on the Accused's behalf, and consistent with the Accused's interests, they could represent the Accused in a quest to obtain declassified sanitized versions of the evidence.

k. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?**

The Accused should maintain the relationship he has with his current translator and this translator should be available to either read or translate documents for the Accused as the Accused deems necessary for him to adequately represent himself. There is no independent burden on the Prosecution to translate every document.

l. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?**

No. Consistent with Moussaoui and other cases, one does not get access to classified evidence or evidence he is otherwise not entitled to see simply because he engages in self-representation. As the case law holds, so long as the Accused is informed up front of the limitations he will experience should he desire to pursue self-representation, it is completely permissible to have standby counsel represent his interests with respect to this evidence.

m. **Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahlul is not a witness?**

The standard for admissibility is does the evidence have probative value to a reasonable person. If in the course of engaging in self-representation the Accused says something that has probative value to a reasonable person in relation to this case, it qualifies as admissible evidence. Just as the Accused has previously made admissible incriminating statements on the record, his self-representation does alter his status and provide him greater protection.

n. **Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?**

At the time of this filing, I have not resolved this issue with JTF GTMO personnel. We will continue to pursue an answer.

o. **Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.**

Not aware of any at this time.

XXXX
Commander, JAGC, U.S. Navy
Prosecutor

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	**PROSECUTION RESPONSE TO DEFENSE MEMO FOR SELF-REPRESENTATION AND RIGHT TO CHOICE OF COUNSEL** 1 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Prosecution joins the Defense in their implied requested relief to amend Commission Law and permit the Accused to represent himself in these Commission proceedings conditioned upon standby counsel being appointed. Standby counsel need to be available to:

a. Assist the Accused in his Defense consistent with the desires of the Accused;
b. Represent the Accused at closed sessions involving classified or otherwise protected information;
c. Take over the representation should the Accused forfeit his right to represent himself.

3. Agreed Upon Facts. The Prosecution does not dispute the factual assertions contained in the Memorandum of Law submitted by the Defense on 2 September 2004.

4. Additional Facts. Mr. al Bahlul appeared before the Military Commission on 26 August 2004. During this appearance, the following was established:

a. The Accused clearly stated that he wished to represent himself before the Military Commission (transcript pages 6-7);
b. Other than his refusal to rise when the Commission members entered and exited the courtroom, the Accused was respectful during the Commission proceedings (see transcript in its entirety);
c. The Accused is 36-years-old and has 16 years of formal education (transcript page 12);
d. The Accused stated clearly that while under no pressure from the American government, he wanted to state that he is an al Qaida member (transcript page 14);
e. The Accused gave his word that he would not be loud or disruptive and that he would not make inflammatory statements if permitted to represent himself (transcript page 16).

5. Legal Authority.

a. Military Commission Instruction No. 4
b. Military Commission Order No. 1
c. Farretta v. California, 422 U.S. 806 (1975)
d. Brady v. United States, 397 U.S. 742 (1970)
e. United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)
f. McKaskle v. Wiggins, 465 U.S. 168 (1984)
g. United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002)
h. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991)
i. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987)
j. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000)
k. Patterson v. Illinois, 487 U.S. 285,299 (1988)
l. Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998)
m. United States v. Lane, 718 F.2d 226, 233 (1983)
n. United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999)
o. Illinois v. Allen, 397 U.S. 337 (1970)
p. United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001)
q. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
r. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998)
s. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972)
t. Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990)
u. President's Military Order of November 13, 2001, Section 4(c)(2).
v. Haig v. Agee, 453 U.S. 280, 309-10 (1981)
w. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring)
x. McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985)
y. Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984)
z. Prosecutor v. Vojislav Seselj, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003
aa. Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000
bb. Rule for Court-Martial 502
cc. United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000)
dd. United States v. Steele, 53 M.J. 274 (2000)
ee. Frazier v. Heebe, 482 U.S. 641, 645 (1987)
ff. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976);
gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976);
hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).
ii. Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B

6. Analysis

a. Current Military Commission Law Does not Permit Self-representation

Military Commission Instruction (MCI) No. 4 clearly delineates that an accused cannot represent himself before a Military Commission. Section 3(D) (2) of this Instruction states that "Detailed Defense Counsel shall represent the Accused before Military Commissions" and that counsel "shall so serve notwithstanding any intention

expressed by the Accused to represent himself." While not worded as unambiguously or as strongly, Sections 4(C) (4) and 5(D) of Military Commission Order (MCO) No. 1 do nothing to contradict MCI No. 4.

The Prosecution concurs with the analysis of the Chief Defense Counsel in his Memorandum of 26 April 2004 where he denied the Defense Counsel's request to withdraw from representing Mr. al Bahlul (Attached).

The Prosecution joins the Defense in their prior request that the Military Commission Instructions be amended to permit self-representation. As will be discussed in detail below, such an amendment will align Commission practice with U.S. Domestic and International Law standards.

b. There is a Right to Self-representation under United States Domestic Law.

Although not binding on Commission proceedings, the right to self-representation is recognized under United States domestic law and in other judicial systems and there are compelling reasons to permit self-representation at Commission trials.

The United States Supreme Court has recognized that a criminal defendant has a Constitutional right to represent himself in a criminal proceeding. Farretta v. California, 422 U.S. 806 (1975). A defendant may waive his right to counsel so long as the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S. 742 (1970); Johnson v. Zerbst, 304 U.S. 458, 468 (1938); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel. McKaskle v. Wiggins, 465 U.S. 168 (1984); United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence in capital case against express wishes of defendant).

Mr. al Bahlul has 16 years of formal education and demonstrated that he is very articulate and intelligent during his preliminary hearing. He did express that he only had a rudimentary understanding of the English language. Regardless, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal training or language abilities. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original).

c. A Detailed Inquiry is Required Before Self-representation is Permitted

In United States Federal District Courts, a detailed inquiry of the defendant is required before he is permitted to represent himself. Singleton, 107 F.3d at 1096. If *pro se* representation is permitted before a Military Commission, this safeguard should also be adopted.

An effective assertion of the right of self-representation "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). To constitute a knowing, intelligent and voluntary waiver, the defendant must be aware of the disadvantages of self-representation. Patterson v. Illinois, 487 U.S. 285,299 (1988); see e.g., Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramifications of self-representation).

An important facet of making a knowing, intelligent and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, the Seventh Circuit held in United States v. Lane, that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited legal access to research facilities away from the prison in which he was detained. 718 F.2d 226, 233 (1983). This inquiry is of significant importance in this case as Mr. al Bahlul does not possess nor will he qualify for the required security clearance necessary to review certain classified materials that have already been provided by the Prosecution as part of the discovery process.

Based upon prior admissions to investigators as well as his own assertion during his initial hearing before the Commission, the Accused is an al Qaida member. He has previously stated that he fully supports Usama bin Laden's *fatwa* calling for the killing of American civilians. He has stated that all those killed in the World Trade Center on September 11th were legitimate targets. He has further admitted to pledging *bayat* to Usama bin Laden and stated that he joined al Qaida because he believed in the cause of bin Laden and the war against America. He acknowledges that he will kill Americans at the first opportunity upon release from detention.

It is clear that under these unique circumstances, measures must be taken to safeguard information in the interests of national security. The investigation of al Qaida and its members is an ongoing endeavor and the concerns over the premature or inappropriate disclosure of classified information are heightened. See United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) (government's terrorism investigation ongoing thereby increasing possibility that unauthorized disclosures might place additional lives in danger). The accused must fully comprehend the limitations required due to national security concerns and give an affirmative waiver with respect to these limitations before being permitted to proceed *pro se*.

The Prosecution has provided a proposed colloquy as an attachment to this response. While we acknowledge that a colloquy was commenced during the Accused's

initial hearing before the Commission, we feel that there must be a more in-depth inquiry before the Accused could qualify to engage in self-representation.

d. The Right to Self-representation is not Absolute and Can Be Forfeited

The Supreme Court in Farretta held that the right to self-representation is not absolute and may be forfeited by a defendant who uses the courtroom proceedings for a deliberate disruption of their trial. 422 U.S. at 834; McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (defendant forfeits right to represent himself if he is unable or unwilling to abide by the rules of procedure or courtroom protocol); Illinois v. Allen, 397 U.S. 337 (1970); United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (right to self-representation forfeited when right being asserted to create delay in the proceedings). The right of self-representation is not "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834 n.46. Forfeiture of the right to proceed *pro se* occurred recently in the high visibility prosecutions of Zacarias Moussaoui (inappropriate and disruptive behavior) and Slobadan Milosevic (Milosevic case being tried before International Criminal Tribunal for the former Yugoslavia (ICTY) and right was forfeited based on poor health of Milosevic). See Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).

Based on his demonstrated behavior at his initial hearing as well as his personal promise on the record, the Accused appears willing to abide by courtroom rules and protocol. There is currently no indication that the Accused's approach to his self-representation will change. However, should he become disruptive, the Commission and/or Appointing Authority should not hesitate to revoke his ability to proceed *pro se*. The Commission should be positioned to be able to continue the Commission trial if things change and the Accused proves to be unable to represent himself. For this and other reasons discussed below, standby counsel should be appointed.

e. Standby Counsel Should be Appointed

Once a court has decided to allow a person to proceed *pro se*, the court may, if necessary, to protect the public interest in a fair trial, appoint standby counsel. McKaskle, 465 U.S. at 173. Once standby counsel are appointed, trial courts are given broad discretion in delineating their responsibilities and defining their roles. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998). This may be done over the objection of the defendant. McKaskle, 465 U.S. at 184. Clear in all cases where standby counsel are present, is the notion that such counsel must be prepared to step into the representative mode should the defendant lose the right of self-representation. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972). The only limitation to the role of standby counsel is that the participation cannot undermine the right to self-representation or the appearance before the jury as one who is defending himself. McKaskle, 456 U.S. at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990). They have assisted with other substantive matters throughout the trial. McKaskle, 465 U.S. at 180 ("Counsel made

motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.").

Standby counsel cannot however interfere with the defendant's control of the case. They may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

The appointment of standby counsel is crucial in this case because of the interplay of classified material with this prosecution. While the Prosecution does not intend to admit any classified evidence as part of its cases on the merits or sentencing, classified materials have been provided as part of the discovery process. Standby counsel would be needed to review such information and make appropriate motions pertaining to such information. Such motions may include requests for unclassified summaries of the information they deem pertinent that could then be provided to the Accused.

In the Federal system, the role of standby counsel with respect to classified information is less intrusive to the accused's right of self-representation because such issues are normally resolved outside the presence of the jury. As the entire Commission panel is both the finder of fact and law, trial sessions dealing with issues involving classified information may be conducted in the Accused's absence before the entire Commission panel. See President's Military Order of November 13, 2001, Section 4(c)(2).

Members of this Military Commission were chosen based upon their experience and maturity. They have all had command as well as combat experience. They will already be involved in the litigation of motions and will be exposed to evidence they otherwise would not have seen had they solely been traditional finders of fact. Any impact that exposure to standby counsel litigating classified matters on the Accused's behalf will certainly not outweigh the benefit to the Accused of meeting his desire to proceed *pro se*.

While the right of self-representation is universally recognized, "it is not a suicide pact." Haig v. Agee, 453 U.S. 280, 309-10 (1981). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the Accused's ability to represent himself in this case. Cf. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). What is of the utmost importance is that the Accused be advised of these lawful limits before he waives his right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; - McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) (court must be satisfied accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel"). If the Accused can show that he fully understands that he will not have access to classified information and he voluntarily continues to assert his desire for self-representation, he should be permitted to proceed *pro se*.

In summary, standby counsel should be appointed regardless of the Accused's desires. They are needed to assist the Accused consistent with his desires, represent the Accused on matters related to classified information and be prepared to assume full representation should the accused forfeit his right to represent himself.

f. Right of Self-representation under International Law

The Prosecution agrees with the Defense assertion that the right of self-representation is fully recognized under International Law. The Prosecution does contend that the Defense Memorandum is at times misleading as it implies that various international treaties **mandate** this Commission to permit self-representation. They fail to note that with respect to many of the treaties they mention, the United States is either not a party, or did not ratify these documents. See, Additional Protocol I to the Geneva Conventions; American Convention on Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms.

With respect to the International Covenant on Civil and Political Rights (ICCPR), the United States has signed and ratified this treaty. However its applicability and binding effect on the United States is not as simple and straightforward as the Defense opines. A lengthy discussion on this issue is unnecessary at present as the Prosecution believes that the right to self-representation should be provided to give what has been recognized as a fundamental right both domestically and internationally.

g. Standby Counsel and Forfeiture of the Right to Self-representation are Recognized Under International Law

In Prosecutor v. Vojislav Seselj, the ICTY recognized that a counsel can be assigned to assist an accused engaging in self-representation on a case by case basis in the interests of justice. "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003 paras 20-21. Noting that the right to self-representation is a starting point and not absolute, the Tribunal asserted its fundamental interest in a fair trial related to its own legitimacy in justifying the appointment of standby counsel. Id.

The recognition of the appropriateness of imposition of defense counsel on an accused was emphasized in a decision of the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000 para 24. Similar to our present case, Barayagwiza instructed his attorneys "not to represent him in the courtroom" and as a result they initially remained passive and did not mount a defense. Id. at para 17. These attorneys requested to withdraw from representation and their request was denied by the Trial Chamber. Id. at paras 17-20. Viewing the accused's actions as a form of protest and an attempt to obstruct the proceedings, counsel were deemed to be under no obligation to follow the accused's instructions to remain passive. Id. at paras 21-24. In his concurring opinion, Judge Gunawardana opined that the counsel should more appropriately be classified as "standby counsel" whose obligations were not just to protect the interests of the accused, but also the due

administration of justice. Barayagwiza, Concurring and Separate Opinion of Judge Gunawardana (relying on Article 20(4) of the ICTR Statute).

h. The Accused's Alternative Request to be Represented Exclusively by an Attorney from Yemen should be Denied

Section 4(C)(3)(b) of MCO No. 1 requires a civilian attorney representing an accused to be: (1) a United States citizen; (2) admitted to practice law in a State, district, territory, or possession of the United States, or before a Federal court; (3) has not been subject to any sanction or disciplinary action . . . (4) has been determined eligible for access to SECRET information; and (5) agrees in writing to comply with all regulations or instructions for counsel. It is clearly evident that a Yemen citizen attorney who is not eligible to practice law in the United States does not meet these criteria.

Additionally, the Accused's first fallback request is not in accord with Section 4(C)(3)(b) of MCO No.1 as his request for representation is conditioned upon his current detailed military Defense Counsel having absolutely no role in his representation. This conflicts directly with MCO No. 1 where it states that representation by a Civilian Defense Counsel will not relieve Detailed Defense Counsel of their duties specified in Section 4(C)(2). Similarly, even a cleared Civilian Counsel is not guaranteed the ability to be present at closed Commission proceedings. MCO No. 1 Section 4(C)(3)(b); MCI No. 4, Section 3(F).

There are sound reasons for the requirements imposed on civilian counsel. As explained by the Presiding Officer in the Accused's initial hearing, there is great importance in counsel having expertise in military law, military terminology, and the ability to argue by analogy to federal, U.S. military and international law (transcript pages 7-9). Furthermore, as already demonstrated by the Defense's attempt to utilize a non-citizen interpreter in this case, it can take upwards to a year (if ever) to do the background investigation necessary for an appropriate security clearance to be granted. Several months have already been lost in the trial preparation process awaiting the granting of this clearance (which has still not been obtained). Protocol and procedures cannot be disregarded when it comes to national security. The time commitment for obtaining a security clearance would not be consistent with Section 4(A)(5)(c) of MCO No. 1 where the Presiding Officer is tasked to ensure an expeditious trial where the accommodation of counsel does not delay the proceedings unreasonably.

In the court-martial setting, Rule for Court-Martial 502(d)(3) requires that a civilian counsel representing an accused be "[a] member of the bar of a Federal court or of the bar of the highest court of a State." Absent such membership, the lawyer must be authorized by a recognized licensing authority to practice law and must demonstrate to the military judge that they have the demonstrated training and familiarity with criminal law applicable to courts-martial. RCM 502(d)(3)(B). For practical purposes, the civilian counsel must in fact be a lawyer who is a "member in good standing of a recognized bar." United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000). The Prosecution is unaware of any caselaw questioning the propriety of these conditions. The decisions of military and other federal courts reflect that admission to practice is a

necessary indicia that a level of competence has been achieved and reviewed by a competent licensing authority. United States v. Steele, 53 M.J. 274 (2000).

The United States Supreme Court has held that federal district courts can regulate the admission of people to its own bar so long as these regulations are consistent with "the principles of right and justice." Frazier v. Heebe, 482 U.S. 641, 645 (1987). Greater approval is given to regulations restricting outside attorneys coming into other "state" courts as opposed to other federal courts as the laws and procedures may differ substantially from state to state. Id. at 647. These differences in laws and procedures are of even greater significance in our case as the laws of Yemen differ dramatically from our laws and procedures. Depending on the qualifications of the yet unnamed proposed attorney from Yemen, it may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused. A right to such representation is not recognized in U.S. domestic law. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976); United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).

Part C of the Defense Memorandum appears to merge the concept or entitlement to self-representation with the entitlement to having another individual who does not meet the court's requisite qualifications represent the Accused. These two concepts require distinct analysis as the right to self-representation has an independent source in the structure and history of the Constitution. No such independent source can be found for the alleged right to the assistance of a non-qualified lawyer. Kelley, 539 F.2d at 1202.

The limitations of MCO No.1 with respect to requiring counsel to be a U.S. citizen are narrowly drawn. If the Accused truly desires an attorney from Yemen to play a role in strategizing for his Commission trial, this individual can be requested as a "foreign attorney consultant." Requests for "foreign attorney consultants" have been requested in two of the other three currently pending Commission cases and these requests have been granted. To date, the Accused has not submitted any such request.

7. Conclusion. Current Military Commission Law does not permit the Accused to represent himself. Absent an amendment to current Commission Law, the Detailed Military Defense Counsel should be ordered by the Commission to represent the Accused. See Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B (Professional Responsibility Instruction which requires continued representation when ordered by a tribunal or other competent authority notwithstanding good cause for terminating the representation).

The Prosecution believes that an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with the standards established for United States domestic courts as well as under Customary International Law.

Exclusive representation by a yet unnamed attorney from Yemen should not be permitted. Military Commission Law does not permit this and Commission Law is narrowly tailored in this regard to promote national security as well as the "principles of

right and justice." Any request for a Yemen attorney to act as a foreign attorney consultant should be looked upon favorably assuming all preconditions are met.

8. Attached Files.

   a. Chief Defense Counsel Memorandum dated 26 April 2004
   b. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
   c. Proposed colloquy.

XXXX
Commander, JAGC, USN
Prosecutor

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant.	)	

ORDER

Before the Court are the pro se defendant's pleadings docketed as #s 1116 and 1117. Read generously, Docket # 1116 is a request for a copy of the classified report of Congress concerning September 11th, and Docket # 1117 is a request for reconsideration of the Order of October 2, 2003, which imposed sanctions on the government and is presently the subject of an interlocutory appeal.

On November 5, 2003, the Court stayed all further action in this case, to conserve resources while the appeal is processed. By a separate order issued on November 5, 2003, Mr. Moussaoui was placed on clear notice that he faced sanctions, including losing his right to represent himself, if he filed "further frivolous, scandalous, disrespectful or repetitive pleadings," or violated any Court orders. By a letter dated November 7, 2003, the Court informally reminded Mr. Moussaoui of the sanctions he faced if he continued to send such writings to the Court.

Pleadings #s 1116 and 1117 violate the two orders of November

5, 2003. First, they ask for relief after the Court made clear that all action in this case was stayed. Second, Docket # 1116 asks for relief to which the defendant knows he is not entitled. Specifically, the defendant has been advised on numerous occasions that he cannot have access to classified material. Docket # 1117 merely expresses the defendant's dissatisfaction with the October 2, 2003 Opinion. It offers no new evidence or argument, and is therefore cumulative of what defendant has previously filed. Third, both pleadings include contemptuous language that would never be tolerated from an attorney, and will no longer be tolerated from this defendant.

Based on the defendant's repeated violation of orders of this Court, he has forfeited his right to represent himself any further in this case. For these reasons, it is hereby

ORDERED that the Order issued on June 14, 2002, granting defendant's request to represent himself be and is VACATED; and it is further

ORDERED that standby counsel are appointed as counsel of record for the defendant. The Court will only accept for filing pleadings submitted by counsel of record. Anything submitted to the Court by the defendant will simply be received for archival purposes, with a copy sent only to defense counsel.

If defendant wants to appeal this decision, he must file a

written notice of appeal within ten days with the Clerk of this Court.

The Clerk is directed to forward copies of this Order to counsel of record and the defendant.

Entered this 14th day of November, 2003.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

GENERAL ADVICE TO MR. AL BAHLUL
(Assumes a right to self-representation is recognized)

Mr. al Bahlul, you may waive your right to counsel and represent yourself, but only if you meet certain requirements. In particular, if you want to represent yourself, you must make a request to do so that is (1) clear and unequivocal, and not for purposes of delay or manipulation; (2) knowing, intelligent and voluntary; and (3) timely.

I will only permit you to represent yourself if you tell me you want to do so clearly and unequivocally. If you do not do that, then you will be represented by your Detailed Military Defense Counsel or any other counsel you may be entitled to under Military Commission Law.

Your request for self-representation must be knowing, intelligent and voluntary. I want you to understand the consequences of your decision and what is at stake here. You must know what you are doing and make your choice with your eyes open.

You are facing a very serious charge that could potentially result in your being confined for the rest of your life if you are convicted. Defending against this charge will require significant legal work, and require familiarity with Commission Law, United States federal and military law, and International Law. Defending against this charge will require the filing of legal motions; examining potential Commission Members to ensure they will be fair and impartial in deciding your case; making objections during the course of the trial; cross-examining witnesses; calling witnesses as part of your defense; making an opening statement; and making a closing argument.

All of these things are usually better done by a lawyer than a lay person, because the lawyer is specially trained to do them and has special knowledge of, and experience with, the substantive and procedural rules of law. Obviously there will be serious consequences if your defense is mishandled here. Moreover, because you are currently detained, your lawyers may have better and easier access to witnesses who may be of help to you. You will not have unlimited access to legal research materials or to telephones. Nor will you have access to visitors other than your counsel. You will also not be allowed to travel to any locations outside the detention camp where you are being held or the courtroom to conduct the examination of witnesses.

In addition, you will not be given access to classified materials as you do not have the proper security clearance to review such items. Nor will you be given access to other sensitive documents I find the disclosure of which would jeopardize public safety. However, as I will discuss in greater detail in a few minutes, I will appoint what is known as "standby counsel," who have the necessary security clearance to review classified materials. These counsel may make any legal motions regarding the classified materials, subject to your approval.

It is almost always a good idea for a defendant in a criminal case to have a lawyer. I do not, however, want you to take these warnings or anything else I am saying as any kind of threat, or as a suggestion that I or the other Commission Members will be disposed against you if you

decide to represent yourself. The choice is entirely yours, so long as you make it in a knowing, intelligent and voluntary fashion, with a proper understanding of what is at stake. I am only trying to ensure that you make an informed decision.

If you decide to represent yourself, I will appoint what is called a "standby" counsel to assist you. You will still largely control the presentation of your case, but you will have lawyers available to explain to you the details of courtroom protocol and the rules of procedure. The standby lawyers will be there to help you during the pretrial stage to investigate the facts and the law, identify possible defenses, and suggest appropriate motions to file. During the trial, they will be there to provide help in introducing evidence and objecting to testimony, and will be available to take over if I find that for some reason you have lost your entitlement to self-representation. Standby counsel are there to assist, but will not be permitted to interfere with your control of the case, with a few exceptions that I will discuss shortly.

You do not have a right to reject these standby lawyers. If you decide to represent yourself, you will have standby counsel. However, even with standby counsel, you will still largely control the presentation of your case to the Commission. You will have the right to control the organization and content of your own defense, to make motions, to argue points of law, to participate in voir dire, to question most witnesses, and to address the Commission at appropriate points in the trial. Standby counsel may express disagreement with your decisions, but must do so outside the Commission's presence. You ultimately retain final authority over the case. Of course, you will have to do all of these things within the limits set by rules of courtroom procedure and other Commission Law.

If you do not waive your right to counsel and you are represented by a lawyer, then the lawyer will conduct your defense: you will not be permitted to examine witnesses, offer evidence, address me or the other Commission members directly or perform any of the attorney's core functions in the courtroom. You will of course be permitted to remain in the courtroom during all unclassified portions of your trial – provided as always that you maintain proper decorum. If you are represented by a lawyer, your only public speaking role would arise if you decided to testify, in which case you would answer the specific questions posed by your lawyers, the prosecutors, and the Commission Members. Again, if you are represented by lawyers, then it is the lawyers, and not you, who will conduct the defense.

If you decide to represent yourself, you will not be treated any differently than any other defendant and the Review Panel will not treat your case any differently. If you make the decision to represent yourself and you make mistakes, you are not going to be able to come back and complain about those mistakes. You will have accepted responsibility for them.

There are some other things you should know. If you do choose to represent yourself, you must understand that it does not give you a license to abuse the dignity of the courtroom, or a license to violate the relevant rules of procedural and substantive law. You must always abide by courtroom protocol and maintain proper decorum, and you may not improperly disrupt the proceedings. If you deliberately engage in serious and obstructionist misconduct, I will terminate your self-representation and you may forfeit your right to remain in the courtroom for the rest of your trial.

In a moment, I will ask you questions so that I can learn a little more about your background, education, job experience, knowledge of English and familiarity with military and International law to determine if your decision today is made knowingly and voluntarily. I will also inquire as to your current physical and mental health to assure myself that your judgment today is not clouded.

COLLOQUY

1. When were you born?
2. Where were you born?
3. Where were you raised?
4. Describe your education?
5. Describe your work experience?
6. What languages do you speak?
7. What is your understanding of the English language?
8. How did you learn English?
9. Have you ever studied law?
10. What system of law did you study?
11. Are you familiar with International Law?
12. How did you gain this familiarity?
13. Have you reviewed the Military Commission Orders and Instructions?
14. Do you feel that you understand the information in these documents?
15. Do you understand that if you represent yourself, the Commission will not tell you how to try your case or give you advice on how to try your case?
16. Are you aware that there may be classified materials involved in this case?
17. Do you understand that you will not be permitted to see these materials and that you will have to rely on your standby counsel, after consultation with you, to represent your interests with respect to these materials?
18. How is your physical health?
19. Are you currently on any medications?
20. How is your mental health?
21. Do you feel you are in need of any psychiatric care?
22. Has anyone threatened you or made any promises to you that have influenced your decision to want to represent yourself?
23. Do you understand that you are charged with the offense of conspiracy?
24. What is your understanding as to what a conspiracy is?
25. Do you understand that you have the right to be represented by your Detailed Military Counsel?
26. Do you understand you have the right to request that a different Military Counsel represent you?
27. Do you understand that assuming they meet criteria of the Military Commission instructions, you can be represented by a civilian counsel at no expense to the United States government?
28. Do you understand that your choice as to who represents you is solely your choice and that the court will not be biased against you regardless of your decision?
29. Do you understand that if you choose to represent yourself, you will have standby counsel appointed?
30. Do you understand that even with standby counsel you will still largely control the presentation of your case?
31. If you are represented by a lawyer, do you understand that the lawyer, and not you will conduct your defense and that you will not be permitted to be an advocate in the courtroom?

32. Do you understand that if you represent yourself and you elect to testify, you will be subject to cross-examination by the Prosecution?
33. Do you understand that if you represent yourself, there may be limits to your access to legal research materials and to visitors, as well as to your use of the telephone and mail system?
34. Do you understand that if you are convicted, you may receive a sentence up to and including spending the rest of your life in confinement?
35. Do you understand everything I have just explained to you?
36. Do you have any questions?
37. Do you still wish to represent yourself?
38. Do you feel you can adequately represent yourself?
39. Are you making this decision to represent yourself of your own free will and voluntarily?

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 05-071
Tuesday, January 18, 2005

MISCELLANEOUS DOCKET - SUMMARY DISPOSITIONS

Misc. No. 05-8021/AR. Ibrahim Ahmed Mahmoud AL QOSI, Presumptive Prisoner of War, Guantanamo Bay, Cuba, Detainee, Petitioner, v. John D. ALTENBURG, Appointing Authority, Colonel Peter BROWNBACK, Presiding Officer, and the United States, Respondents. Notice is hereby given that a petition for extraordinary relief in the nature of a writ of prohibition and writ of mandamus was filed under Rule 27(a) on January 12, 2005, and placed on the docket this date. In addition, Petitioner has filed a motion to attach documents and a motion to submit a corrected page.

On consideration of these pleadings, we note that: (1) Petitioner states that he has been designated as subject to trial before a military commission; (2) Petitioner previously filed a petition for extraordinary relief in the United States District Court for the District of Columbia asking for relief similar to the request in the present petition; (3) that petition remains pending before the District Court; (4) in a separate case involving a different detainee, Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C. 2004), the District Court has ordered relief for that detainee substantially similar to the relief requested by Petitioner; (5) the Government has appealed the District Court's decision in Hamdan to the United States Court of Appeals for the District of Columbia Circuit; and (6) Petitioner states that the commission proceedings in his case, as well as in three other cases, are being held in abeyance, by order of the Appointing Authority, pending the outcome of the appeal in Hamdan.

In view of the pending appeal in Hamdan and Petitioner's related proceeding in the United States District Court for the District of Columbia, and as a matter of comity, see Justiniano v. Nickels, 49 M.J. 47 (C.A.A.F. 1998)(summary disposition), it is premature for this Court to reach a decision with regard to jurisdiction or the merits of this petition.

Accordingly, it is ordered that Petitioner's motion to attach documents and motion to submit a corrected page are

hereby granted; and that said petition is hereby dismissed without prejudice. [See also MISCELLANEOUS DOCKET – FILINGS and INTERLOCUTORTY ORDERS this date.]

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re **IBRAHIM AHMED MAHMOUD AL QOSI** Presumptive Prisoner of War, Guantánamo Bay Cuba Detainee, *Petitioner,* v. The Honorable **JOHN D. ALTENBURG,** Appointing Authority for the Military Commissions; Col (O-6) **PETER BROWNBACK,** Presiding Officer of the Military Commission; and **THE UNITED STATES OF AMERICA,** *Respondents.*	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION AND WRIT OF MANDAMUS USCA Misc. Dkt. No. _____

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Preamble

In the first military commission of its kind, the United States seeks to try a presumptive prisoner of war for an alleged violation of the law of war. In so doing, the United States violates constitutional, international, and military law, and subverts the Uniform Code of Military Justice. This Court, the highest military tribunal in the land, should bring this unlawful process to an end.

Petitioner Ibrahim Ahmed Mahmoud Al Qosi, who shortly begins his fourth year of captivity at Guantánamo Bay Cuba, prays for a writ directing Respondents (1) not to try him before the currently structured military commission and (2) mandating

that Respondents institute rules and procedures for the military commission that are not "contrary to or inconsistent with" those of the UCMJ.

I. Statement of Statutory Jurisdiction

Through the All Writs Act, 28 U.S.C. §1651(a), this Court can "entertain original petitions for relief including … writs of mandamus [and] writs of prohibition …." Rule 4(b), Rules of Practice and Procedure, Court of Appeals for the Armed Forces. Specifically, this Court may take action "to grant extraordinary relief in aid of its jurisdiction, including the exercise of supervisory powers over the administration of the UCMJ." Rule 5, Rules of Practice and Procedure, Court of Appeals for the Armed Forces.

Here, the jurisdictional question is inextricably intertwined with the substantive one. Whether this Court has the power to provide for the requested relief depends on whether this Court otherwise would have the power to consider Petitioner's issues in the normal course of appellate review under the UCMJ.

This is so because in *Clinton v. Goldsmith*, 526 U.S. 529, 533 (1999), the Supreme Court limited this Court's ability to turn to §1651(a) to broadly administer the application of military justice. But the Supreme Court did not so limit that ability when the very heart of this Court's mandate--protection

of the UCMJ itself--is at stake. *See Noyd v. Bond*, 395 U.S. 683, 695 (1969)(in this Court "Congress has confided primary responsibility for the supervision of military justice in this country and abroad."); *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)(noting that *Goldsmith* involved an amendment to a statute outside the UCMJ and indicating that *Goldsmith* does not circumscribe the Court's ability to collaterally review imposition of punishment under the UCMJ). When the UCMJ is at stake, §1651(a) is merely the mechanism by which this Court can exercise its jurisdiction and protect the UCMJ from subversion in a military-criminal proceeding.

If Petitioner were an American service member or POW, then there would be little dispute that the military appellate courts have jurisdiction to review his criminal prosecution, either directly or through collateral review. Articles 2(1) and 2(9) subject service members and POWs to the UCMJ, and thus direct review is available through its articles (59-76b) and collaterally under §1651(a).

If Petitioner is not a POW, he still is a person who is subject to the UCMJ (Article 2(12)) being prosecuted in a system which cannot by design or application be "contrary to or inconsistent with" the UCMJ. *See* Article 36; §VII(B), *infra* (the substantive argument). The UCMJ gives the military appellate courts jurisdiction to review findings and sentences

of cases that arise under it. It is true that the Presidential Military Order that created the military-commission system attempts to sidestep this, or any, independent review. *See* App. A (at §7(b)) of Motion to Attach Documents.[1] But in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the Supreme Court effectively invalidated that prohibition by allowing federal collateral review to proceed. The rationale for entertaining Petitioner's claims here is the same--the historic ability of the courts to review matters within their jurisdictions.

In the normal case, when the United States in its prosecution of an American service member substantially diverts from its obligations under the UCMJ, the military appellate courts have the power and obligation to step in to remedy the error. The obligation and the legal basis for doing so is the same in this case. This Court has jurisdiction to provide for the relief requested.

II. Reasons Relief Not Sought Below

The power to empanel and administer the military commission is vested directly in the Secretary of Defense, rather than a particular service component, and he exercises that power through Respondents. As the rules and procedures of the military commissions must comport with the UCMJ, and as this

[1] Submitted the same day as this Petition, the Motion to Attach Documents (hereinafter MTAD) indexes the documents relevant to the issues presented. All references to "App." herein are to documents indexed in the MTAD.

Court holds "supervisory power[] over the administration of the UCMJ," it appears to be the military appellate court of first and last resort.

III. History of the Case

On 13 November 2001, the President issued an executive order titled *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (herein President's Military Order or PMO). *See* MTAD App. A. Besides indefinite detention of purported members of al Qaeda (aka "enemy combatants"), the PMO authorizes trials by military commission for any purported al Qaeda member that the President believes has violated the "law of war."

Petitioner is a citizen of Sudan who was detained in Pakistan near the Afghanistan border in late 2001. Since early 2002, he has been held as an enemy combatant at the United States Naval Station Guantánamo Bay, Cuba.

On 3 July 2003, the President designated Petitioner as eligible for trial before military commission. *See* MTAD App. B. On 28 June 2004, the Appointing Authority (AA) referred a charge of conspiracy to engage in illegal activities, including "terrorism," against Petitioner. The AA also appointed six military-officer members to Petitioner's military-commission panel, to include a judge advocate to serve as Presiding Officer. *See* MTAD App. C.

The first hearing took place on 27 August 2004. At that time, Petitioner was not arraigned and did not enter a plea. Rather, the Presiding Officer confirmed the status of Petitioner's legal representation and set an 8 December 2004 trial date. *See* MTAD App. D. Subsequently, without explanation and over defense objection, the Presiding Officer extended the trial date to 8 February 2005. *See* MTAD App. E.

On 8 November 2004, Petitioner filed a Petition for Writ of Mandamus in the United States District Court for the District of Columbia. Petitioner seeks relief both from his indefinite detention as an enemy combatant, and his prosecution by military commission. *See* MTAD App. F.

On the same date, on a similar petition (*i.e. Hamdan v. Rumsfeld*), a District Court judge ruled that some aspects of the military commission process were unlawful--including some of those challenged herein. *See* MTAD App. G. The Government appealed and arguments are set for 8 March 2005. The Government's primary argument is abstention; that under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the federal courts should not entertain habeas petitions by military prisoners until all available military remedies have been exhausted. See MTAD App. H. On 10 December 2004, the AA put all military commissions into abeyance pending the outcome of this federal appeal. *See* MTAD App. I.

IV. Relief Sought

Petitioner respectfully requests that this Court issue a writ prohibiting Respondents from trying him in the currently constituted military commission and requiring Respondents to institute rules and procedures for the military commission that are not "contrary to or inconsistent with" those of the UCMJ.

V. Issues Presented

A. WHETHER THE UNITED STATES CAN SUBJECT PETITIONER TO TRIAL BEFORE THIS MILITARY COMMISSION WHEN (1) A COMPETENT TRIBUNAL HAS NOT DETERMINED HIS STATUS UNDER THE GENEVA CONVENTIONS; (2) THIS MILITARY COMMISSION IS NOT LAWFULLY CONSTITUTED; AND (3) THIS MILITARY COMMISSION, AS STRUCTURED, DENIES EQUAL PROTECTION UNDER THE LAW.

B. WHETHER THE RULES AND PROCEDURES OF THIS MILITARY COMMISSION MUST CONFORM TO THE UNIFORM CODE OF MILITARY JUSTICE.

VI. Statement of Facts

On 18 September 2001, Congress passed a resolution authorizing the President to "use all necessary and appropriate force" in response to the 9/11 attacks. Joint Resolution 23, Authorization for Use of Military Force (herein AUMF), Pub. L. 107-40, 115 Stat. 224 (2001); *see* MTAD App. J. In early October 2001, the President sent United States Armed Forces into Afghanistan to attack al Qaeda and dislodge the Taliban regime that supported it. Within three months, our forces defeated the

Taliban and detained hundreds of people thought to be members of the Taliban or al Qaeda.

Petitioner was one such person. In December 2001, he was detained in Pakistan near the Afghanistan/Pakistan border and turned over to our forces in Afghanistan. After approximately two weeks in Afghanistan, he was transported to Guantánamo Bay, Cuba, where he is presently imprisoned as an enemy combatant.

The United States Government asserts that enemy combatants fall into a special category to which the minimum protections of the Geneva Conventions do not apply--these individuals are not considered prisoners of war nor civilians and the United States denies them rights available under constitutional, international, or military law. *See* MTAD App. K.

The "rights" for enemy combatants charged with war crimes flow from the *ad hoc* rules of the military-commission system. *See* MTAD App. L. In this system, a civilian designee of the Secretary of Defense (the AA), brings the charges and empanels a military commission. The AA appoints three to seven military officers (O-4s and higher) to a military commission and these members collectively decide all issues of law and fact. The judge advocate member, the Presiding Officer, has no greater say than any other member in deciding what the law is. There is no "appellate review"; post-trial review is accomplished through a

DoD-appointed "Review Panel," with final disposition in the hands of the President.

Petitioner entered this system on 3 July 2003 with the Presidential finding. In January 2004, his jailors separated Petitioner from the other Guantanamo Bay detainees and placed him into solitary confinement in a holding area for "pre-Commission detainees." *See* MTAD App. M. In February 2004, the United States Government detailed military defense counsel to represent him and counsel began preparing Petitioner's many defenses. *See* MTAD App. N. At that time, the AA gave notice of its intent to charge Petitioner with the newly created war crime of conspiracy to engage in, among other things, terrorism. On 30 June 2004, the AA formally referred that charge.

The AA did so the day after the Supreme Court decided the "enemy combatant" cases. In those cases, the Supreme Court approved federal-court jurisdiction to consider challenges of enemy combatants to the legality of their detentions.[2] In response, the United States created Combatant Status Review Tribunals (herein CSRT). In these proceedings, the only determination to be made is whether the detainee was properly classified originally as an enemy combatant; during the CSRT "process," the detainee is presumed to be an enemy combatant and

[2] *See Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2636 (2004); *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004).

the Government's "evidence" in this regard is presumed correct. *See* MTAD App. O.

In late September 2004, Petitioner's CSRT went forward without him, with the result to date undisclosed. Given his continued captivity, Petitioner expects he was found to be an enemy combatant. Petitioner continues to demand speedy trial before a lawful tribunal.

VII. Reasons Why Writ Should Issue

Petitioner seeks relief to prevent the miscarriage of justice that is occurring in the *ad hoc* military commission at Guantánamo Bay. This miscarriage of justice results from Respondents' efforts to try him without a preceding determination by competent tribunal of his status under the Geneva Conventions, by a military-commission process that lacks legislative authority, that treats him worse than persons similarly situated, and that subverts the UCMJ.

A. The United States Cannot Subject Petitioner To Trial Before This Military Commission

(1) A competent tribunal has not determined Petitioner's status under the Geneva Conventions

Every person detained in an "armed conflict," of any kind, has a status under the Geneva Conventions.[3]

[3] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 (herein Geneva III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (herein Geneva IV).

> [A detainee] is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. … There is no intermediate status; nobody in enemy hands can be outside the law.

MTAD App. P (International Committee of the Red Cross, Geneva IV, *Commentary*, Art. 4, at 51). Geneva III details the protections afforded a prisoner of war (herein POW). Article 5 of Geneva III requires presumptive POW status when there is "any doubt" as to that status.

> Should <u>any doubt</u> arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a <u>competent tribunal</u>. (emphasis added).

Army Regulation (AR) 190-8 specifies, in precise detail, how a competent tribunal makes such an Article 5 determination and the different kinds of status that can be given to a detained person other than POW. *See* MTAD App. Q.

Until a competent tribunal determines to the contrary, however, a detained person is considered a POW and is entitled to the protections of Geneva III. While these protections may seem quaint to some, most are fundamentally important when a Detaining Power attempts to prosecute a POW for "war crimes." These rights include, but not limited to the following:

(a) **Speedy Trial**: Under Article 103 of Geneva III, Petitioner is entitled to be tried within three months. The

President designated him for trial 17 months ago (July 2003), he was moved into "pre-Commission" detention 12 months ago (January 2004), and the current charge was referred 6 months ago (June 2004). The Respondent AA has now indefinitely delayed the trial. The United States has denied Petitioner his right to speedy trial under Geneva III.

(b) **UCMJ:** Under Article 102 of Geneva III, Petitioner is entitled to a process that mirrors that which United States service members charged with similar crimes would receive. Such service members would be subject to court-martial (or trial in federal district court) for war-crimes charges. In a court-martial (or federal criminal court), the accused is protected by rules that provide fundamental and familiar judicial guarantees. Not only does the military-commission system ignore such rules (*i.e.* the UCMJ), its *ad hoc* rules differ in fundamental and important ways from the same (*see* §VII(B)). This denies Petitioner the procedural protections he is entitled to by virtue of Geneva III.

(c) **Appellate Review:** Under Article 106 of Geneva III, if convicted and sentenced, Petitioner should be entitled to the *same* appellate process that United States service members similarly convicted and sentenced would receive. Petitioner should receive appellate review in the military system to this Court or through the federal court system. By subjecting

Petitioner's "appeal" to a DoD-beholden Review Panel, the United States will deny him the appellate protection he should be entitled to by virtue of Geneva III.

The United States Government violates this international law because it has never subjected its detention of Petitioner to an AR 190-8 tribunal. By executive fiat it has simply presumed him to be an enemy combatant and unilaterally decided that an enemy combatant can never be a POW. This does not satisfy United States' obligations under international law or military regulation.

Furthermore the CSRT does not satisfy these obligations. While the procedures are somewhat similar between the two, the possible determinations the two tribunals can make are substantially different. The AR 190-8 tribunal can, without presumption to any, determine that the detainee is a POW, Retained Person, an innocent civilian, or a civilian internee, *see* AR 109-8, ch. 1-6(e)(10)(a)-(d), while the CSRT makes essentially one determination: whether the detainee, who is presumed to be an enemy combatant, is an enemy combatant.

A detained person is not required to assert protection under Geneva in order to be entitled to it--on this point, he or she can remain silent. Rather, the burden is on the Government to establish, in a competent tribunal, the detained person's status.

That it has not done here. And that it must do because the circumstances of Petitioner's capture raise at least a reasonable inference that he is entitled to presumptive POW status. Petitioner was detained in Pakistan near the border, during a period of United States' military operations in the area. The United States asserts that he was present in Afghanistan during the applicable period of time. It asserts that he is a member of "al Qaida," which was fighting alongside the Taliban in Afghanistan when the United States began offensive operations. In these circumstances, there is at least some doubt as to Petitioner's status, and therefore the United States must establish it through a competent tribunal to be in compliance with international and military law.

Therefore, having failed to provide a competent tribunal to determine Petitioner's status, the Respondents cannot try him outside the protections of Geneva III. As the Respondents threaten to do just that, this Court should prohibit them by issuing the requested writ.

(2) This military commission is not lawfully constituted

Even if the United States can try Petitioner on war-crimes charges, it cannot try him by this military commission. The United States may try Petitioner only in a lawfully constituted court. This military commission is not lawfully constituted.

Article I, section 8 of the United States Constitution vests in Congress the exclusive power to set up courts inferior to the Supreme Court. International agreements to which the United States is a party, and those that express customary international law, require that criminal prosecutions take place only before "regularly constituted courts" or "tribunals established by law."[4]

Congress has not authorized the currently structured military-commission system by any express statutory authorization. Rather, in the preamble to the PMO, the President claims power to convene the military commissions through two acts of Congress: (a) the 18 September 2001 AUMF Resolution; and (b) Articles 21 and 36 of the UCMJ.

(a) AUMF Resolution: This does not contemplate military commissions. Nothing in the text or scant legislative history gives even a hint that the Congress intended to cede its court-making power under Article 1, §8 to the President. Rather, the AUMF Resolution's intent was to give the President authority consistent with the War Powers Resolution (herein WPR) to use military force--the WPR requiring periodic Congressional

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[4] These include: Common Article III, §1(d) to each of the Geneva Conventions; International Covenant on Civil and Political Rights, Article 14.1, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 75(4), June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977).

approval of the use of military power in absence of a declaration of war. Congress expressly noted this limitation in the AUMF Resolution itself:

> Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

By conditioning the AUMF Resolution by reference to the WPR, Congress demonstrated that when it intends to cede its Article I, §8 power to the President (such as the power to declare war), it does so expressly and conditions this grant. While Congress did this with regard to its power to declare war, it did not with its court-making power.

The Supreme Court's interpretation of the AUMF Resolution in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), likewise evidences the limited ceding of power it represents. The Supreme Court merely found that detention of "enemy combatants" was a so "fundamental and accepted incident to war" that Congress must have considered that detention as part of the all-necessary-and-appropriate-force language of the AUMF Resolution. The object of "detention" was "to prevent a combatant's return to the battlefield," for a period of time until he is "exchanged, repatriated, or otherwise released." 124 S.Ct. at 2460. In this context, nothing suggests that this "detention" equals trial.

Thus, nothing expressly in the AUMF Resolution, nor implicitly from the power it gives the President, is a congressional exercise under Article I, §8. The AUMF Resolution does not authorize this military commission.

(b) UCMJ: Neither Article 21 nor Article 36, explicitly or implicitly, provides Congressional authorization for ceding court-making power to the President. Article 21 is merely negative, providing that the jurisdiction of courts-martial does not deprive a military commission of jurisdiction over offenders or offenses that it, "by statute or by the law of war," may otherwise have. And Article 36, rather than establishing requirements for the appointment, composition, jurisdiction or procedure of military commissions, instead delegates to the President the ability to define procedures for military commissions--procedures that "may not be contrary to or inconsistent with this chapter."

In fact, the only legislation Congress has enacted relating to the subject-matter jurisdiction of military commissions involves two articles of the UCMJ--Article 104 (aiding the enemy) and Article 106 (spying). But these statutes do not authorize military commissions themselves; they merely allow otherwise properly created military commissions to try these offenses. They are conclusory--they give power to a military

commission that is already authorized by Congress. There is no such authorization here.

Petitioner's military commission is not the result of any legislative process; there has been no congressional debate, no reflection, no consideration of views, and no consensus that the President can have unfettered power to establish a court with rules vastly inconsistent with the UCMJ, court-martial system. This military commission, lacking express Congressional authorization, is not a lawfully constituted court that can try alleged violations of the law of war.

Courts-martial and federal district courts, on the other hand, are "regularly constituted courts" and "tribunals established by law." Congress established them through detailed legislation--legislation that provides for their funding, organization, rules and procedures, and legislation that limits the discretion of the Executive Branch to only prosecution; not to judge, jury and (potentially) executioner as is the Executive's power in this military commission.

This military commission is not a lawfully constituted court. A court-martial is a lawfully constituted court. Respondents can try Petitioner in the latter, not the former. Either the United States (1) follows the Congressionally approved military-commission system (instituting rules and procedures that comport with the UCMJ), or it (2) obtains

Congressional approval to create an entirely new court system based on something other than the established rules and procedures of the UCMJ.[5] Until Respondents accomplish the second option, this Court should prohibit them from prosecuting Petitioner in this military commission by issuing the requested writ.

(3) This military commission, as structured, denies equal protection under the law.

By expressly applying military commissions to "non-citizens" only, the United States has created a system that is separate but not equal. While convenience may require such unequal treatment, the law does not allow it. The Fourteenth Amendment provides that the government shall not deny "any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amend. XIV. The Equal Protection Clause is "implicit" in the Due Process Clause of the Fifth Amendment and as such it is applicable in military prosecutions. *See United States v. Lugo*, 54 M.J. 558, 560 (A.F.C.C.A. 2000). Equal protection requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*,

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[5] Such an effort was made in the most recent Congress. The "Military Commissions Act of 2004," H.R. 5222, 108th Congress, 2d Sess. (introduced 5 October 2004), did not emerge from the House Committee on Armed Services. *See* MTAD App. R. The Act would have codified the PMO with important changes, including separating fact and law finding, prohibiting "secret" evidence, and expressly providing for appeal to this Court.

473 U.S. 432, 439 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

Certainly, there are circumstances when two people can be treated differently under the law. When a classification, such as here, is based on national origin, or affects a "fundamental right," strict scrutiny applies. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Graham v. Richardson*, 403 U.S. 365 (1971). Under strict scrutiny, the government bears the burden of proving that the classification is narrowly drawn to accomplish a compelling governmental interest. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). As the Supreme Court has noted: race or national origin are "seldom relevant to the achievement of any legitimate state interest" and, therefore, "are deemed to reflect prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne*, 473 U.S. at 440.

The United States has expressly discriminated between citizens and non-citizens in meting out criminal punishment here. While in the area of immigration the Supreme Court has permitted limitations on constitutional protections, it has never extended that permission to criminal prosecutions. The Supreme Court made this clear over one hundred years ago in *Wong Wing v. United States*, 163 U.S. 228 (1896). There, after noting that unequal treatment in violation of the constitutional

protection of the Fifth Amendment was permissible in deportation matters, the Supreme Court held that that permission ceased once the federal government attempted to impose criminal punishment: where Congress "sees fit to … subject … the persons of such aliens to infamous punishment," the ability to discriminate came to an end as "even aliens shall not be held to answer for a capital or other infamous crime" without the protections afforded citizens under the Fifth Amendment. *See Wong Wing*, 163 U.S. at 237-38. This rationale survives to this century. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 694 (2001)(citing *Wong Wing* for the rule that, in the context of "punitive measures … all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotation and citation omitted); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001)(it is settled that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.").

The heart of the problem here is this: Two people accused of doing exactly the same thing are treated differently, on the basis of national origin. An American enemy combatant charged with war crimes gets the full protections of a lawfully constituted American court to defend himself, while Petitioner struggles with the patent unfairness of this military

commission. This is not a hypothetical possibility, this is reality.[6]

Separate is certainly not equal in this situation. Even just a general overview of the two systems demonstrates the fundamental inequities:

CITIZENS [e.g. Lindh]	NON-CITIZENS [e.g. Petitioner]
- Incarceration in established facility	- Incarceration in make-shift facilities
- Independent and impartial court	- Executive-branch beholden
- Established & comprehensive court rules	- Sketchy and ever-changing ad hoc rules
- Formal Rules of Evidence	- "Probative value" standard
- Legally-trained judge decides all issues of law based on established principles and precedent	- Lay members vote on law, little precedent
- Jury: fair cross section, unanimous vote	- Stacked panel, 2/3rds vote
- Appeal to established, impartial, and independent court	- "Review Panel"; Executive-branch beholden

This does not withstand strict scrutiny analysis. The distinctions the United States has drawn with the military-commission system are in no way narrowly drawn to accomplish a compelling governmental interest. There is no plausible explanation why the diametrically opposed treatment of citizens and non-citizens is necessary to achieve the Government's "compelling interest," whatever that may be. The true answer may be the improper one--that the United States simply does not

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[6] *See United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va. 2002)(the "American Taliban" case). Many other citizens and non-citizens prosecuted during the War on Terror have had their cases adjudicated in United States Federal Court. *See, e.g., United States v. Bin Laden*, 132 F.Supp.2d 168 (S.D.N.Y 2001).

believe that the Guantanamo Bay detainees are "worthy or deserving" of equal justice under law. While popular opinion may support this view, the law does not. By issuing the requested writ prohibiting this military commission from going forward, this Court can ensure equal treatment under the law.

WHEREFORE, Petitioner respectfully requests that this Honorable Court issue a writ prohibiting this military commission from prosecuting him.

B. The Rules and Procedures of the Military Commission Must Comport with the UCMJ

Even if he is not protected under Geneva III, and even if this military commission is in some way lawful, Petitioner is still entitled to relief. He is entitled to a military commission that follows rules that are not "contrary to or inconsistent with" the UCMJ. The rules of this military commission are substantially "contrary to or inconsistent with" the UCMJ.

Article 36, cited by the President as authority for empanelling the military commissions, states:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district

courts, but which may not be contrary to or inconsistent with this chapter. (emphasis added)

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

Straightforward reading of Article 36 requires that all provisions of the UCMJ apply to this military commission. The plain language of Article 36 notes that it is subject to "this chapter." Article 36 is located in a "chapter" of the United States Code entitled "Uniform Code of Military Justice," which comprises 145 sections--18 U.S.C. §801-946.

More than that, this Court has long held that the whole panoply of rules of statutory construction applies when interpreting the UCMJ. In *United States v. Brinston*, 31 M.J. 222, 226 (C.M.A. 1990), this Court summarized these rules:

- legislative intent in enacting a statute should be gleaned from the statute as a whole rather than from any of its parts
- "the entire act must be read together because no part of the act is superior to any other part"
- "statutes in pari materia must be construed together."

Reading the UCMJ as a "coherent whole," being mindful that the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail requires finding that Article 36 encompasses rather than excludes all other articles.

This is in accord with long-standing military law. In *United States v Villasenor*, 19 C.M.R. 129 (C.M.A. 1955), the

Court held that any rule issued pursuant to Article 36 must not "offend against the Uniform Code, conflict with another well-recognized principle of military law, or clash with other Manual provisions." In essence, any rule issued pursuant to Article 36 must not be contrary to or inconsistent with any other provision of the UCMJ. *See also United States v Johnson*, 42 C.M.R. 66 (C.M.A. 1970)("Rules prescribed under [Article 36] have the force of law unless they conflict with other provisions of the Code or Manual or another recognized principle of military law.").

History also weighs in favor of such a reading. When Congress created the Judge Advocate General in 1862, it directed his office to receive, "for revision, the records and proceedings of all courts-martial and military commission." 12 Stat. 598, §5 (1862). The review procedure was identical for both. In 1916, in testifying on changes to Article 15 of the Articles of War (the precursor to Article 21 of the UCMJ, which the President also cites as authority for the PMO), Brig Gen. Crowder, former Judge Advocate General, noted that courts-martial and military commissions were intended to "have the same procedure." S.Rept. No. 130, 64th Cong., 1st Sess. 40 (1916).

Further, the Supreme Court long ago had occasion to consider whether courts-martial and military commissions were intended to follow the same procedural articles of the UCMJ. In

In re Yamashita, 327 U.S. 1 (1946), the Supreme Court was presented with essentially the same argument: *i.e.* that enemy combatants were entitled to application of the procedural provisions of the Articles of War during a post-World War II military commission. The Supreme Court held that they were not, because enemy combatants were not designated as persons to whom Article 2 of the Articles of War stated they applied. *Yamashita*, 327 U.S. at 20.

Under the same analysis, the opposite now holds true. Now, Article 2(12) of the UCMJ (the successor to Article 2 of the Articles of War considered in *Yamashita*) expressly enumerates Petitioner as the type of person who is subject to the UCMJ:

> persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary and which is outside the United States and is outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Article 2(12) describes persons detained at Guantánamo Bay. Any argument to the contrary ignores the plain language and the facts. In fact, in *Rasul v. Bush* the Supreme Court reviewed the unique status of the United States' lease on Guantanamo Bay and rejected the Government's argument that Guantanamo Bay was not part of the United States' territorial jurisdiction.

Thus, basic statutory construction, legislative history, and the Supreme Court's analysis in *Yamashita*, dictate that all

the procedural provisions of "this chapter" (the entire UCMJ), guide the military-commission context. Thus, all the *ad hoc* rules of this military commission must comport with the UCMJ; they must not be contrary nor be inconsistent with it. Essentially, if the UCMJ says something should or should not happen, then the military-commission rules should not say otherwise.

In fundamentally important ways, the rules of the military commission essentially do say otherwise. Those rules either directly contradict articles of the UCMJ, or are silent as to important equivalents. For example:

A service member placed in pretrial confinement has the right under the UCMJ to expedited notice of charges (Article 33), speedy trial (Article 10), protection from illegal punishment (Article 13), pretrial investigation of the charges (Article 32), and preferral and referral by a commissioned officer (Article 22). Military Commission Order No. 1 (*see* MTAD App. L) is silent as to these protections and the process to date has denied Petitioner each of them. It took months, if not years, rather than eight days to inform him of the charges. It is taking years to bring him to trial. He suffered month after month of solitary confinement while awaiting trial. He has not had a pre-trial investigation of the charge. A civilian outside

the military chain of command has charged him in a military court.

Should Petitioner's case ever proceed to trial, it will bear little resemblance to the type of fair trial demanded by the UCMJ. In a court-martial where members are empanelled, a qualified military judge decides questions of law outside the presence of the members and plays no part in the findings or sentencing deliberations (Article 16, 26, 39). There is no "judge" in the military-commission context. There is a judge advocate, who acts as Presiding Officer, but the members collectively decide all issues of law and fact.

And these members, rather than the "best qualified" officers available for a court-martial (Article 25), are limited to officers in the grade of O-4 or above, preferably with combat experience, who the AA determines to be "competent." MCO No. 1, 4(A)(3); *see also* MTAD App. S. Rather than a minimum of five such members (Article 16) with the prosecution and defense each having one preemptory challenge (Article 41), the military commission rules require only three members, with no preemptory challenges. *See* MCO. No. 1, 4(A)(2). While in a court-martial 3/4ths of these members would have to agree to a sentence in excess of 10 years (Article 52), only 2/3rds of military-commission members need agree to a sentence up to life. *See* MCO No. 1, 6(F).

There are many more examples of the substantial differences between the two systems. Article 31 prohibits compulsory self-incrimination while military commission rules allow coerced and unwarned statements. *See* MCO No. 1(5)(F). Article 42 requires all witnesses to take an oath before testifying while military commission rules do not. *See* MCO No. 1(6)(D). Article 39(b) requires the accused's presence during all evidentiary presentation while military commission rules exclude the accused and any civilian counsel from the presentation of some evidence. *See* MCO No. 1(6)(B) and (D). The UCMJ has already been subverted in a military criminal proceeding, continues to be subverted and nothing suggests this subversion will not intensify once trial begins.

WHEREFORE, if the current military commission goes forward, Petitioner respectfully requests that this Honorable Court issue a writ mandating that it do so only with rules that comport with the UCMJ.

C. Equity Demands That This Court Consider Petitioner's Claims

Extraordinary relief is equitable relief. It must be "necessary" and "appropriate," it is not an alternate to "other, adequate remedies at law." *Goldsmith*, 526 U.S. at 536. There must be good reasons for extraordinary relief, and here there are: A military commission, purportedly created under military

law, should be reviewed by a military appellate court. That review here can take place, essentially as a matter of law, before the steam roller of injustice totally flattens Petitioner. And as the Government in other forums argues federal abstention and exhaustion of "military remedies," resort to the highest military tribunal to exhaust those military remedies is of paramount importance.

VIII. Conclusion

It is no overstatement to say that this case presents some of the most important issues in the history of modern military law. Just as *Marbury v. Madison*, 5 U.S. 137 (1803), established the Supreme Court's power to "say what the law is," this case gives this Court the opportunity to do the same with the UCMJ and military law. Petitioner stands ready and looks forward to the opportunity to further brief and argue the important issues this petition can but briefly touch. We ask for that opportunity.

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Harvey, [redacted] Mr, DoD OGC

From: Harvey, [redacted] Mr, DoD OGC
Sent: Thursday, October 27, 2005 09:12
To: Swift, Charles, LCDR, DoD OGC; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: RE: Hamdan MFR

LCDR Swift,

The reason I provided an email to the Chief Defense Counsel and the Chief Defense Paralegal was to ensure that my emails are conveyed to the correct parties. They will have a much better idea of the current identity and location of the person(s) representing the accused. I plan to continue to CC the leadership of the prosecution too.

CCing the leadership of the defense and prosecution offices also assists them in being aware of the overall status of the cases.

Please do not consider my emails as a request for "supervision," representation, or as a complaint. But rather consider the emails as backup service--an extra safeguard for the rights of the accused.

Again, thanks for your comments. I will file this email in Volume III.

Mr. Harvey
Chief Clerk of Commissions

----Original Message-----
From: Swift, Charles, LCDR, DoD OGC
Sent: Thursday, October 27, 2005 08:35
To: Harvey, [redacted] Mr, DoD OGC; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: RE: Hamdan MFR

One comment initially is that Col Gunn is not the chief defense counsel; secondly since the Chief defense counsel is prohibited by instruction from representation why is he copied on the memorandums while the detailed defense counsel is not. As I understand the system the Chief prosecutors is prosecuting the case on behalf of the government but the Chief Defense counsel is not defending it on behalf of the accused but rather responsible for the detailing of counsel, ensuring their, adequate resources, observing their performance to ensure competent representation and the ethical compliance of both civilian and military defense counsel. Lastly Chief [redacted] vice MSGT [redacted] is the military paralegal for this case. MSGT [redacted] has no involvement.

V/r
LCDR Swift

-----Original Message-----
From: Harvey, [redacted] Mr, DoD OGC
Sent: Wednesday, October 26, 2005 18:49
To: Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Swift, Charles, LCDR, DoD OGC
Subject: Hamdan MFR

Sorry, forgot to change subject line.

-----Original Message-----
From: Harvey, [redacted] Mr, DoD OGC
Sent: Wednesday, October 26, 2005 18:48
To: Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] DoD OGC; Swift, Charles, LCDR, DoD OGC
Subject: RE: Military Commission Bailiff SOP

COL Davis or Mr. Swann or COL

The attached MFR will be filed in Volume III to indicate:

(1) service on the parties prior to posting on the DoD PAO website;

(2) the rationale for allied papers;

(3) the rationale for deleting personal information;

(4) to support the administrative completeness of the seven volumes of unredacted documents provided to the parties;

(5) the absence of objection to the matters included in the seven volumes of materials; and,

(6) the absence of objection to the matters to be posted on the DoD PAO website.

If any comments about the MFR are received from the parties, they too will be posted in Volume III.

Mr. Harvey

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CHIEF CLERK OF
MILITARY COMMISSIONS

October 26, 2005

MEMORANDUM FOR RECORD *United States v. Hamdan*

SUBJECT: Review of Redacted Record of Trial, and Delivery of Unredacted Paper Copy of Volumes VI* to XII* to the Parties

On October 3, 2005, the Prosecution and Defense were notified that the redacted record of trial (12 Volumes in total, 2 Volumes Sealed) in electronic format was available for their review on the Office of Military Commissions' S Drive.

On October 6, 2005, the Prosecution and Defense were served with an unredacted paper copy of the transcript and exhibits for the following sessions:

VI*	**Transcript (August 24 and November 8, 2004 sessions)**
VII*	**Review Exhibits 1-15 (August 24, 2004 session)**
VIII*	**Review Exhibits 21-29 (November 8, 2004 session)**
IX*	**Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)**
X*	**Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)**
XI*	**Review Exhibits 30-33 (November 8, 2004 session)**
XII*	**Review Exhibits 34-58 (November 8, 2004 session)**

The defense was served by delivery of the above listed seven volumes to the Office of the Chief Defense Counsel.

Objections to records. As of October 26, 2005, no objections were received pertaining to either the redacted or unredacted records.

Allied Papers. The Appointing Authority's memorandum, dated September 20, 2005 (Enclosure 3), authorizes assembly and filing of these

* **Interim volume numbers. Final numbers to be added when trial is completed.**

allied papers as an optional attachment to a record of trial. The Appointing Authority reasoned, "Optional allied papers should illuminate the processing of the case, explain any delays in processing of the charges, provide background information about the detainee, and assist future historical researchers."

Military Justice publications such as the Uniform Code of Military Justice, the *Manual for Courts-Martial* (*MCM*), Army Regulation (AR) 27-10, Military Justice, and Air Force Manual 51-203, Records of Trial do not address the issue of required military Commission records. These military justice references provide useful, non-controlling guidance about what is appropriate for inclusion as allied papers to a record of trial. Rule for Courts-Martial (R.C.M.) 1103(b), for example, lists the materials that "a complete record shall include." Included in this list are all the matters pertaining to the staff judge advocate's (SJA) post-trial recommendation and convening authority's action. R.C.M. 1103(b) also includes the Article 32 investigation, SJA's pretrial advice, deferment requests, and clemency recommendations as part of a complete record. AR 27-10, para. 5-40 adds a requirement to include pretrial confinement documents, including the magistrate's review, chronology documents, the SJA's checklist, and information about the location of confinement. Army practice is for the Office of the SJA (OSJA) to place other materials into the record, for example, most OSJAs include the Criminal Investigation Command or Military Police reports of investigation, civilian police reports and convictions, AR 15-6 reports of investigation, requests for discharge in lieu of trial, recommendations as to disposition of the charges, personnel records, unit counseling statements, disciplinary records from the confinement facility, trial counsel's report of result of trial, etc. After trial is completed, the clerk of the appellate court adds appellate briefs, decisions of appellate tribunals, decisions of the Review Board Agency, and documents showing where the accused can be served while on excess leave. The accused in the military justice system frequently exercises the option of filing other matters under the authority of *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which are included in the allied papers of the record of trial.

Air Force Manual 51-203, Records of Trial (1 October 1999) provides for a variety of materials that should be included in a record of trial (Enclosure 6). For example, item 20 lists the following pretrial allied papers:

a. First indorsement to DD Form 458, Charge Sheet, - the unit commander's transmittal of the charges to the special court-martial convening authority with a copy of the personal data sheet as an attachment.

b. Any other papers, indorsements, or investigations that accompanied the charges when referred for trial.

c. Article 34 pretrial advice of the Staff Judge Advocate.

d. Indorsement of convening authority to the pretrial advice.

e. Proof of Service of Article 34 pretrial advice on accused and defense counsel.

f. Pretrial Confinement proceedings, if any.

g. Withdrawn charge sheets, if any.

h. Other pretrial requests by counsel and the action taken thereon. Group the requests by subject area in chronological order, with the oldest on top to the most recent on the bottom. Subject areas include, but are not limited to, requests for delays, IMDC, mental health board reports, pretrial agreements, discharge in lieu of court-martial, witnesses, depositions, and immunity

i. Record of any former trial - include 2 copies of the promulgating order only. However, in cases involving a retrial, comply with paragraph 12.1. of this manual.

j. Miscellaneous pretrial related documents, when appropriate (i.e. writs, collateral litigation). [Note: It is not necessary to include the following items as allied papers in a ROT: Discovery requests/responses and court member selection documents (unless raised as an issue in a motion and not made appellate exhibits) and Congressional inquiries.

Attachments to this Memorandum. The Chief Clerk of Military Commissions (CCMC) memorandum concerning service of the redacted records is Enclosure 1. The CCMC memorandum concerning service of the unredacted seven volumes of paper records with one attachment is Enclosure 2. The Appointing Authority's memorandum of September 20, 2005, which on page 4 describes the "Service on the Parties," is Enclosure 3. The Appointing Authority's memorandum of June 30, 2005 which describes the service on the parties of records prior to posting on the Department of Defense Public Affairs web site is Enclosure 4. Department of Defense letters describing the requirement to redact sensitive and protected information is Enclosure 5. Air Force Manual 51-203, Records of Trial (1 October 1999), pages 14-18, which lists numerous items that may be included in allied papers is Enclosure 6.

Future Processing of Records. The only changes that will be made to the seven volumes provided to the parties prior to the CCMC's referral to the Appointing Authority for his certification under Military Commission Order No. 1, paragraph 6(H)(3) will be to finalize indexes so that they accurately reflect all materials in the record of trial, and to annotate the covers of the volumes to accurately reflect the number of the particular volume and the total number of volumes. Any additional authenticated transcripts, volumes and additional exhibits will be served on the parties.

These seven volumes will not be delivered to the Appointing Authority for his administrative review until the Presiding Officer authenticates the final trial session.

A copy of this memorandum will be filed in the allied papers in the Clerk of Military Commissions section and attached to the record of trial.

//Signed//

M. Harvey
Chief Clerk of
Military Commissions

6 Enclosures:
1. CCMC Memorandum of October 3, 2005 (2 pages)
2. CCMC Memorandum of October 6, 2005 (2 pages)
   with 1 Attachment: Index of Volumes (2 pages)
3. Appointing Authority Memorandum of June 30, 2005 (5 pages)
4. Appointing Authority Memorandum of September 20, 2005 (5 pages)
5. Three letters from the Department of Defense Office of Administration and Management: September 1, 2005 (2 pages); December 28, 2001 (2 pages), and November 9, 2001 (2 pages)
6. Air Force Manual 51-203, Records of Trial (1 October 1999), pages 14-18 (5 pages)

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

CHIEF CLERK FOR
MILITARY COMMISSIONS

October 3, 2005

MEMORANDUM FOR Detailed Defense Counsel
Detailed Prosecutor

SUBJECT: Review of Redacted Record of Trial, *United States v. Hamdan*

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

(b) Military Commission Order No. 1 (Aug. 31, 2005)

(c) Appointing Authority Memoranda (June 30, 2005 and Sept. 20, 2005) (Attachment 1)

(d) Office of Administration and Management, Office of the Secretary of Defense (September 1, 2005) with two attachments (Attachment 2)

This memorandum requests your comments in accordance with reference (c), prior to release of redacted, authenticated transcripts, exhibits and allied papers for posting on the Department of Defense (DoD) Public Affairs (PA) Web site.

Reference (a), para. 4.1.7 and reference (b), para. 6(B)(3), require that military commission proceedings be open to the maximum extent practicable, and para. 4.1.8 mandates "the public release of transcripts." Reference (b), para. 6(B)(3) authorizes the Appointing Authority to direct "public release of transcripts at the appropriate time."

Based upon the delegation of the Appointing Authority in reference (c), and references (a) through (d), I have determined that it is appropriate to release the attached transcripts, exhibits and other allied papers (Attachment 3) for posting on the DoD PA Web site. I have redacted sensitive information adversely affecting the personal privacy of the Commission members and Office of Military Commission personnel. I have also redacted the transcript pages marked "SECRET" by the court reporters, and the documents that the Presiding Officer ordered to be sealed.

Even if the classified pages were unclassified, portions of these classified transcripts would still be redacted to protect the identities of the commission members. I have also redacted information such as the names of translators and court reporters that the Presiding Officer ordered protected under reference (b), para. 6(D)(2)(d) and 6(D)(5).

The parties are required by reference (c) to "review these session transcripts, to ensure redaction of sensitive or protected information. If additional redactions are necessary, the parties will provide such redactions along with their reasons to the [me] within ten calendar days of receipt." I will then "make other redactions or changes as necessary and provide the redacted documents to the DoD PA for Web-posting."

If any discrepancies in the attached records are noted, please bring them to my attention. Subject to your objections, the attached documents at Attachment 3 are complete.

Subject to objection by the parties, I intend to provide a copy of the information that I eventually provide to the DoD PA to the parties, and to the Commission Trial Clerk, who will likely provide a copy to the Presiding Officer.

A copy of this memorandum with Attachments 1 and 2, as well as any response you provide will be placed into the volume labeled "DoD Litigation."

Thank you for your help with this requirement.

//Signed//

M. Harvey
Chief Clerk
of Military Commissions

CC
Chief Prosecutor and Chief Defense Counsel
Chief of Staff for Military Commissions
Commission Trial Clerk

3 Attachments
As stated

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CHIEF CLERK FOR
MILITARY COMMISSIONS

October 6, 2005

MEMORANDUM FOR Prosecutor, *United States v. al Hamdan*
Detailed Defense Counsel, *United States v. Hamdan*

SUBJECT: Review of Redacted Record of Trial by the Parties

Pursuant to the Appointing Authority's memorandum of September 20, 2005, page 4 "Service on the Parties," the Prosecution and Defense are hereby served with a copy of the transcript and exhibits for the following sessions:

VI*	**Transcript (August 24 and November 8, 2004 sessions)**
VII*	**Review Exhibits 1-15 (August 24, 2004 session)**
VIII*	**Review Exhibits 21-29 (November 8, 2004 session)**
IX*	**Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)**
X*	**Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)**
XI*	**Review Exhibits 30-33 (November 8, 2004 session)**
XII*	**Review Exhibits 34-58 (November 8, 2004 session)**

Subject to your objection(s), the only changes that will be made to these seven volumes prior to my referral to the Appointing Authority for his certification under Military Commission Order No. 1, paragraph 6(H)(3) will be to finalize indexes so that they accurately reflect all materials in the record of trial, and to annotate the covers of the volumes to accurately reflect the number of the particular volume and the total number of volumes. Any additional authenticated transcripts and additional exhibits will be served later.

These seven volumes will not be delivered to the Appointing Authority for his administrative review until the final session is authenticated by the Presiding Officer.

---

* **Interim volume numbers. Final numbers to be added when trial is completed.**

No response is required. If I do not receive any response in ten calendar days, I will assume these seven volumes are administratively complete.

You should retain these seven volumes. Should replacement be necessary your office will need to make the copies from the electronic versions that I will provide.

A copy of this memorandum, and any response received from the parties will be filed in the allied papers in the Clerk of Military Commissions section and attached to the record of trial.

//Signed//

M. Harvey
Chief Clerk of
Military Commissions

2 Attachments:
1. Seven Volumes of Records
2. Index of Volumes (2 pages)

United States v. Salim Ahmed Hamdan, NO. 040004

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions
IV*	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V*	Federal Litigation at U.S. District Courts
VI*	Transcript (August 24 and November 8, 2004 sessions)
VII*	Review Exhibits 1-15 (August 24, 2004 session)
VIII*	Review Exhibits 21-29 (November 8, 2004 session)

* **Interim volume numbers. Final numbers to be added when trial is completed.**

United States v. Salim Ahmed Hamdan, NO. 040004

INDEX OF VOLUMES

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** Interim volume numbers. Final numbers to be added when trial is completed.

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

JUN 30 2005

MEMORANDUM FOR CHIEF CLERK, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Duties and Responsibilities of Chief Clerk of Military Commissions

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

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

(c) Military Commission Order No. 1 (Mar. 21, 2002)

(d) Military Commission Instruction No. 8 (Aug. 31, 2004)

(e) Military Commission Instruction No. 9 (Dec. 26, 2003)

(f) Appointing Authority Regulation No. 2 (Nov. 17, 2004)

(g) Presiding Officer Memorandum 2-1 (July 19, 2004)

(h) Presiding Officer Memorandum 4-2 (Aug. 12, 2004)

(i) Presiding Officer Memorandum 13 (Nov. 22, 2004)

This memorandum describes the responsibilities of the Chief Clerk of Military Commissions (CCMC) at the trial level. The CCMC is responsible for: (1) acting as the custodian of records of trial for military commissions; (2) releasing properly redacted transcripts and exhibits for posting on the Department of Defense Public Affairs (DoD PA) Web site; (3) ensuring adequate preparation of the trial transcript, and that the record of trial is complete; (4) ensuring the professional appearance of the hearing room's interior; (5) designating spectator seating at the commission hearing (see

reference (b), para. 4.1.8); (6) providing translator and security classification services for commission sessions; (7) arranging for handling and storage of all classified documents on behalf of Presiding Officers; (8) sending administrative instructions from Presiding Officers to commission members as required; (9) issuing promulgating orders describing the results of trials; and (10) providing other necessary administrative support to Presiding Officers and/or commissions as directed by the Appointing Authority. The CCMC has discretion to delegate responsibilities to the Deputy CCMC. The first three items require additional explanation.

Custodian of records of trial. The CCMC will store original documents, tape recordings of proceedings and transcripts. The CCMC will create such copies as are necessary. Exhibits will not be removed from the hearing room without the permission of the Presiding Officer, and will be stored at the site where the military commission is meeting until the trial is completed. After the trial is terminated, the original documents will be moved to the Office of the CCMC at the letterhead address.

Releasing transcripts and copies of exhibits for posting on the DoD PA Web site.

(a) **Generally**. Reference (b), para. 4.1.7 and reference (c), para. 6(B)(3), require that military commission proceedings be open to the maximum extent practicable, and reference (b), para. 4.1.8 mandates "the public release of transcripts." Reference (c), para. 6(B)(3) authorizes public release of transcripts of open proceedings at the "appropriate time." The CCMC may act on behalf of the Appointing Authority in the release of transcripts and exhibits for posting on the DoD PA Web site. The CCMC will delay release of information when it will adversely affect the fairness of the proceeding. Sensitive information adversely affecting for example, personal privacy or national security, must be redacted from transcripts and exhibits prior to Web-posting. Information that the Presiding Officer orders protected under reference (c), para. 6(D)(2)(d) and 6(D)(5) will not be released to the public.

(b) **Release of unauthenticated transcripts**. Court reporters will electronically provide unauthenticated transcripts as well as tape recordings of the sessions to the CCMC as soon as practicable (ASAP). The CCMC will provide redacted, unauthenticated transcripts to the parties along with the reason(s) the CCMC redacted information from the unauthenticated transcripts ASAP. The parties will review the unauthenticated transcript, not for completeness or accuracy, but for redaction of sensitive information purposes. If additional redactions are necessary, the parties will provide such redactions

along with their reasons to the CCMC within 24 hours of receipt, or such time as the CCMC shall designate, whichever is later. Failure to meet the deadline established by the CCMC shall constitute waiver of the right to request additional redactions. The CCMC will make other redactions or changes as necessary and provide the redacted documents to the DoD PA for Web-posting. The parties will not further release redacted or unredacted, unauthenticated transcripts, but may direct requests for information to the DoD PA Web site. The DoD PA Website will prominently display the following disclosure:

> The following document is an UNOFFICIAL transcript of a military commission proceeding. The Presiding Officer has not reviewed it, and it may contain spelling, grammar, translation, and/or other errors. Do NOT consider it the official Record of Trial or rely on it for accuracy. Its sole purpose is to disseminate general information. The authenticated transcript of this hearing will be released at this web site after careful comparison with the tape recordings from the proceeding.

(c) **Release of authenticated session transcripts**. The CCMC will provide redacted, authenticated session transcripts to the parties along with the reason(s) the CCMC redacted information from these transcripts ASAP. The parties will review these session transcripts, to ensure redaction of sensitive or protected information. If additional redactions are necessary, the parties will provide such redactions along with their reasons to the CCMC within ten calendar days of receipt. The CCMC will make other redactions or changes as necessary and provide the redacted documents to the DoD PA for Web-posting. The DoD PA Website will prominently display the following disclosure:

> The following document is an OFFICIAL, authenticated session transcript of a military commission record of trial. A description of the matters deleted, and the reasons for such deletions, are attached after the authentication page, which is the last page of the transcript.

(d) **Release of copies of exhibits**. The process for motions filing is described in references (f) and (h). Commission Trial Clerk will provide electronic copies of motions, including attachments if any, to the CCMC ASAP. The CCMC will then redact necessary information and then provide the redacted documents to the parties along with the reason(s) the information was redacted. The parties will review the redacted documents and provide additional redactions or comments if any to the opposing party and to the CCMC. The parties may file additional comments to the same

addressees thereafter as they deem appropriate. The CCMC will make other redactions or changes as necessary and provide the redacted documents to the DoD PA for Web-posting after the Presiding Officer cites them at the hearing as a particular review exhibit.

Authenticating records of trial. Consistent with reference (c), para. 6(H)(1), and reference (i), Presiding Officers, court reporters, prosecutors and defense counsel will ensure that session transcripts are authenticated as rapidly as practicable after each trial session. Presiding Officers will transmit the authenticated sessions to the CCMC ASAP.

Relationship of CCMC with Presiding Officers. The CCMC will report to and work under the supervision of Staff Director, Office of Operations and Support, Office of the Appointing Authority for Military Commissions. The CCMC will not provide advice to Presiding Officers on procedures or other legal matters, but may discuss release of information to DoD PA, coordinate preparation of the record of trial, and discuss resolution of other issues directly related to the responsibilities in paragraph 1 of this memorandum. Until session transcripts are authenticated and delivered to the CCMC, control of, and authority to release, audio files or tape recordings pertaining to those sessions resides with the Presiding Officer even if the CCMC has physical custody of these items. A copy of audio files or tape recordings will be retained at the Office of the Appointing Authority until the session transcripts are authenticated. Requests for access to, or copies of, audio files or tape recordings prior to authentication of session transcripts will be initially directed to the Presiding Officer.

Relationship of CCMC with Commission Trial Clerk. The duties of the CCMC referred to Appointing Authority Regulation No. 2, para. 3 (17 Nov. 2004) are assumed by the Commission Trial Clerk.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

CC
Chief Prosecutor (COL Swann)
Chief Defense Counsel (COL Gunn)
Presiding Officer (COL Brownback)
Commission Trial Clerk (Mr. [redacted])
DoD Public Affairs Officer (Majo[redacted])

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

APPOINTING AUTHORITY
FOR MILITARY COMMISSIONS

SEP 20 2005

MEMORANDUM FOR CHIEF CLERK, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Duties and Responsibilities of Chief Clerk of Military Commissions-Records Proceedings and Allied Papers

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

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

(c) Military Commission Order No. 1, current edition

(d) Military Commission Instructions No. 8 and 9, current editions

(e) Appointing Authority Regulation No. 2, current edition

(f) Appointing Authority Memorandum, June 30, 2005 (Encl)

(g) Presiding Officer Memoranda (POM) 4-2, 8, 13, and 14, current editions

This memorandum provides instructions concerning preparation and service of session transcripts, records of Commission trial proceedings, records of Commission proceedings, and allied papers as well as retention of tape recordings of trial sessions.

Definitions. Reference (c), paragraph 6(H)(1) provides: "Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial."

A "record of Commission trial proceedings" consists of the record of trial plus additional exhibits to include all Review Exhibits marked by the Presiding Officer (or with his permission,) and prosecution and defense exhibits offered but not admitted.

A "record of Commission proceedings" consists of a record of Commission trial proceedings plus allied papers. Allied papers will be added by the Chief Clerk of Military Commissions (CCMC) in accordance with this memorandum.

Processing records of Commission proceedings.

(1) After the Presiding Officer authenticates the record of trial under reference (c), paragraph 6(H)(1), the Presiding Officer will forward the record of Commission trial proceedings to the CCMC, who delivers it to the Appointing Authority.

(2) After the Appointing Authority certifies the record of trial is administratively complete under reference (c), paragraph 6(H)(3), and reference (d), Military Commission Instruction No. 9, paragraph 4(C)(3), the record of Commission proceedings is transmitted to the Review Panel.

(3) Reference (c), paragraph 6(H)(4) and reference (d), Military Commission Instruction No. 9, paragraph 4(C)(3) lists the materials the Review Panel shall consider and has discretion to consider. Additionally, the Review Panel has discretion to consider other allied papers included in the record of Commission proceedings.

During sessions of the Commission, unclassified exhibits shall be maintained by the Commissions Trial Clerk in coordination with the CCMC. When the Commission is not in session, these exhibits shall be maintained by the CCMC. The CCMC and the Commission Trial Clerk shall arrange for copies of any exhibits that the Presiding Officer may need for periods when the Commission is not in session.

The CCMC is authorized to add documents as "allied papers" as it is processed to final action. The CCMC shall file documents in the allied papers based on the guidelines and instructions in this memorandum.

Required Allied Papers. Allied papers shall include the promulgating order, the final order, referral documents, charge sheets, documents showing service of records on the parties, any errata submitted

by the parties, authentication documents, memoranda certifying that records are complete, transmittal documents, briefs filed by the parties for consideration by the Commission and Review Panel, the decision of the Review Panel, matters considered by the Appointing Authority in nominating and selecting the Presiding Officer and members of the Commission, transmittal documents, and the President or designee's final decision on the case. Clemency recommendations endorsed to the CCMC by detailed military defense counsel will also be included in the allied papers. The CCMC will also include any objections to the contents of the allied papers submitted by the parties. Documents that are exhibits in the record of trial need not be replicated in the allied papers.

Optional Allied Papers. Optional allied papers should illuminate the processing of the case, explain any delays in processing of the charges, provide background information about the detainee, and assist future historical researchers. The CCMC has discretion to include in the allied papers relevant case law or filings in other forum, such as briefs filed or decisions issued by Article III Federal Courts. Allied papers may include records from the Accused's Combatant Status Review Tribunal, Annual Review Board(s), disciplinary records from the detention facility, and criminal investigative files. Allied papers should include important references issued by the Executive Branch of the Federal Government. For example, the allied papers should include references (a) to (g) and other Military Commission Orders, Instructions, Appointing Authority Regulations, and Presiding Officer Memoranda in effect at the time of and after referral of the charges to trial. The allied papers may also include other Department of Defense decisions concerning the processing of military commissions, such as this memoranda, decisions on challenges of commission members, and decisions on interlocutory appeals, if not already included as exhibits to the record of trial. Allied papers should generally not include classified materials.

Commissions Library. A copy of pertinent portions of the electronic Commissions Library described in reference (g), POM 14, that are not readily available to the legal community or the public, should be included in the Commissions Library portion of the allied papers. Reported cases, Manuals, law review articles, and other publications that are commonly available need not be part of the allied papers. Internet items, news articles, and other items referred to by the parties during trial sessions or in briefs that are not readily available should be included. The Prosecution, Defense, Commissions Trial Clerk, and Review Panel's designee may recommend such materials for filing in the allied papers. The Presiding

Officer or President of the Review Panel may direct that such matters be filed as part of the allied papers.

Service on the Parties. Prior to the Appointing Authority's certification of a record as complete, the CCMC will provide a copy of all allied papers that will be attached to the record of trial to the Defense and Prosecution who will be given ten calendar days to object to inclusion of the allied papers, or to request inclusion of additional allied papers. The CCMC will inform the parties of the materials ultimately included in the allied papers. The CCMC or designee is also authorized to serve documents on the Prosecution and Defense, and to request appellate filings under Military Commission Instruction No. 9.

Communications from the Parties. Email that the Prosecution and Defense address to the Appointing Authority concerning the responsibilities outlined in reference (f), this memorandum, and interlocutory questions filed under reference (e), paragraph 8 shall be copy furnished to the Legal Advisor, Office of the Appointing Authority for Military Commissions; Staff Director, Office of Operations and Support, Office of the Appointing Authority for Military Commissions; and the CCMC.

Format of Records. The CCMC will ensure that the original and all copies of the transcripts forwarded to the appointing authority after the date of this memorandum meet the standards set forth below:

(1) All transcripts must appear double spaced on one side of 8 ½ by 11-inch letter-size white paper of sufficient weight (for example, 20-lb) that the print on each succeeding page does not show through the page above.

(2) Court reporters will provide the transcript in electronic format to the CCMC in Microsoft Word™. The type font must be "Times New Roman," Font Size 12. Character spacing is "Expanded" by .7 pt.

(3) The lines of the text should be numbered.

(4) The printing method used must produce a clear, solid, black imprint. The top margin of each page should be 2 inches to permit document fasteners to be used to attach the pages.

Retention of trial recordings. The recordings of the original proceedings shall upon authentication of the session concerned be provided to the CCMC for storage. The CCMC will retain trial recordings until

completion of final action by the President or his designee. Thereafter, the recordings will be processed and filed in the National Archives.

Indexing Records. The CCMC is authorized to include an index of the transcript, exhibits and allied papers of the record of trial.

Failure to comply with this memorandum shall not create a right to relief for the Accused or any other person.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

CC
Department of Defense General Counsel
Presiding Officer
Chief Prosecutor and Chief Defense Counsel

Attachment
As stated

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION AND
MANAGEMENT

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.

Howard G. Becker
Deputy Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001

COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and

Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.

John P Stenbit

John P. Stenbit

Attachment
As stated

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950

ADMINISTRATION &
MANAGEMENT

November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.

- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.

D. O. Cooke
Director

Attachment:
As stated

4.5. Accused's Copy. Do not include classified materials, controlled test materials, or matters ordered sealed by the judge in the accused's copy. Follow the procedures in Chapter 6. Furthermore, if a ROT contains sexually explicit materials that have not been ordered sealed by the military judge, the following guidance applies to these items:

4.5.1. Remove these items from the accused's copy of the ROT. (This includes sexually explicit exhibits contained in Article 32 investigations). In place of the materials, insert a certificate stating the materials were removed due to their sexually explicit content and that the original ROT, which includes the materials, may be inspected at AFLSA/JAJM. Insert a certificate at each location such materials are removed.

4.5.2. Include these items in the original ROT and each copy of the ROT forwarded to AFLSA/JAJM. However, insert the materials, wherever located in the ROT, in a sealed opaque envelope containing the following label. "WARNING: SEXUALLY EXPLICIT MATERIALS ENCLOSED – NOT ORDERED SEALED BY THE COURT."

4.6. Organization of Contents of Record of Trial. Arrange the contents of the ROT as set forth in Figure 4.1, "Guide for Assembling Records of Trial," with heavy stock dividers used to separate major components of the records. To the extent applicable, include signed originals of pertinent documents in the original ROT. Explain the absence of an original document, and insert a certified true copy or signed duplicate original copy in the ROT. However, if a photocopy or datafax copy is provided in lieu of the original document for use in the proceedings, including pretrial and post-trial matters, treat the photocopy or datafax copy as an original and place it in the ROT. No certification is required.

Figure 4.1. Guide for Assembling Records of Trial.

GUIDE FOR ASSEMBLING RECORDS OF TRIAL (SPECIAL AND GENERAL COURTS-MARTIAL)

1. Front Cover, DD Form 490, **Record of Trial.** If computer generated forms are used, print the front cover of the DD Form 490 on hard card stock (Dutch Blue cover paper bearing stock number 9310-01-083-5214). There is no requirement to complete the Chronology Sheet inside the front cover of the DD Form 490, nor is there a requirement to reproduce the Chronology Sheet when computer generated forms are used. In addition, there is not a requirement to list the date of the first AMJAMS input on the cover of the DD Form 490. [Note: A duplicate DD Form 490 on hard card stock should be inserted at the beginning of each volume of a ROT. On each DD Form 490, remember to annotate the volume number and the volume's contents and remember to label each copy to reflect whose it is. (See paragraph 5.1.2).]

2. Chronology with reporter's transcription log.

3. Any orders transferring the accused to a confinement facility or paperwork pertaining to excess/appellate leave.

4. AF Form 304, **Request for Appellate Defense Counsel.** Ensure the form includes the accused's permanent address where he or she can be reached during the appellate process. Insert a copy in each ROT (not just the original) for general courts-martial, including those that are examined under Article 69(a), UCMJ, and all BCD-special courts-martial.

5. Court-Martial Data Sheet. (Either DD Form 494 or Air Force version may be used). Use of this form is optional. If used, include a copy in each additional copy of record.

6. Defense Counsel Article 38(c) Briefs, if any.

7. Court-Martial Orders -- Include 10 copies in the original ROT and one copy in each copy of the record for cases reviewed under Article 66 and Article 69(a). (See RCM 1111(a)(1)). Include four copies in the original ROT and one in each copy of the ROT for courts-martial which result in acquittal of all charges; are terminated before findings; and cases reviewed under Article 64(a).

8. Proof of Service on the defense counsel of the Staff Judge Advocate's recommendation (and Proof of Service on defense counsel of any addenda containing new matters).

9. Defense response to the Staff Judge Advocate's recommendation (and addenda), if any. [NOTE: If defense counsel combines the RCM 1105 and 1106 submissions in a single memorandum, place the memorandum addressing both matters as provided in paragraph 12 below and insert a page at this point in the record stating "Defense Response to Staff Judge Advocate's Recommendation is included with the RCM 1105 submissions."

10. Proof of Service of the Staff Judge Advocate's Recommendation on the accused (and Proof of Service of any addenda containing new matters on the accused) or a statement explaining why the accused was not served personally.

11. Staff Judge Advocate's Recommendation, with AF Form 1359, **Report of Result of Trial**, and Personal Data Sheet attached, and any addenda to the Staff Judge Advocate's Recommendation. Also include any AF Form 138, **Post-Trial Clemency Evaluation**, or other evaluations obtained by the government.

12. Post-trial matters submitted by accused under RCM 1105, in the following order, as applicable:

a. Defense counsel's memorandum pertaining to RCM 1105 submissions.

b. Accused's statement.

c. Other statements and submissions.

d. Notification letter to accused regarding submission of post-trial matters.

13. If the ROT is transferred to another GCM jurisdiction for review, insert documentation concerning the transfer in the following order:

a. Request for transfer (for disqualification or other reason).

b. Correspondence between GCMs.

c. Documents designating new GCM to review case.

14. Any request for deferment of post-trial confinement and action thereon.

15. Any request for deferment/waiver of automatic forfeitures and any action thereon.

16. Any request for deferment of reduction in grade and any action thereon.

17. Heavy stock divider.

18. Article 32 investigation, if any, and all related exhibits and attachments, in the following order, as applicable:

a. Letter appointing Article 32 Investigating Officer (separate letter from convening authority to the investigating officer).

b. DD Form 457, Investigating Officer's Report, unless the accused waived the Article 32 investigation. If waived, insert the written waiver at this point in the ROT.

c. Recommendations of the SPCMCA to the GCMCA.

d. Proof of Service of Article 32 report on accused and defense counsel.

e. Defense objections to the Article 32 report, if any.

f. Documents related to scheduling the Article 32 hearing, including delays.

g. Additional Article 32 Investigations. Add documents, in the order described in (a) through (d) above, after the original Article 32 investigation report and related documents.

19. Heavy stock divider.

20. Pretrial Allied Papers, including:

a. First indorsement to DD Form 458, Charge Sheet, - the unit commander's transmittal of the charges to the special court-martial convening authority with a copy of the personal data sheet as an attachment.

b. Any other papers, indorsements, or investigations that accompanied the charges when referred for trial.

c. Article 34 pretrial advice of the Staff Judge Advocate.

d. Indorsement of convening authority to the pretrial advice.

e. Proof of Service of Article 34 pretrial advice on accused and defense counsel.

f. Pretrial Confinement proceedings, if any.

g. Withdrawn charge sheets, if any.

h. Other pretrial requests by counsel and the action taken thereon. Group the requests by subject area in chronological order, with the oldest on top to the most recent on the bottom. Subject areas include, but are not limited to, requests for delays, IMDC, mental health board reports, pretrial agreements, discharge in lieu of court-martial, witnesses, depositions, and immunity

i. Record of any former trial - include 2 copies of the promulgating order only. However, in cases involving a retrial, comply with paragraph **12.1.** of this manual.

j. Miscellaneous pretrial related documents, when appropriate (i.e. writs, collateral litigation). [Note: It is not necessary to include the following items as allied papers in a ROT: Discovery requests/responses and court member selection documents (unless raised as an issue in a motion and not made appellate exhibits) and Congressional inquiries.

21. Heavy stock divider.

22. Record of Proceeding of Court-Martial, in the following order:

a. Judge's errata sheet (AF Form 135), if any.

b. Cover Page, Master Index of Proceedings, Witnesses and Exhibits, and Receipt of Accused (See suggested format at Figure 4.2). Since the preprinted index on DD Form 490 is inadequate to properly reflect the proceedings, witnesses, and exhibits, court reporters should substitute and expand upon the index as illustrated in Figure 4.2. Include all 39(a) sessions held and a brief

description of them. Pay special attention to noting the pages at which exhibits are offered and accepted/rejected, to include annotating those page numbers on the bottom of an exhibit as appropriate. If the accused does not receipt for ROT, ensure record contains trial counsel's certificate in lieu of receipt pursuant to RCM 1104(b)(1)(B) or substitute service on defense counsel pursuant to RCM 1104(b)(1)(C).

c. Page 1 of the Transcript. Use suggested format at Figure 4.3, followed by:

1. Convening order.
2. Amending orders, if any.
3. Written orders or correspondence detailing the military judge or counsel, if any.
4. DD Form 1722, Request for Trial before Military Judge Alone, if any (unless marked as an appellate exhibit).
5. Written request for enlisted members, if any (unless marked as an appellate exhibit).

d. Transcript of the proceedings of the court, including all Article 39(a) sessions. Insert the original Charge Sheet, at arraignment. (Note: If pen and ink changes have physically been made on the original charge sheet after arraignment, insert at arraignment a photocopy of the charge sheet as it existed at arraignment followed by the original charge sheet containing the post arraignment changes. Include a notation in the ROT identifying the page numbers for "the photocopy of the charge sheet as it existed at arraignment" and the page numbers for "the original charge sheets with the post arraignment changes.")

e. Authentication sheet, including trial counsel's certificate of review and defense counsel's examination of the record. (For format, see Figure 12.1).

f. Certificate of Correction, if any.

g. Action of the Convening Authority.

h. Assumption of or appointment to command orders, if the commander who takes the action is different from the commander who referred the case.

23. Heavy stock divider.

24. Post-trial sessions. (Page numbers should continue in sequence from end of the transcript of the original proceedings, and will be separately authenticated if initial proceedings have been previously authenticated. Additional exhibits should be lettered or numbered in sequence, following those already marked/admitted.)

25. Heavy stock divider.

26. Prosecution exhibits admitted into evidence.

27. Heavy stock divider.

28. Defense exhibits admitted into evidence.

29. Heavy stock divider.

30. Prosecution exhibits marked but not offered and/or admitted into evidence.

31. Heavy stock divider.

32. Defense exhibits marked but not offered and/or admitted into evidence.

33. Heavy stock divider.

34. Appellate exhibits.

35. Heavy stock divider.

36. Any records of proceedings in connection with vacation of suspension.

37. Hard Backing. There is no longer a requirement to include the inside back cover of the DD Form 490 (Instructions for Preparing and Arranging Record of Trial) in the ROT. However, each separate volume of a ROT (original and copies) should contain a hard backing.