RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD
AKHBAR FARNAD

NO. 050008

VOLUME I OF ___ TOTAL VOLUMES

PRESIDENTIAL, CONGRESSIONAL, AND DEPARTMENT OF DEFENSE PUBLICATIONS

United States v. Omar Ahmed Khadr, NO. 050008

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.

Some 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 the Appointing Authority's administrative certification.

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I*	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)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, Chief Clerk of Commissions documents
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*** CURRENT THROUGH P.L. 109-169, APPROVED 1/11/06 ***

TITLE 50. WAR AND NATIONAL DEFENSE
CHAPTER 33. WAR POWERS RESOLUTION

50 USCS § 1541 (2005)

§ 1541. Purpose and policy

(a) Congressional declaration. It is the purpose of this joint resolution [50 USCS §§ 1541 et seq.] to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause. Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) Presidential executive power as Commander-in-Chief; limitation. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Congressional Authorizations for Use of Force After September 11, 2001

Authorization for use of military force against those responsible for attacks launched against United States on Sept. 11, 2001. Act Sept. 18, 2001, ◆ P.L. 107-40, 115 Stat. 224, provides:

"Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

"Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

"Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

"Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

"Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

"Section 1. Short title.

"This joint resolution may be cited as the 'Authorization for Use of Military Force'.

"Sec. 2 Authorization for use of United States Armed Forces.

"(a) In general. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

"(b) War Powers Resolution requirements.

(1) Specific statutory authorization. Consistent with section 8(a)(1) of the War Powers Resolution [50 USCS § 1547(a)(1)], 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 [50 USCS § 1544(b)].

"(2) Applicability of other requirements. Nothing in this resolution supercedes any requirement of the War Powers Resolution [50 USCS §§ 1541 et seq.].".

Authorization for Use of Military Force Against Iraq Resolution of 2002. Act Oct. 16, 2002, ◆ P.L. 107-243, 116 Stat. 1498, provides:

"Whereas in 1990 in response to Iraq's war of aggression against and illegal occupation of Kuwait, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq;

"Whereas after the liberation of Kuwait in 1991, Iraq entered into a United Nations sponsored cease-fire agreement pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons programs and the means to deliver and develop them, and to end its support for international terrorism;

"Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons and a large scale biological weapons program, and that Iraq had an advanced nuclear weapons development program that was much closer to producing a nuclear weapon than intelligence reporting had previously indicated;

"Whereas Iraq, in direct and flagrant violation of the cease-fire, attempted to thwart the efforts of weapons inspectors to identify and destroy Iraq's weapons of mass destruction stockpiles and development capabilities, which finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998;

"Whereas in Public Law 105-235 (August 14, 1998) [unclassified], Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in 'material and unacceptable breach of its international obligations' and urged the President 'to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations';

"Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

"Whereas Iraq persists in violating resolution of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait;

"Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

"Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

"Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

"Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of United States citizens;

"Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations;

"Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself;

"Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994);

"Whereas in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) [note to this section], Congress has authorized the President 'to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolution 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677';

"Whereas in December 1991, Congress expressed its sense that it 'supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against Iraq Resolution (Public Law 102-1) [note to this section],' that Iraq's repression of its civilian population violates United Nations Security Council Resolution 688 and 'constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region,' and that Congress, 'supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688';

"Whereas the Iraq Liberation Act of 1998 (Public Law 105-338) [22 USCS § 2151 note] expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

"Whereas on September 12, 2002, President Bush committed the United States to 'work with the United Nations Security Council to meet our common challenge' posed by Iraq and to 'work for the necessary resolutions,' while also making clear that 'the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable';

"Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the

national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

"Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

"Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

"Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40) [note to this section]; and

"Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

"Section 1. Short title.

"This joint resolution may be cited as the 'Authorization for Use of Military Force Against Iraq Resolution of 2002'.

"Sec. 2. Support for United States diplomatic efforts.

"The Congress of the United States supports the efforts by the President to--

"(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in those efforts; and

"(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

"Sec. 3. Authorization for use of United States Armed Forces.

"(a) Authorization. The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to--

"(1) defend the national security of the United States against the continuing threat posed by Iraq; and

"(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

"(b) Presidential determination. In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that--

"(1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

"(2) acting pursuant to this joint resolution is consistent with the United States and

other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.

"(c) War Powers Resolution requirements.

(1) Specific statutory authorization. Consistent with section 8(a)(1) of the War Powers Resolution [50 USCS § 1547(a)(1)], 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 [50 USCS § 1544(b)].

"(2) Applicability of other requirements. Nothing in this joint resolution supersedes any requirement of the War Powers Resolution [50 USCS §§ 1541 et seq.].

"Sec. 4. Reports to Congress.

"(a) Reports. The President shall, at least once every 60 days, submit to the Congress a report on matters relevant to this joint resolution, including actions taken pursuant to the exercise of authority granted in section 3 and the status of planning for efforts that are expected to be required after such actions are completed, including those actions described in section 7 of the Iraq Liberation Act of 1998 (Public Law 105-338) [22 USCS § 2151 note].

"(b) Single consolidated report. To the extent that the submission of any report described in subsection (a) coincides with the submission of any other report on matters relevant to this joint resolution otherwise required to be submitted to Congress pursuant to the reporting requirements of the War Powers Resolution (Public Law 93-148) [50 USCS §§ 1541 et seq.], all such reports may be submitted as a single consolidated report to the Congress.

"(c) Rule of construction. To the extent that the information required by section 3 of the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) [note to this section] is included in the report required by this section, such report shall be considered as meeting the requirements of section 3 of such resolution.".

Delegation of certain reporting authority. Pres. Mem. of July 2, 2004, 69 Fed. Reg. 43723, provides:

"Memorandum for the Secretary of State

"By the authority vested in me as President by the Constitution and laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to you the functions and authority conferred upon the President by section 4 of the Authorization for Use of Military Force Against Iraq Resolution of 2002, Public Law 107-243 [note to this section], and by section 3 of the Authorization for Use of Military Force Against Iraq Resolution, Public Law 102-1 [note to this section], to make the specified reports to the Congress.

"You are authorized and directed to publish this memorandum in the Federal Register.".

United States policy on IRAQ. Act Jan. 6, 2006, ◆ P.L. 109-163, Div A, Title XII, Subtitle C, § 1227, 119 Stat. 3465, provides:

"(a) Short title. This section may be cited as the 'United States Policy in Iraq Act'.

"(b) Sense of Congress. It is the sense of the Congress that, in order to succeed in Iraq--

"(1) members of the United States Armed Forces who are serving or have served in Iraq and their families deserve the utmost respect and the heartfelt gratitude of the American people for their unwavering devotion to duty, service to the Nation, and selfless sacrifice under the most difficult circumstances; the United States Congress supports our troops and supports a successful conclusion to their mission;

"(2) it is important to recognize that the Iraqi people have made enormous sacrifices and that the overwhelming majority of Iraqis want to live in peace and security; and that the Iraqi security forces in a growing number of incidences are fighting side-by-side with coalition forces, are increasing in numbers and improving in military capability;

"(3) the terrorists seeking to prevent the emergence of a secure, stable, peaceful, and democratic Iraq are led by individuals seeking to restore dictatorship in Iraq or who want to advance al Qaeda's broad vision of violently extreme Islam in the Middle East;

"(4) calendar year 2006 should be a period of significant transition to full Iraqi sovereignty, with Iraqi security forces taking the lead for the security of a free and sovereign Iraq, thereby creating the conditions for the phased redeployment of United States forces from Iraq;

"(5) United States military forces should not stay in Iraq any longer than required and the professional military judgment of our senior military should be a key factor in future decisions;

"(6) the Administration should tell the leaders of all groups and political parties in Iraq that they need to make the compromises necessary to achieve the broad-based and sustainable political settlement that is essential for defeating the insurgency in Iraq, within the schedule they set for themselves; and

"(7) the President has committed to continue to explain to Congress and the American people progress toward a successful completion of the mission in Iraq.

"(c) Reports to Congress on United States policy and military operations in Iraq. Not later than 90 days after the date of the enactment of this Act, and every three months thereafter until all United States combat brigades have redeployed from Iraq, the President shall submit to Congress a report on United States policy and military operations in Iraq. To the maximum extent practicable, the report required in (c) shall be unclassified, with a classified annex if necessary. Each report shall include to the extent practical, the following information:

"(1) The current military mission and the diplomatic, political, economic, and military measures that are being or have been undertaken to successfully complete or support that mission, including:

"(A) Efforts to convince Iraq's main communities to make the compromises necessary for a broad-based and sustainable political settlement.

"(B) Engaging the international community and the region in efforts to stabilize Iraq and to forge a broad-based and sustainable political settlement.

"(C) Strengthening the capacity of Iraq's government ministries.

"(D) Accelerating the delivery of basic services.

"(E) Securing the delivery of pledged economic assistance from the international

community and additional pledges of assistance.

"(F) Training Iraqi security forces and transferring additional security responsibilities to those forces and the government of Iraq.

"(2) Whether the Iraqis have made the compromises necessary to achieve the broad-based and sustainable political settlement that is essential for defeating the insurgency in Iraq.

"(3) Any specific conditions included in the April 2005 Multi-National Forces-Iraq campaign action plan (referred to in United States Government Accountability Office October 2005 report on Rebuilding Iraq: DOD Reports Should Link Economic, Governance, and Security Indicators to Conditions for Stabilizing Iraq), and any subsequent updates to that campaign plan, that must be met in order to provide for the transition of additional security responsibility to Iraqi security forces.

"(4) To the extent that these conditions are not covered under paragraph (3), the following should also be addressed:

"(A) The number of battalions of the Iraqi Armed Forces that must be able to operate independently or to take the lead in counterinsurgency operations and the defense of Iraq's territory.

"(B) The number of Iraqi special police units that must be able to operate independently or to take the lead in maintaining law and order and fighting the insurgency.

"(C) The number of regular police that must be trained and equipped to maintain law and order.

"(D) The ability of Iraq's Federal ministries and provincial and local governments to independently sustain, direct, and coordinate Iraq's security forces.

"(5) The criteria to be used to evaluate progress toward meeting such conditions.

"(6) A plan for meeting such conditions, an assessment of the extent to which such conditions have been met, information regarding variables that could alter that plan, and the reasons for any subsequent changes to that plan.".

Sec. Art.
819. 19. Jurisdiction of special courts-martial.
820. 20. Jurisdiction of summary courts-martial.
821. 21. Jurisdiction of courts-martial not exclusive.

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 817. Art. 17. Jurisdiction of courts-martial in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

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.

SUBCHAPTER V. COMPOSITION OF COURTS-MARTIAL

Sec. Art.
822. 22. Who may convene general courts-martial.
823. 23. Who may convene special courts-martial.
824. 24. Who may convene summary courts-martial.

Sec. Art.
825. 25. Who may serve on courts-martial.
826. 26. Military judge of a general or special courts-martial.
827. 27. Detail of trial counsel and defense counsel.
828. 28. Detail or employment of reporters and interpreters.
829. 29. Absent and additional members.

§ 822. Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

§ 823. Art. 23. Who may convene special courts-martial

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

§ 824. Art. 24. Who may convene summary courts-martial

(a) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) When only one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when considered desirable by him.

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force

may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

§ 827. Art. 27. Detail of trial counsel and defense counsel

(a)

(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.

(2) No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

§ 828. Art. 28. Detail or employment of reporters and Interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or

court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

§ 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused 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.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(l)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

SUBCHAPTER VI. PRE-TRIAL PROCEDURE

Sec.	Art.	
830.	30.	Charges and specifications.
831.	31.	Compulsory self-incrimination prohibited.
832.	32.	Investigation.
833.	33.	Forwarding of charges.
834.	34.	Advice of staff judge advocate and reference for trial.
835.	35.	Service of charges.

§ 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for

further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

(1) the specification alleges an offense under this chapter;

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec.	Art.	
836.	36.	President may prescribe rules.
837.	37.	Unlawfully influencing action of court.
838.	38.	Duties of trial counsel and defense counsel.
839.	39.	Sessions.
840.	40.	Continuances.
841.	41.	Challenges.
842.	42.	Oaths.
843.	43.	Statute of limitations.
844.	44.	Former jeopardy.
845.	45.	Pleas of the accused.
846.	46.	Opportunity to obtain witnesses and other evidence.
847.	47.	Refusal to appear or testify.
848.	48.	Contempts.
849.	49.	Depositions.
850.	50.	Admissibility of records of courts of inquiry.
850a.	50a.	Defense of lack of mental responsibility.
851.	51.	Voting and rulings.
852.	52.	Number of votes required.
853.	53.	Court to announce action.
854.	54.	Record of trial.

§ 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.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court

(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. The fore-

going provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted

One Hundred Ninth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourth day of January, two thousand and five

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,191,287,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $22,788,101,000.

(J) An assessment, in a classified annex if necessary, of United States military requirements, including planned force rotations, through the end of calendar year 2006.

SEC. 9011. Supervision and administration costs associated with a construction project funded with appropriations available for operation and maintenance, and executed in direct support of the Global War on Terrorism only in Iraq and Afghanistan, may be obligated at the time a construction contract is awarded: *Provided,* That for the purpose of this section, supervision and administration costs include all in-house Government costs.

SEC. 9012. Amounts appropriated or otherwise made available in this title are designated as making appropriations for contingency operations related to the global war on terrorism pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are

in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the

release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection

(e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) REQUIRED POLICIES.—

(1) IN GENERAL.—The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) ACKNOWLEDGMENT OF TRAINING.—The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) DEADLINE FOR POLICIES TO BE PRESCRIBED.—The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) ARMY FIELD MANUAL.—

(1) TRANSLATION.—The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) DISTRIBUTION.—The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) TRANSMITTAL OF REGULATIONS.—Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) ANNUAL REPORT.—Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

This division may be cited as the "Department of Defense Appropriations Act, 2006".

Federal Register

Friday,
November 16, 2001

Part IV

The President

Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

Federal Register
Vol. 66, No. 222
Friday, November 16, 2001

Presidential Documents

Title 3—

The President

Military Order of November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. *Findings.*

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) 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.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense

purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. *Definition and Policy.*

(a) The term ''individual subject to this order'' shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be —

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.*

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. *Additional Authorities of the Secretary of Defense.*

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. *Relationship to Other Law and Forums.*

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or

proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

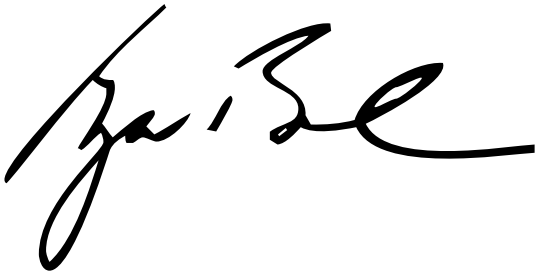
(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term ''State'' includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. *Publication.*

This order shall be published in the **Federal Register**.



THE WHITE HOUSE,
November 13, 2001.

[FR Doc. 01–28904
Filed 11–15–01; 8:56 am]
Billing code 3195–01–P

Department of Defense
DIRECTIVE

NUMBER 5105.70
February 10, 2004

DA&M

SUBJECT: Appointing Authority for Military Commissions

References: (a) U.S. Constitution, Article II, Section 2, Clause 2
(b) Sections 113 and 131(b)(8), title 10, United States Code
(c) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (November 16, 2001) ("President's Military Order")
(d) DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," March 21, 2002
(e) through (i), see enclosure 1

1. PURPOSE

Pursuant to the authority vested in the Secretary of Defense under references (a), (b), and (c), this Directive establishes the position and office of the Appointing Authority for Military Commissions, with the responsibilities, functions, relationships, and authorities as prescribed herein.

2. APPLICABILITY AND SCOPE

This Directive applies to:

2.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, all other organizational entities in the Department of Defense (hereafter referred to collectively as "the DoD Components").

2.2. Any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to Section 4(B)(2) of reference (d)

2.3. Any civilian attorney who seeks qualification as a member of a pool of qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (d); and to any attorney who has been qualified as a member of that pool.

3. ORGANIZATION

3.1. The Appointing Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense.

3.2. The Office of the Appointing Authority shall consist of the Appointing Authority, the Legal Advisor to the Appointing Authority, and such other subordinate officials and organizational elements as are established by the General Counsel of the Department of Defense within the resources assigned by the Secretary of Defense.

4. RESPONSIBILITIES AND FUNCTIONS

4.1. The Appointing Authority for Military Commissions is an officer of the United States appointed by the Secretary of Defense pursuant to the U.S. Constitution and 10 U.S.C. (references (a) and (b)). In this capacity, the Appointing Authority for Military Commissions shall exercise the duties prescribed in DoD Military Commission Order No. 1 (reference (d)) and this Directive and shall:

4.1.1. Issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order (reference (c)) and reference (d); and appoint any other personnel necessary to facilitate military commissions.

4.1.2. Appoint military commission members and alternate members, based on competence to perform the duties involved. Remove members and alternate members for good cause pursuant to Military Commission Instruction No. 8 (reference (e)).

4.1.3. Designate a Presiding Officer from among the members of each military commission to preside over the proceedings of that military commission. The Presiding Officer shall be a military officer who is a judge advocate of any United States Armed Force.

4.1.4. Approve and refer charges prepared by the Prosecution against an individual or individuals subject to reference (c).

4.1.5. Approve plea agreements with an Accused.

4.1.6. Decide interlocutory questions certified by the Presiding Officer.

4.1.7. Ensure military commission proceedings are open to the maximum extent practicable. Decide when military commission proceedings should be closed pursuant to references (c) and (d).

4.1.8. Make decisions related to attendance at military commission proceedings by the public and accredited press and the public release of transcripts. Such matters, including policy and plans for media coverage shall be coordinated with the Assistant Secretary of Defense for Public Affairs (ASD(PA)) and, as appropriate, the Assistant Secretary of Defense for Special

Operations/Low Intensity Conflict (ASD(SO/LIC)) under the Under Secretary of Defense for Policy (USDP)).

4.1.9. Approve or disapprove requests from the Prosecution and Defense to communicate with news media representatives regarding cases and other matters related to military commissions. Such matters shall be coordinated with the ASD(PA).

4.1.10. Detail or employ personnel such as court reporters, interpreters, security personnel, bailiffs, and clerks to support military commissions, as necessary. When such details effect resources committed to operational missions, coordinate with the ASD(SO/LIC) under the USD(P) and the Heads of appropriate DoD Components.

4.1.11. Order that such investigative or other resources be made available to Defense Counsel and the Accused as deemed necessary for a full and fair trial, including appointing interpreters.

4.1.12. Promptly review military commission records of trial for administrative completeness and determine appropriate disposition, either transmitting the record of trial to the Review Panel or returning it to the military commission for any necessary supplementary proceedings.

4.1.13. Implement directions of officials with final decision-making authority for sentences.

4.1.14. Perform supervisory and performance evaluation duties pursuant to this Directive and DoD Military Commission Instruction No. 6 (reference (f)).

4.1.15. Coordinate matters involving members of the Congress, including correspondence, with the Assistant Secretary of Defense for Legislative Affairs; and coordinate and exchange data and information with other OSD officials, the Heads of the DoD Components, and other Federal officials having collateral or related functions.

4.1.16. Establish, maintain, and preserve records that serve as evidence of the organization, functions, policies, decisions, procedures, operations, and other activities of the Office of the Appointing Authority for Military Commissions in accordance with Title 44 U.S.C. (reference (g)).

4.1.17. Perform such other functions as the Secretary of Defense may prescribe.

4.2. The General Counsel of the Department of Defense shall:

4.2.1. Review and approve such regulations, instructions, memoranda, and other DoD publications prepared by the Appointing Authority (see paragraph 6.3., below) for the conduct of proceedings by military commissions established pursuant to references (c) and (d).

4.2.2. Provide guidance and issue instructions necessary to facilitate the conduct of proceedings by military commissions established pursuant to references (c) and (d), including but not limited to instructions pertaining to military commission-related offices, performance evaluations and reporting relationships.

4.3. The Chairman of the Joint Chiefs of Staff and the OSD Principal Staff Assistants shall exercise their designated authorities and responsibilities as established by law or DoD guidance to support the Appointing Authority for Military Commissions in the implementation of the responsibilities and functions specified herein.

4.4. The Secretaries of the Military Departments shall support the personnel requirements of the Appointing Authority as validated by the General Counsel of the Department of Defense and provide other requested assistance and support within their capabilities.

5. RELATIONSHIPS

5.1. In the performance of assigned functions and responsibilities, the Appointing Authority for Military Commissions shall:

5.1.1. Report directly to the Secretary of Defense.

5.1.2. Use existing facilities and services of the Department of Defense and other Federal Agencies, whenever practicable, to avoid duplication and to achieve an appropriate level of efficiency and economy.

5.2. Other OSD officials and the Heads of the DoD Components shall coordinate with the Appointing Authority for Military Commissions on all matters related to the responsibilities and functions cited in section 4., above.

5.3. Nothing herein shall be interpreted to subsume or replace the responsibilities, functions, or authorities of the OSD Principal Staff Assistants, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of Combatant Commands, or the Heads of Defense Agencies or the Department of Defense Field Activities prescribed by law or Department of Defense guidance.

6. AUTHORITIES

The Appointing Authority for Military Commissions is hereby delegated authority to:

6.1. Obtain reports and information, consistent with DoD Directive 8910.1 (reference (h)) as necessary to carry out assigned functions.

6.2. Communicate directly with the Heads of the DoD Components as necessary to carry out assigned functions, including the transmission of requests for advice and assistance. Communications to the Military Departments shall be transmitted through the Secretaries of the Military Departments, their designees, or as otherwise provided in law or directed by the

Secretary of Defense in other Department of Defense issuances. Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff.

6.3. Subject to the approval of the General Counsel of the Department of Defense, issue DoD Publications and one-time directive-type memoranda consistent with DoD 5025.1-M (reference (i)); Military Commission Instructions consistent with DoD Military Commission Instruction No. 1 (reference (j)); and such other regulations as are necessary or appropriate for the conduct of proceedings by military commissions established pursuant to references (c) and (d). Instructions to the Military Departments shall be issued through the Secretaries of the Military Departments. Instructions to the Combatant Commands, except in unusual circumstances, shall be communicated through the Chairman of the Joint Chiefs of Staff.

6.4. Communicate with other Government officials, representatives of the Legislative Branch, members of the public, and representatives of foreign governments, as applicable, in carrying out assigned functions.

7. EFFECTIVE DATE

This Directive is effective immediately.

Donald Rumsfeld
Secretary of Defense

Enclosures – 1
E1. References, continued

E1. ENCLOSURE 1

REFERENCES, continued

(e) DoD Military Commission Instruction No. 8, "Administrative Procedures," April 30, 2003
(f) DoD Military Commission Instruction No. 6, "Reporting Relationships for Military Commission Personnel," April 30, 2003
(g) Title 44, United States Code
(h) DoD Directive 8910.1, "Management and Control of Information Requirements," June 11, 1993
(i) DoD 5025.1-M, "DoD Directives Systems Procedures," March 5, 2003
(j) DoD Military Commission Instruction No. 1, "Military Commission Instructions," April 30, 2003

Department of Defense

Military Commission Order No. 1

August 31, 2005

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References: (a) United States Constitution, Article II, Section 2

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

(c) DoD 5200.2-R, "Personnel Security Program," current edition

(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)

(e) Section 603 of title 10, United States Code

(f) DoD Directive 5025.1, "DoD Directives System," current edition

(g) Military Commission Order No. 1 (March 21, 2002)

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials. This Order supersedes reference (g).

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the Presiding Officer, other members, and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission except sessions with members deliberating and voting on findings and sentence and sessions conducted by the Presiding Officer under Section 4(A)(5)(a), but the absence of an alternate member shall not preclude the Commission from conducting proceedings. Alternate members shall attend deliberations on matters other than findings or sentence, but may not participate in such deliberations or in any voting. In case of incapacity, resignation, or removal of any member, an alternate member, if available, shall take the place of that member, in the sequence designated by the Appointing Authority. Any vacancy among the members or alternate members occurring after a trial has begun may, but need not, 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.

(2) Number of Members

Each Commission shall consist of a Presiding Officer and at least three other members, the number being determined by the Appointing Authority. For each such Commission, the

Appointing Authority shall also appoint at the outset of proceedings one or more alternate members, the number being determined by the Appointing Authority..

(3) Qualifications

Each member and alternate member 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. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

The Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. The Presiding Officer may conduct hearings (except hearings on the admissibility of evidence under Section 6(D)(1)) outside the presence of the other members for the purposes of hearing and determining motions, objections, pleas, or such other matters as will promote a fair and expeditious trial. If the Presiding Officer determines that deliberations are necessary to resolve a challenge by another member under Section 6(D)(1) to a ruling by the Presiding Officer on the admissibility of evidence, the Presiding Officer shall deliberate and vote with the other members to determine the admissibility of the evidence in question. The Presiding Officer shall not deliberate or vote with the other members on findings or sentence, nor shall the Presiding Officer be present at such deliberations or votes.

(b) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(c) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to

the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(d) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(e) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(f) As soon as practicable at the conclusion of each Commission session, the Presiding Officer shall transmit an authenticated copy of the proceedings to the Appointing Authority.

(6) Duties of the Other Members

The other members of the Commission shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1).

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a

United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member, other than the Presiding Officer, shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. 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).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. 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. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused shall be present at every stage of the trial before the Commission, to the extent consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Presiding Officer for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Presiding Officer will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and the Commission will be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;

(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(c) Require the production of documents and other evidentiary material; and

(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable.

Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time authorized by the Presiding Officer.

C. Oaths

(1) All members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Presiding Officer on his own initiative, or if requested by other members of the Commission, may also summon and hear witnesses. The Presiding Officer 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 to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may submit written questions to the Presiding Officer for the witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Presiding Officer may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested. The Presiding Officer shall inform the other members of any facts conclusively noticed under this provision.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the President's Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel. The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission, other than the Presiding Officer, deliberate and vote on findings in closed conference, the senior-ranking member who voted on findings shall announce the Commission's findings in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission, other than the Presiding Officer, deliberate and vote on a sentence in closed conference, the senior-ranking member who voted on a sentence shall announce the Commission's sentence in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

In accordance with instructions from the Presiding Officer, the other members of the Commission shall deliberate and vote in closed conference. Such a Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the other members is required for a finding of Guilty. When appropriate, the other members of the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the other members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the other members. Votes on findings and sentences shall be taken by secret, written ballot. The Presiding Officer shall not participate in, or be present during, the deliberations or votes on findings or sentence by the other members of the Commission.

G. Sentence

Upon conviction of an Accused, in accordance with instructions from the Presiding Officer, the other members of the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the other members of the Commission shall determine to be proper. Only a Commission that includes at least seven other members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

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. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for

authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within seventy-five days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or

other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

Department of Defense
Military Commission Order No. 3

September 21, 2005

SUBJECT: Special Administrative Measures for Certain Communications Subject to Monitoring

References: (a) Military Commission Order No. 1 (current edition)

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

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

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

(e) Military Commission Order No. 3 (February 5, 2004)

1. PURPOSE

This Order promulgates policy, assigns responsibilities, and prescribes procedures for matters related to monitoring certain communications of persons who are subject to trial by military commission pursuant to references (a) and (b). This Order supersedes reference (e).

2. AUTHORITY

This Order is issued pursuant to section 7(A) of reference (a) and in accordance with references (b), (c), and (d).

3. COMMUNICATIONS SUBJECT TO MONITORING

This Order applies solely to the monitoring of communications (including oral, electronic, written, or any other means) between individuals whom the President has determined to be subject to reference (b) and their defense counsel (including Civilian Defense Counsel, Detailed Defense Counsel, and any interpreter or other person detailed or employed to assist in the defense of such person), for security or intelligence purposes. For purposes of this Order, "monitoring" includes both real-time interception and analysis and recording of the subject communications by any means.

4. POLICIES AND PROCEDURES

A. *Approval of Monitoring*. The Commander of the Combatant Command with control of the detainee, or that commander's designee, shall approve any communications monitoring that may be conducted pursuant to this Order. Communications monitoring conducted pursuant to this Order shall be approved only upon a determination that such

monitoring may prevent communications aimed at furthering or facilitating terrorist operations or other illegal acts.

B. *Notification to Defense Counsel.* In cases in which the Combatant Commander, or designee, determines that communications subject to this Order will be monitored, the Detailed Defense Counsel and Civilian Defense Counsel shall be notified in advance of any monitoring of their communications. The Detailed Defense Counsel and Civilian Defense Counsel may, in turn, notify the individual with whom they are communicating that their communications will be monitored.

C. *Action Agent.* A Department of Defense intelligence collecting entity ("monitoring entity") will conduct any monitoring approved pursuant to this Order.

D. *Review of Monitored Communications.* Monitoring entity personnel shall review any monitored communications for security and intelligence purposes as well as for purposes of assessing distribution restrictions consistent with this Order.

E. *Prohibited Monitoring.* Communications solely between two or more defense counsel shall not be monitored.

F. *Use and Disclosure of Monitored Communications.* Information derived from communications monitored pursuant to this Order shall not be used in proceedings against the individual who made or received the relevant communication; and such information shall not be disclosed to personnel involved in the prosecution or underlying prosecution investigation of said individual. Information that may prevent communications aimed at furthering or facilitating terrorist operations or other illegal acts and derived from monitored communications may be disclosed to appropriate persons other than those involved in such prosecutions.

G. *Reporting Requirements.* The monitoring entity will report promptly to the Combatant Commander, or that commander's designee, any monitored communication deemed relevant to the furthering or facilitating of terrorist operations or other illegal acts. If the Combatant Commander, or designee, is satisfied that a reasonable suspicion exists to believe that such communications may further or facilitate terrorist operations or other illegal acts, he shall report promptly such information through established intelligence or law enforcement reporting channels.

5. EFFECTIVE DATE

This Order is effective immediately.

Gordon England ACTING
Deputy Secretary of Defense

Department of Defense

Military Commission Order No. 5

March 15, 2004

SUBJECT: Designation of Appointing Authority

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

(c) Department of Defense Directive 5105.70, Appointing Authority for Military Commissions

(d) Military Commission Order No. 2 (Jun. 21, 2003)

1. PURPOSE

This order assigns responsibilities under references (a), (b), and (c) for trials before military commissions of individuals subject to the President's Military Order.

2. REVOCATION OF MILITARY COMMISSION ORDER NO. 2

Reference (d) designated the Deputy Secretary of Defense, Dr. Paul D. Wolfowitz, as the Appointing Authority on June 21, 2003. Reference (d) is hereby revoked.

3. DESIGNATION OF APPOINTING AUTHORITY

In accordance with the President's Military Order and Military Commission Order No. 1, John D. Altenburg, Jr. is hereby designated as the Appointing Authority.

4. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

Department of Defense
Military Commission Order No. 6

March 26, 2004

SUBJECT: Revocation of Military Commission Order No. 4

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

(c) Military Commission Order No. 4 (Jan. 30, 2004)

1. PURPOSE

Reference (c) designated Brigadier General Thomas L. Hemingway, U.S. Air Forces, as the Deputy Appointing Authority on January 30, 2004. Reference (c) is hereby revoked.

2. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

Department of Defense
Military Commission Instruction No. 1

April 30, 2003

SUBJECT: Military Commission Instructions

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

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

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

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

(e) Section 898 of Title 10 of the United States Code

1. PURPOSE

This Instruction establishes policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to references (a) and (b).

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (c) and (d).

3. APPLICABILITY

This Instruction, and, unless stated otherwise, all other Military Commission Instructions apply throughout the Department of Defense, including to the Office of the Secretary of Defense, the Military Departments, the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense, to any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to Section 4(B)(2) of reference (a), to any civilian attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (a), and to any

attorney who has been qualified as a member of that pool.

4. POLICIES AND PROCEDURES

A. *Promulgation.* Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

B. *Professional Responsibility.* Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

C. *Compliance Breaches.* Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or Instruction applicable to trials by military commission convened pursuant to references (a) and (b) may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to references (a) and (b), punitive measures imposed under reference (e), and any other lawful sanction.

5. CONSTRUCTION

Military Commission Instructions shall be construed in a manner consistent with references (a) and (b). Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of references (a) and (b) shall govern as provided in Section 7(B) of reference (b). Pronouns referring to the male gender shall be construed as applying to both male and female.

6. NON-CREATION OF RIGHT

Neither this Instruction nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.

7. RESERVATION OF AUTHORITY

Neither this Instruction nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.

8. AMENDMENT

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

9. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 2

April 30, 2003

SUBJECT: Crimes and Elements for Trials by Military Commission

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

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

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

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

(e) Section 821 of Title 10 of the United States Code

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

1. PURPOSE

This Instruction provides guidance with respect to crimes that may be tried by military commissions established pursuant to references (a) and (b) and enumerates the elements of those crimes.

2. AUTHORITY

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

3. GENERAL

A. *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by reference (b). No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that

body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

B. *Effect of Other Laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.

C. *Non-Exclusivity.* This Instruction does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. APPLICABLE PRINCIPLES OF LAW

A. *General Intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

B. *The Element of Wrongfulness and Defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this Instruction does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the

Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in Section 5(C) of reference (a), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

C. *Statute of Limitations.* Violations of the laws of war listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. *Combatant immunity.* Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

B. *Enemy.* "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

C. *In the context of and was associated with armed conflict.* Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. *Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

E. *Object of the attack.* "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

F. *Protected property.* "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

G. *Protected under the law of war.* The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

H. *Should have known.* The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. *Substantive Offenses—War Crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused intended to kill such person or persons;

(3) Such person or persons were protected under the law of war;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

2) Attacking Civilians

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(3) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(4) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

3) Attacking Civilian Objects

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was civilian property, that is, property that was not a military objective;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known that such property was not a military objective; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

4) Attacking Protected Property

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was protected property;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

5) Pillaging

a. *Elements.*

(1) The accused appropriated or seized certain property;

(2) The accused intended to appropriate or seize such property for private or personal use;

(3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

6) Denying Quarter

a. *Elements.*

(1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (3) precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy

combatants. For example, a remotely delivered attack cannot give rise to this offense.

7) **Taking Hostages**

a. *Elements.*

(1) The accused seized, detained, or otherwise held hostage one or more persons;

(2) The accused threatened to kill, injure, or continue to detain such person or persons;

(3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) **Employing Poison or Analogous Weapons**

a. *Elements.*

(1) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(2) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(4) The accused knew or should have known of the nature of the substance or weapon; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The "death or serious damage to health" required by Element (2) of this offense must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric

oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(3) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

9) Using Protected Persons as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(2) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(2) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

11) Torture

a. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe physical or mental pain or suffering;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(2) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (3) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

12) Causing Serious Injury

a. *Elements.*

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

13) Mutilation or Maiming

a. *Elements.*

(1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(2) The accused intended to subject such person or persons to such mutilation;

(3) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(5) Such person or persons were in the custody or control of the accused; and

(6) The conduct took place in the context of and was associated with armed conflict.

14) Use of Treachery or Perfidy

a. *Elements.*

(1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(2) The accused intended to betray that confidence or belief;

(3) The accused killed, injured, or captured one or more persons;

(4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(5) The conduct took place in the context of and was associated with armed conflict.

15) Improper Use of Flag of Truce

a. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(3) The conduct took place in the context of and was associated with armed conflict.

16) Improper Use of Protective Emblems

a. *Elements.*

(1) The accused used a protective emblem recognized by the law of armed conflict;

(2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(3) The accused knew or should have known of the prohibited nature of such use; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Combatant purposes," as used in Element (2) of this offense, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

17) Degrading Treatment of a Dead Body

a. *Elements.*

(1) The accused degraded or otherwise violated the dignity of the body of a dead person;

(2) The accused intended to degrade or otherwise violate the dignity of such body;

(3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense precludes prosecution for actions justified by military necessity.

18) Rape

a. *Elements.*

(1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(3) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(4) The concept of "invasion" is gender neutral.

B. *Substantive Offenses—Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Hijacking or Hazarding a Vessel or Aircraft

a. *Elements.*

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

2) Terrorism

a. *Elements.*

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) Murder by an Unprivileged Belligerent

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The term "kill" includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

4) Destruction of Property by an Unprivileged Belligerent

a. *Elements.*

(1) The accused destroyed property;

(2) The property belonged to another person, and the destruction was without that person's consent;

(3) The accused intended to destroy such property;

(4) The accused did not enjoy combatant immunity; and

(5) The destruction took place in the context of and was associated with armed conflict.

5) Aiding the Enemy

a. *Elements.*

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

6) Spying

a. *Elements.*

(1) The accused collected or attempted to collect certain information;

(2) The accused intended to convey such information to the enemy;

(3) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(2) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

7) Perjury or False Testimony

a. *Elements.*

(1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(2) Such testimony or information was material;

(3) Such testimony or information was false; and

(4) The accused knew such testimony or information to be false.

8) Obstruction of Justice Related to Military Commissions

a. *Elements.*

(1) The accused did an act;

(2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(3) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission

or

(b) there was an ongoing investigation of offenses triable by military commission.

C. *Other Forms of Liability and Related Offenses.* A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

1) Aiding or Abetting

a. *Elements.*

(1) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(2) Such other person or entity committed or attempted to commit the substantive offense; and

(3) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

b. *Comments.*

(1) The term "aided or abetted" in Element (1) includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring

another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

2) Solicitation

a. *Elements.*

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. *Comments.*

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

3) Command/Superior Responsibility – Perpetrating

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

b. *Comments.*

(1) The phrase "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Misprision

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. *Comments.*

(1) The phrase, "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

5) Accessory After the Fact

a. *Elements.*

(1) The accused received, comforted, or assisted a certain person;

(2) Such person had committed an offense triable by military commission;

(3) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(4) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. *Comments.*

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

6) Conspiracy

a. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. *Comments.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains

guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) **Attempt**

a. *Elements.*

(1) The accused committed an act;

(2) The accused intended to commit one or more substantive offenses triable by military commission;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.

b. *Comments.*

(1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

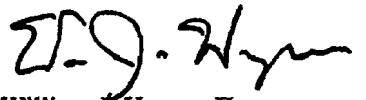
(4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the

abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE

This Instruction is effective immediately.



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

Department of Defense
Military Commission Instruction No. 3

July 15, 2005

SUBJECT: Responsibilities of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and Assistant Prosecutors

References:
(a) Military Commission Instruction No. 1 (Mar. 21, 2002)
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition
(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition
(g) Military Commission Instruction No. 3 (Apr. 15, 2004)

1. PURPOSE

This Instruction establishes the responsibilities of the Office of the Chief Prosecutor (OCP) and components thereof. This instruction expressly supersedes reference (g).

2. AUTHORITY

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

3. OFFICE OF THE CHIEF PROSECUTOR

A. *General.* The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions (OMC) and shall be comprised of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

B. *Chief Prosecutor.*

1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Prosecutor shall report directly to the Legal Advisor to the Appointing Authority and then to the Appointing Authority.

3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith.

6) The Chief Prosecutor shall inform the Appointing Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in Section 4(B)(2) of reference (a). The Chief Prosecutor may detail himself to perform such duties.

10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to references (a) and (b).

11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

C. *Deputy Chief Prosecutor.*

1) The Deputy Chief Prosecutor shall be a judge advocate of any United States armed force or a Department of Defense Civilian Attorney and shall be designated by the General Counsel of the Department of Defense.

2) The Deputy Chief Prosecutor shall have full authority to exercise the authority and perform the duties of the Chief Prosecutor in the absence of the Chief Prosecutor.

D. *Prosecutors.*

1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with references (a) and (b).

3) Prosecutors shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Prosecutor.

4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

4. DUTIES AND RESPONSIBILITIES OF THE PROSECUTION

A. *Regular Duties.* The Prosecution shall perform all duties specified or implied in reference (a) as responsibilities of the Prosecution.

B. *Administrative Duties.* The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Legal Advisor to the Appointing Authority, prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

C. *Special Duties.* The Prosecution shall perform all other functions, consistent with references (a) and (b), as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Prosecutors Serving as Defense Counsel.* Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under section 4(C)(3)(a) of reference (a).

B. *Prohibition on Certain Disclosures.* All Prosecutors must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

C. *Statements To The Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 4

September 16, 2005

SUBJECT: Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

References: (a) Military Commission Order No. 1 (current edition)

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

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

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

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

(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

(g) Military Commission Instruction No. 4 (July 15, 2005)

1. PURPOSE

This Instruction establishes the responsibilities of the Office of Chief Defense Counsel (OCDC) and components thereof. This instruction expressly supersedes reference (g).

2. AUTHORITY

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

3. OFFICE OF THE CHIEF DEFENSE COUNSEL

A. *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions (OMC) and shall be comprised of the Chief Defense Counsel, Deputy Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

B. *Chief Defense Counsel.*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (a) and (b).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (a) and (b) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Appointing Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense an information copy of such requests.

6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (a) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel. The Chief Defense Counsel

may receive information protected by the attorney-client privilege, incurring the concomitant obligation of confidentiality, in order to fulfill his responsibilities set forth in section 4(C)(1) of reference (a) and this Military Commission Instruction.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (a) and (b) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (a). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (a), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military

commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

C. *Deputy Chief Defense Counsel.*

1) The Deputy Chief Defense Counsel shall be a judge advocate of any United States armed force or a Department of Defense Civilian Attorney and shall be designated by the General Counsel of the Department of Defense.

2) The Deputy Chief Defense Counsel shall have full authority to exercise the authority and perform the duties of the Chief Defense Counsel in the absence of the Chief Defense Counsel.

D. *Detailed Defense Counsel.*

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with reference (a) and this Instruction. In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (a); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (a). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

E. *Selected Detailed Defense Counsel.*

1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in

any other capacity that the Judge Advocate General of the Military Department concerned may determine precludes availability because of the nature or responsibilities of the judge advocate's assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (a), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Subject to direction by the Appointing Authority or the General Counsel of the Department of Defense as to time and manner, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case. If requested by the Accused, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as an additional Detailed Defense Counsel, in accordance with Section 4(C)(3)(a) of reference (a).

F. *Qualified Civilian Defense Counsel.*

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (a).

2) Consistent with Section 6(B) of reference (a), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (a).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (a).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (a) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. *Regular Duties.* The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. *Special Duties.* The Office of the Chief Defense Counsel shall perform such other functions, consistent with references (a) and (b) and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Certain Agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

B. *Prohibition on Certain Disclosures.* All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. *Statements to the Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 5

April 30, 2003

SUBJECT: Qualification of Civilian Defense Counsel

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

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

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

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

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

(f) Section 1001 of Title 18 of the United States Code

(g) DoD 5200.2-R, "Personnel Security Program," current edition

1. PURPOSE

This Instruction establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (a) in accordance with reference (b).

2. AUTHORITY

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

3. POLICIES AND PROCEDURES

A. *Application Procedures*

1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in Section 4(C)(3)(b) of reference (a) as further detailed in this

Instruction, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to:

Office of the General Counsel, Department of Defense
(Attn: Chief Defense Counsel, Office of Military Commissions)
1600 Defense Pentagon
Washington, DC 20301-1600

Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in Section 4(C)(3)(b) of reference (a):

a. Section 4(C)(3)(b)(i), *Civilian Defense Counsel shall be United States citizens.* Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).

b. Section 4(C)(3)(b)(ii), *Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court.* Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

c. Section 4(C)(b)(iii), *Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.*

i. An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for

inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

ii. Further, applicants shall submit a properly executed Authorization for Release of Information (Annex A), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

d. Section 4(C)(b)(iv), *Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2-R, "Personnel Security Program."*

i. Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

ii. Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET of higher shall state in writing their willingness to submit to a background investigation in accordance with reference (g) and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this Instruction and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel's services are likely to be sought.

e. Section 4(C)(b)(v), *Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* This requirement shall be satisfied

by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to this Instruction. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (*i.e.*, no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under reference (f).

B. *Application Review*

1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with references (a) and (b) and with this Instruction.

2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with references (a) and (b) or with this Instruction.

4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

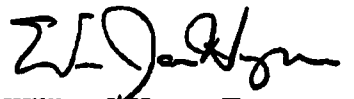
5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool

on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

4. EFFECTIVE DATE

This Instruction is effective immediately.



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

ANNEX A to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

UNITED STATES OF AMERICA
Authorization for Release of Information
(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

_____ _____
Signature (sign in ink) SSN Date

ANNEX B to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's 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) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

1. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

   A. I have read and understand the President's Military Order, MCO No. 1. MCI No. 4, MCI No.5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the Accused throughout the military commission process. from the inception of my representation through the completion of any post-trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. Prior to undertaking representation of an Accused, I will ensure that I can commit sufficient time and resources to handle an Accused's case expeditiously through its conclusion. In making this assessment, I am aware that the Presiding

Officer may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the Presiding Officer's determination such a continuation would unreasonably delay the proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority as appropriate, and I will state any special requests regarding access to the Accused, Protected Information, as defined in MCO No. 1, Paragraph 6.D.5.a, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product will be required to complete an affidavit similar to this Annex prior to receiving any attorney confidences or attorney work product. I further understand that those I request to have access to an Accused, other detainees, or Protected Information will be required to obtain a security clearance and be specifically approved for access to each individual or item of Protected Information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or other Protected

Information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an Accused before military commissions, unless I obtain approval in advance from the Appointing Authority or the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case. Such discussions, transmissions, or sharing may include consulting with other legal professionals for assistance with defense tasks that I may have otherwise personally undertaken consistent with this agreement, and any other applicable laws, military commission

orders, instructions, rules, regulations, or directives. I understand that I may not share attorney confidences, attorney work product, or any Protected Information with anyone unless that individual has been previously approved for that specific type of relationship or information as part of the Defense Team in accordance with paragraph II(C) of this affidavit. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Appointing Authority or Presiding Officer before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other Protected Information.

2. Once proceedings have begun, I will not travel from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. I understand the Presiding Officer or the Appointing Authority will not unreasonably restrict travel from the site of the proceedings during extended breaks in commission proceedings.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting Protected Information under MCO No. 1. This restriction does not apply to discussions with other members of the Defense Team or the Chief Defense Counsel who are appropriately authorized

to receive the specific Protected Information in question, when such disclosure is related to the Defense efforts on behalf of the Accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of Protected Information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other Protected Information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that communications with an Accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/_____

Print Name: _____

Address: _____

_____

Date: _____

STATE OF)

COUNTY OF)

Sworn to and subscribed before me, by _____, this ___ day of _____, 20__.

Notary

My commission expires:

Department of Defense
Military Commission Instruction No. 6

April 15, 2004

SUBJECT: Reporting Relationships for Military Commission Personnel

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

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

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

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

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

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

1. PURPOSE

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

2. AUTHORITY

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

3. POLICIES AND PROCEDURES

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

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

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

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

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

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

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

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

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

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

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

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

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

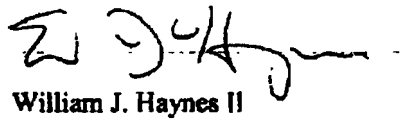
C. *Responsibilities of Supervisory/Reporting Officials.* Officials designated in this Instruction as supervisory/reporting officials shall:

1) Supervise subordinates in the performance of their duties.

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

4. EFFECTIVE DATE

This Instruction is effective immediately.



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

Department of Defense
Military Commission Instruction No. 7

April 30, 2003

SUBJECT: Sentencing

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

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

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

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

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

1. PURPOSE

This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to references (a) and (b).

2. AUTHORITY

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

3. AVAILABLE SENTENCES

A. *General.* Reference (a) permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in reference (a) are met. Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing

the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

B. *Conditions of Imprisonment.* Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with Section 6(H) of reference (a).

C. *Prospective Recommendations for Sentence Modification.* A sentence imposed by military commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions upon which the suspension, remission, commutation, or other modification is contingent (usually relating to the performance, behavior or conduct of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with Section 6(H) of reference (a).

4. SENTENCING PROCEDURES

A. *General.* Reference (a) permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with Section 6(B) of reference (a).

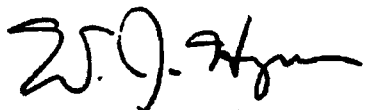
B. *Information Relevant to Sentencing.* Section 6(E)(10) of reference (a) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (e.g., the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with references (a) and (b).

C. *Cases Involving Plea Agreements.* In accordance with Section 6(A)(4) of reference (a), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accordingly, the Presiding Officer may exercise the authority granted in Section 6(E) of reference (a) to curtail or preclude the presentation of information and argument relative to the military commission's determination of an appropriate sentence.

D. *Special Duties.* In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

5. EFFECTIVE DATE

This Instruction is effective immediately.



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

Department of Defense
Military Commission Instruction No. 8

September 16, 2005

SUBJECT: Administrative Procedures

References: (a) Military Commission Order No. 1 (current edition)

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

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

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

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

(f) Military Commission Instruction No. 8 (August 31, 2004)

1. PURPOSE

This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to references (a) and (b). This Instruction supersedes reference (f).

2. AUTHORITY

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

3. COMMISSION PERSONNEL

A. *Removal of Commission Members.* 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. Any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member. The Presiding Officer shall decide challenges for cause in accordance with the standards established by the Appointing Authority.

B. *Military Commission Security Officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

4. EFFECT OF INTERLOCUTORY QUESTIONS CERTIFIED TO THE APPOINTING AUTHORITY

In accordance with Section 4(A)(5)(e) of reference (a), the Presiding Officer shall certify all interlocutory questions the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect to hold proceedings in abeyance or to continue.

5. IMPLIED DUTIES OF THE PRESIDING OFFICER

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with reference (a). Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. Notwithstanding the role of the Presiding Officer and other Commission Members in decisions concerning the probative value of evidence as set forth in Section 4(c)(3) of reference (b), the Presiding Officer shall have independent responsibility for issuing protective orders and deciding upon issues of limited disclosure of information pursuant to Sections 6(D)(5)(a) and (b) of reference (a) and for directing closure of proceedings pursuant to Section 6(B)(3) of reference (a).

6. DISCLOSURES

A. *General.* Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the

Presiding Officer no later than three days prior to the scheduled convening of a military commission.

B. *Notifications by the Prosecution.* The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

C. *Notifications by the Defense.* The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

D. *Evidence Related to Mental Responsibility.* If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, or both, and both parties shall have access to the results of that examination.

7. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 9

October 11, 2005

SUBJECT: Review of Military Commission Proceedings

References: (a) Military Commission Order No. 1 (current edition)

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

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

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

(e) Section 603 of Title 10 of the United States Code

(f) Military Commission Instruction No. 1 (current edition)

(g) Military Commission Instruction No. 2 (current edition)

(h) Military Commission Instruction No. 9 (December 26, 2003)

1. PURPOSE

This Instruction prescribes procedures and establishes responsibilities for the review of military commission proceedings. This Instruction supersedes reference (h).

2. AUTHORITY

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

3. ADMINISTRATIVE REVIEW BY THE APPOINTING AUTHORITY

Pursuant to Section 6(H)(3) of reference (a), the Appointing Authority shall promptly perform an administrative review of the record of trial. Once satisfied that the proceedings of the military commission are administratively complete and after compliance with Section 4(C)(3) of this Instruction, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4) of reference (a) and in accordance with this Instruction. If not

so satisfied, the Appointing Authority shall return the case to the military commission for any necessary supplementary proceedings.

4. REVIEW PANEL

A. *Generally.* A Review Panel shall consist of three Military Officers and shall commence its review of a military commissions case upon the forwarding of a record of trial by the Appointing Authority.

B. *Members.* The Secretary of Defense will designate three or more Military Officers, including civilians commissioned pursuant to reference (e), as eligible to serve on a Review Panel. With regard to the internal operations of a Review Panel, civilians appointed as officers shall have the same authority, duties, and responsibilities as any other member of the armed forces serving on the Review Panel. Such officers whose total service under reference (e) and otherwise to the United States is not expected to exceed 130 days during any period of 365 consecutive days shall be special Government employees for the purposes of 18 U.S.C. §§ 202, 203, 205, 207, 208, and 209. Section 973(b) of Title 10, U.S. Code, does not apply to such officers. At least one member of each Review Panel shall have experience as a judge. The General Counsel of the Department of Defense may designate a previously designated member of the Review Panel to serve as the Review Panel Chief.

1) *Qualifications.*

a. In designating members as eligible to serve on a Review Panel, only individuals who are well qualified by virtue of their experience, impartiality, and judicial temperament shall be chosen.

b. No person shall be eligible to serve on a Review Panel if such person:

(1) Participated in the investigation of the case;

(2) Served as a member of the military commission that heard the case;

(3) Served as prosecutor or defense counsel before such commission; or

(4) Is otherwise incapable of providing an impartial review of military commissions as determined by the Secretary of Defense.

c. No person who has served a term of appointment as a member eligible to serve on a Review Panel may be reappointed to a second term.

2) *Term of Appointment.* The Secretary of Defense will prescribe the term of each Review Panel member, which normally shall not exceed two years. The Secretary of Defense may permanently remove a Review Panel member only for good cause. "Good cause" includes, but is not limited to, physical disability, military exigency, or other circumstances that render the member unable to perform his duties.

3) *Review Panel Composition and Administration.* The Review Panel Chief shall coordinate among the members the composition of individual three-member panels, the procedures for selecting a President of each individual three-member panel, and the assignment of cases. The Review Panel Chief shall also be responsible for other administrative requirements of the Review Panel.

4) *Oath of Office.* An oath (or affirmation) of office shall be administered to each Review Panel member.

   a. *Procedure for administering oath.* The following oath (or affirmation) may be administered by the Secretary of Defense, the General Counsel of the Department of Defense, and any person duly authorized to administer oaths: "Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the rules applicable to the review of trials by military commissions, all the duties incumbent upon you as a member of this Review Panel (so help you God)?"

C. *Post-Trial Review by the Review Panel.*

1) *Action on the Record of Trial.* After it has completed its review, the Review Panel shall take action as specified in subparagraphs (a) or (b) below:

   a. Return the case to the Appointing Authority for further proceedings when a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

      (1) In cases where the only further proceedings necessitated by the Review Panel's conclusion that a material error of law occurred are proceedings where the charge(s) against the Accused shall be dismissed, the Appointing Authority shall dismiss the charge(s).

      (2) In all other cases, the Appointing Authority shall refer the Review Panel's conclusions to the military commission for proceedings consistent with those conclusions.

   b. Forward the case directly to the Secretary of Defense with a written opinion, consistent with Section 4(C)(5) of this Instruction, when a majority of the Review Panel has not formed a definite and firm conviction that a material error of law occurred.

      (1) As to each finding of Guilty, the Review Panel shall recommend that it be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense. The Review Panel may recommend disapproval of findings of guilty on a basis other than a material error of law.

      (2) As to the sentence imposed or any portion thereof, the Review Panel shall recommend that it be approved, mitigated, commuted, deferred, or suspended.

2) *Standard of Review.*

a. *Material Error of Law.* Variance from the procedures specified in reference (a) and its implementing Instructions that would not have had a material effect on the outcome of the military commission shall not constitute a material error of law.

b. Material errors of law may include but are not limited to the following:

(1) A deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial:

(2) Conviction of a charge that fails to state an offense that by statute or the law of armed conflict may be tried by military commission pursuant to references (a), (b), and (g);

(3) Insufficiency of the evidence as a matter of law; and

(4) A sentence that is not consistent with Section 6(G) of reference (a).

3) *Timing of Post-Trial Review.* After completing the administrative review of the record of trial for completeness under reference (a), the Appointing Authority shall forward the record to the Defense and Prosecution. The Defense has 30 days from receipt of the record of trial to submit to the Appointing Authority and the Prosecution a brief for the Review Panel. The Prosecution has 30 days from the receipt of the Defense post-trial brief, if any, to submit an answer brief for the Review Panel. *Amici curiae* shall submit briefs no later than the time by which the Prosecution must submit its brief. Upon submission of all briefs, the Appointing Authority shall promptly forward to the Review Panel the record of trial, briefs of the parties, and *amicus curiae* briefs. The Review Panel shall complete its review and forward the record of trial within 75 days of receipt of the record of trial. Upon written application of the Review Panel Chief, the Secretary of Defense may grant extensions of time.

4) *Scope of Post-Trial Review.*

a. The Review Panel shall review the entire record of trial as defined by Section 6(H)(1) of reference (a), including decisions by the Appointing Authority.

(1) In making the determination specified in Section 4(C)(l)(a) of this Instruction and the recommendations required in Section 4(C)(l)(b) of this Instruction, the Review Panel may consider factual matters included in the record of trial.

(2) In making the determination specified in Section 4(C)(l)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may review sentences as part of its review of the record of trial.

b. The Review Panel shall review the post-trial submissions, if any, from the Prosecution and the Defense. The Review Panel may in its discretion grant oral arguments on the written submissions.

c. The Review Panel may in its discretion review any *amicus curiae* submissions, but shall ordinarily review any such submissions from the government of the nation of which the accused is a citizen.

5) *Written Opinions.* The Review Panel shall issue a written opinion in every case. addressing the determination specified in Section 4(C)(l)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction.

a. The written opinion shall include a legal analysis in the form of a memorandum supporting the Review Panel's determination in Section 4(C)(l)(a) and recommendations in Section 4(C)(1)(b) of this Instruction and where it otherwise deems appropriate in the exercise of its discretion.

b. Members of the Review Panel may write a separate opinion concurring with or dissenting from the majority opinion.

c. The written opinions of each individual three-member panel shall constitute precedent for subsequent opinions of all others.

D. *Deliberation.* The members of the Review Panel shall deliberate in closed conference and shall not disclose the contents of their deliberations outside their closed conference.

E. *Publication.* Except as necessary to safeguard protected information (as defined by reference (a)), the written opinions of the Review Panel shall be published.

F. *Applicability of 10 U.S.C. § 837(a).* The provisions of 10 U.S.C. § 837(a). prohibiting any attempts to coerce or, by any unauthorized means, influence the action of any military tribunal or reviewing authority, apply to Review Panel members.

G. *Effectiveness, Fitness, or Evaluation Reports.* The consideration or evaluation of the substantive judicial decisions made by a member of the Review Panel is prohibited in preparing effectiveness, fitness, or evaluation reports of a Review Panel member.

H. *Administrative Support.* The Review Panel shall be provided any necessary administrative and logistical support required to perform its duties through the Office of the Appointing Authority. In doing so, no member of the Office of the Appointing Authority or of any other component of the Office of Military Commissions may provide direction or guidance to the work of any member of the Review Panel or its staff. The Review Panel may be provided a Chief Clerk for the Panel and one individual law clerk for each panel member. The Review Panel Chief will supervise and assign duties to the Chief Clerk.

I. *Procedural Rules.* The Review Panel Chief, in consultation with the other Review Panel members, may issue administrative rules of procedure consistent with references (a) – (g) and this Instruction to facilitate the timely review of military commission proceedings.

5. REVIEW BY THE SECRETARY OF DEFENSE AFTER RECEIPT OF THE REVIEW PANEL'S RECOMMENDATION

Pursuant to Section 6(H)(5) of reference (a), the Secretary of Defense will review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of reference (b), forward it to the President with a recommendation as to disposition.

6. FINAL DECISION

Pursuant to Section 6(H)(6) of reference (a), after review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense: 1) The Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or 2) The Secretary of Defense may mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) of reference (a) shall constitute the final decision. Pursuant to Section 6(H)(2) of reference (a), an authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.

7. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Appointing Authority Regulation No. 1

August 20, 2004

SUBJECT: Disclosure of Communications

References:
(a) Military Commission Order No. 1 (Mar. 21, 2002)
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
(c) Military Commission Order No. 3 (Feb. 5, 2004)
(d) Military Commission Instruction No. 8, current edition
(e) Department of Defense Directive 5105.70, "Appointing Authority for Military Commissions" (Feb. 10, 2004)

1. PURPOSE

This Regulation establishes confidentiality of certain communications between an individual and his or her attorney, and between an individual who has been detailed a Defense Attorney or has been served with a copy of approved charges and his or her psychotherapist.

2. AUTHORITY

This Regulation is issued pursuant to Section 7(A) of reference (a) and Section 6.3 of reference (e), and in accordance with references (b), (c), and (d).

3. COMMUNICATIONS SUBJECT TO THIS REGULATION

This Regulation applies only to communications between an individual and his or her attorney or persons who have been designated as members of the Defense Team, and to communications between an individual who has been detailed a Defense Attorney or has been served with a copy of approved charges and his or her licensed psychotherapist, including a licensed psychiatrist or psychologist, or a medical provider working under the supervision of a licensed psychiatrist or psychologist.

4. DISCLOSURE OF COMMUNICATIONS

A. Communications between Attorney and Client.

1) Communications (oral, electronic, written, or any other means) made between an individual and his or her attorney, or persons who have been designated as

members of the Defense Team, shall not be disclosed and are not subject to disclosure unless:

a. The communications contemplate the future commission of a crime or fraud;

b. Such disclosure is necessary for the security of the facility where the individual is detained;

c. Such disclosure may prevent communications aimed at facilitating terrorist operations;

d. The communications relate to the conduct, furtherance, facilitation, or prevention of further terrorist or other illegal acts;

e. Communications were monitored pursuant to reference (c);

f. The individual consents in writing to such disclosure; or

g. The individual voluntarily disclosed the content of the communications to a third party, if the disclosure itself is not privileged.

2) Communications disclosed pursuant to Section 4(A)(1)(a), (b), (c), (d), or (e) of this Regulation shall be disclosed to the appropriate persons other than those involved in prosecution or the underlying prosecution investigation of the individual.

B. Communications between Psychotherapist and Patient.

1) Communications (oral, electronic, written, or any other means) made between an individual who has been detailed Defense Attorney or has been served with a copy of approved charges and his or her psychotherapist, including a licensed psychiatrist or psychologist, or medical providers working under the supervision of a licensed psychiatrist or psychologist, for the purpose of facilitating diagnosis or treatment of the individuals' mental or emotional condition, shall not be disclosed or be subject to disclosure unless:

a. The communications contemplate the future commission of a crime or fraud;

b. Such disclosure is necessary for the safety or health of the individual;

c. Such disclosure is necessary for the security of the facility where the individual is detained;

d. Such disclosure may prevent communications aimed at facilitating terrorist operations;

e. The communications relate to the conduct, furtherance, facilitation, or prevention of further terrorist or other illegal acts;

f. The communications were made during a mental examination conducted by a military psychologist or psychiatrist pursuant to Section 6(D) of reference (d);

g. The individual consents in writing to such disclosure; or

h. The individual voluntarily disclosed the content of the communication to a third party, if the disclosure itself is not privileged.

2) Communications disclosed pursuant to Section 4(B)(1)(a), (b), (c), (d), (e), or (f) of this Regulation shall be disclosed to the appropriate persons other than those involved in prosecution or the underlying prosecution investigation of the individual.

5. EFFECTIVE DATE

This Regulation is effective immediately.

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

Department of Defense
Appointing Authority Regulation No. 2

January 26, 2006

SUBJECT: Trial Procedures

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 Instruction No. 8, current edition

(e) Military Commission Instruction No. 9, current edition

(f) Appointing Authority Regulation No. 2 (November 17, 2004)

1. PURPOSE

This Regulation establishes responsibility for the development of trial practice and procedure in a military commission. This regulation supersedes reference (f).

2. AUTHORITY

This regulation is issued pursuant to Section 6.3 of reference (b) and Section 7(A) of reference (c) and in accordance with reference (a). The provisions of references (d) and (e) are applicable to this Regulation.

3. PROMULGATION AUTHORITY FOR RULES OF PRACTICE AND PROCEDURE

The Presiding Officer may promulgate uniform rules of practice and procedure applicable to all military commissions concerning the form, timing, and processing of motions, as well as other trial procedures, provided that such procedures do not conflict with reference (a) or (b), Military Commission Orders, Military Commission Instructions, and Appointing Authority Regulations, orders or memoranda in their current form and as they may be later issued, amended, modified, or supplemented. The Appointing Authority shall have an opportunity to review all Presiding Officer Memoranda before they are issued. In the event that there is more than one Presiding Officer, the Appointing Authority shall designate a Chief Presiding Officer who may promulgate

changes to rules of practice and procedure only after consultation with all other sitting Presiding Officers and an opportunity for review by the Appointing Authority.

4. INTERLOCUTORY QUESTIONS

A. *Required Certification of Interlocutory Questions.* In accordance with Section 4(A)(5)(e) of reference (c), the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect the termination of the proceedings with respect to a charge, for decision by the Appointing Authority.

1) An interlocutory question would only effect the termination of the proceedings with respect to a charge if, after consideration of the motion or question that arises during the course of a trial, the Presiding Officer (or a majority of the Commission pursuant to Section 6(D)(1) of reference (c)) reaches a conclusion that would effect a dismissal with respect to that charge. An interlocutory question does not arise until the Presiding Officer rules on a motion filed by the parties.

2) If the Presiding Officer (or a majority of the Commission pursuant to Section 6(D)(1) of reference (c)) reaches a conclusion that would not effect a dismissal with respect to a charge, there is no requirement for certification of an interlocutory question.

B. *Other Interlocutory Questions.* The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. The Presiding Officer may grant and consider argument by the Prosecution and Defense as to whether an issue should be certified as an interlocutory question.

5. PROCEDURES FOR SUBMITTING INTERLOCUTORY QUESTIONS

A. *Generally.* An interlocutory question does not arise until a party to the action, by motion, requests any type of relief from the Presiding Officer, who subsequently rules upon the motion.

1) The Presiding Officer shall ensure, where appropriate, that evidence, witnesses, and arguments of counsel are entertained before a ruling is made on the motion. The Presiding Officer shall issue a ruling on the motion before the issue considered is certified to the Appointing Authority as an interlocutory question.

2) A request for interpretation of Commission rules and procedures from the Presiding Officer or parties to an action does not constitute an interlocutory question. If the Presiding Officer has questions concerning Commission rules and procedures, he or she shall exercise discretion in interpreting such rules with the interests of a full and fair trial in mind. Such determinations by the Presiding Officer do not become interlocutory questions unless challenged by motion by one of the parties to the case, the Commission issues a ruling on the

motion, and the Presiding Officer subsequently certifies the issue raised pursuant to subsection 4, above.

B. *Commission Procedures Prior to Submitting an Interlocutory Question.*

1) Once the Presiding Officer decides to certify an interlocutory question, the Presiding Officer will notify the Prosecution and Defense whether the certification was required or optional.

2) The Presiding Officer will inform the Prosecution and Defense of the decision on the issue and the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority. The Presiding Officer will also inform the Prosecution and Defense whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

3) The Presiding Officer, may at his discretion, grant and hear argument from the Prosecution and Defense on the appropriateness of the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority, and whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

C. *Commission Procedures after Receiving a Response from the Appointing Authority.*

1) Once the Presiding Officer receives a response from the Appointing Authority, he will provide the response to the Prosecution, Defense, and other Commission Members and conduct the Commission consistent with the Appointing Authority's response.

2) The Appointing Authority's response and the documents the Appointing Authority considered will be made a part of the Record of Trial and subject to review in accordance with reference (e).

6. MATERIAL SUBMITTED TO THE APPOINTING AUTHORITY

A. When submitting an interlocutory question to the Appointing Authority, the Presiding Officer will provide the following:

1) A memorandum that states:

a. Whether the certification of the interlocutory question was required or optional;

b. The interlocutory question or issues presented to the Appointing Authority;

c. The decision of the Presiding Officer, subject to Section 6(D)(1) of reference (c);

d. A list of the documentary or other materials, if any, the Presiding Officer forwarded to the Appointing Authority in conjunction with an interlocutory question; and

e. Whether the Presiding Officer is holding the proceedings in abeyance until receiving a response on the interlocutory question.

2) Portions of the record of trial, including all applicable exhibits that pertain to the certified questions or issues.

B. The Appointing Authority may return the interlocutory question to the Presiding Officer with direction to obtain additional information.

7. INTERLOCUTORY QUESTION CERTIFICATION EFFECT ON PROCEEDINGS

While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

8. OTHER

This Regulation is prospective in application and shall not serve as a basis to challenge or reconsider decisions made prior to the effective date of this Regulation.

9. EFFECTIVE DATE

This Regulation is effective immediately.

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

Department of Defense
Appointing Authority Regulation No. 3

November 17, 2004

SUBJECT: Professional Responsibility

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. 1, current edition
(e) Section 898 of Title 10 of the United States Code

1. PURPOSE

This Regulation establishes policies for the ethical conduct of attorneys in connection with a proceeding before, during and after a trial by military commission pursuant to references (a) and (b).

2. AUTHORITY

This Regulation is issued pursuant to Section 6.3 of reference (b) and Section 7(A) of reference (c) and in accordance with reference (a). The provisions of references (c), (d), and (e) are applicable to this Regulation.

3. APPLICATION OF PROFESSIONAL RESPONSIBILITY RULES

A. *Generally.* In addition to State and branch specific armed forces Rules of Professional Conduct, compliance with all rules, regulations, and instructions applicable to trials by military commission convened pursuant to references (a) and (b) shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

1) Failure to adhere to the rules, regulations, and instructions applicable to trials by military commission may be subject to appropriate action by the Appointing Authority for Military Commissions, the General Counsel of the Department of Defense or the Presiding Officer of a military commission.

2) Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to references (a) and (b), punitive measures imposed under reference (d), and any other lawful sanction.

B. *Violations of the Rules of Other Jurisdictions.* If the conduct of covered attorneys appears to be in violation of the branch specific armed forces Rules of Professional Conduct or rules of other jurisdictions that regulate the professional conduct of attorneys, the Legal Advisor to the Appointing Authority for Military Commissions shall forward information concerning those instances to The Judge Advocate General of the appropriate armed force or the appropriate officials of other jurisdictions for appropriate action.

C. *Conflicts.* If a conflict exists between the rules, regulations, and instructions applicable to trials by military commission and the branch specific armed forces Rules of Professional Conduct or rules of other jurisdictions that regulate the professional conduct of attorneys, the Appointing Authority for Military Commissions or the Presiding Officer of a military commission shall apply the rules, regulations, and instructions applicable to trials by military commission only after the Legal Advisor to the Appointing Authority for Military Commissions coordinates with The Judge Advocate General of the appropriate armed force or the appropriate officials of other jurisdictions.

4. EFFECTIVE DATE

This Regulation is effective immediately.

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

Office of the Presiding Officer
Military Commission

14 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 1-2 - Presiding Officers Memoranda

This POM supercedes POM # 1-1 dated 12 August 2004

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer has established Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and others concerned within the Office for Military Commissions. In general, these POMs are issued to assist the Commission and its participants, to include the Presiding Officer, in preparing for and providing a full and fair trial under the provisions of Commission Law as defined below.

2. POMs, communications with counsel, and courtroom proceedings may use the term "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.

3. Numbering and effective dates of POMs.

a. Each POM will be limited to a single, general subject.

b. Changes to POMs will be in the form of rescinding a previous POM and reissuing a complete revision. Revised POMs will carry a number with a hyphen. *Example*: POM 15 is the first POM on a topic. If that POM is changed, the new POM will be numbered 15-1. A subsequent change would be POM 15-2.

c. A POM is effective on the date of the POM unless otherwise indicated.

d. References to superseded POMs. In some cases, one POM may refer to another, but the reference is out of date. References to superseded POMs will be read to refer to the current POM in the series. *Example:* POM 15 refers to POM 4-1. Later, POM 4-2 is issued but the reference in POM 15 is not changed immediately. Though the reference in POM 15 is no longer current, POM 4-2 (and not POM 4-1) is still in effect. Furthermore, POM 15 shall be read to refer to POM 4-2 because POM 4-2 is the current one in the POM 4 series.

4. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

5. Some POMs may be issued in conjunction with the Chief Clerk for Military Commissions when there may be shared responsibility among or between the Presiding Officer, the Assistant to the Presiding Officers and the Chief Clerk.

Signed by:

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

Office of the Presiding Officer
Military Commission

September 14, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 2-2 Appointment and Role of the Assistant to the Presiding Officers

This POM supersedes POM # 2-1, dated September 16, 2004

1. Pursuant to Military Commission Order No. 1, and Military Commission Instruction No. 6, an Assistant to the Presiding Officers has been detailed and shall report to the Presiding Officer and work under his supervision to provide advice in the performance of the Presiding Officer's adjudicative and administrative functions. The Assistant may act on behalf of the Presiding Officer. The Assistant does not act, and does not have authority to act, on any matter or in any manner, on behalf of the Appointing Authority. (See Appointing Authority Memorandum, SUBJECT Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions, 19 Aug 2004 - Enclosure 1.)

2. The current Assistant to the Presiding Officers is Mr. Keith Hodges who has been detailed by the Department of Homeland Security. The Assistant to the Presiding Officers is also referred to as the Commission Trial Clerk. His duties are:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on substantive legal, procedural, logistical, and administrative matters and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officers of the Military Commissions, which may require legal or other analysis of substantive legal, procedural, logistical, and administrative matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers, to include providing advice to the Presiding Officers in connection with their performance of adjudicative functions, *ex parte* if required, with respect to substantive legal, administrative, logistical, and procedural matters. (See ABA Model Code of Judicial Conduct Canon 3B(7)).

d. Act on the Presiding Officer's behalf to make logistical and administrative arrangements.

e. Draft, coordinate, staff, and publish guidelines for Commission Proceedings to include Presiding Officer Memoranda (POM). (POMs must be personally approved by the Presiding Officer.)

f. Process and manage policy, procedure, and similar actions and activities designed to contribute to the efficient operation of the Commission - both current and future operations.

g. Coordinate the integration of operations that affect in-court proceedings with OMC and JTF, Guantanamo Bay, and other support personnel - to include the bailiff, security personnel, and court reporters - in providing services to the Commission.

h. To sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, or does direct, except those that under Commission Law or a POM can only be performed personally by the Presiding Officer.

i. Other duties not listed above which are consistent with improving the processes, procedures, administration, and logistics of the Office of the Presiding Officer and the Commissions and which are not inconsistent with paragraph 3 below.

3. The Assistant is *not* authorized to:

a. Communicate or discuss any matter with any Commission member or alternate member (except the Presiding Officer) other than to arrange for their administrative and logistical needs.

b. Be present during any closed conference or session of the members.

c. Advise the Presiding Officer concerning the decision on any matter that requires the vote of the entire Commission, including the Presiding Officer; however, the Assistant may prepare any documents and drafts necessary or required to *process, record, and disseminate* any decision by the Commission.

d. Provide any substantive advice to the Presiding Officer on any matter that, at the time the substantive advice would be offered, requires a vote or decision by the entire Commission, including the Presiding Officer.

4. Except as approved in advance in writing by the Presiding Officer, Mr. Hodges is not permitted to perform any duties for the Department of Homeland Security that involve: advice to law enforcement concerning an active case or investigation; advice on how to detect, investigate, or prosecute alleged acts of terrorism or violations of international law; or any other matter that would create a perception in the minds of a reasonable person that the Assistant's home agency (Department of Homeland Security) has any part in the Commission process through the actions of the Assistant.

5. **Any** email which is sent to the Presiding Officer will be CC to the Assistant to the Presiding Officers. If counsel believe there is a legal reason not to CC the Assistant to the Presiding Officers, counsel shall include that reason in the email to the Presiding Officer.

Signed by:

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

1 Enclosure
As stated

[redacted]

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

19 August, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions

This memorandum sets forth the reporting relationships and levels of authority for persons assigned as Assistant to the Presiding Officer.

Pursuant to Section 4(D), Military Commission Order No. 1 and Paragraph 3(B)(11), Military Commission Instruction No. 6, an Assistant to the Presiding Officer shall report to the Presiding Officer. The Assistant to the Presiding Officer will work under the supervision of the Presiding Officer and provide advice in the performance of the Presiding Officer's adjudicative functions. The Assistant to the Presiding Officer will act on behalf of the Presiding Officer.

The Assistant to the Presiding Officer does not act, and does not have authority to act, on any manner on behalf of the Appointing Authority.

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

cc: Chief Prosecutor
Chief Defense Counsel

Office of the Presiding Officer
Military Commission

8 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 3-1: Communications, Contact, and Problem Solving

This POM supersedes POM # 3 dated July 19, 2004

1. This POM establishes general procedures for communications among counsel, the Presiding Officer, and the Assistant to the Presiding Officers. These procedures are designed to avoid *ex parte* communications, to ensure the accused receives a full and fair trial, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications.

2. The preferred, and most reliable, method of communication among the Presiding Officer and counsel is email with CCs to opposing counsel and the Assistant. The following email conventions will be followed. Counsel should review the enclosure on the benefits of email communications.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject.

c. Use a descriptive subject line in the email. If the email concerns an item that has a filings inventory number, the subject line *must* include that number.

d. Identify, in the body of the email, each attachment being sent.

e. When sending a document that has an attachment, send all the attachments in the same email as the document to which it is an attachment. (The exception would be if such an email would exceed the capabilities of the LAN.) Parties are welcome to make a filing with all the attachments merged into a single document. Legal NCOs are adept at this.

f. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF).

g. Save all emails you send for your record copy of the communication. Remember that all filings that are before the Commission will be listed on the filings inventory, and it is the responsibility of counsel to compare what they think has been properly filed with the filings inventory.

g. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

h. Avoid archiving (WinZip.) Before sending an archived file, get permission from the PO or APO.

i. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

j. Given the number of counsel and the changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email and advise the sender of the failure to include the person.

k. Counsel are encouraged to CC their own Legal NCOs and the Legal NCOs of opposing counsel. These NCOs have a measurably positive impact on the efficiency and reliability of the system.

3. Because of frequent changes to the composition of trial teams, the Assistant and/or the Presiding Officer may elect to send an email to the Chief Defense Counsel or Prosecutor, and their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. When the Presiding Officer or the Assistant uses this method, the Chief Legal NCO will CC the Assistant with a copy of the email that the Chief legal NCO sends to the counsel.

4. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

5. The Presiding Officer is responsible for insuring that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not, in her/his opinion, being satisfactorily addressed must present the problem to the Presiding Officer if s/he wants the Presiding Officer to take some action. That request may trigger the need to use procedures set forth in another POM.

Signed by:

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

1 Enclosure

Enclosure to POM # 3-1

This enclosure comes from part of an email the Presiding Officer sent on August 4, 2004

To All Counsel,

1. I received an email from a counsel today asking that a particular "e-mail and (counsel's) response be made part of the record of proceedings and published to the public in keeping with the (accused's) right to a public hearing." I thought it would be beneficial to provide a reply that might assist all.

2. In case some of you missed my thoughts on this matter, let me share with you a portion (slightly edited) of an email I sent recently on the general topic of using email in preparing cases for trial.

Most lawyers and judges find email presents a fast, inexpensive, world-wide accessible, and reliable system to share information among multiple parties. It is, in my opinion, far more reliable, faster, and efficient than multiple mailings, multiple fax transmissions, and tracking down people for conference calls. It provides a record that a document was sent and received, and a record of what was done. For those who travel a lot and who are unsure where they will be, one can check an email account, 24 hours a day, in almost any city in the world. I also believe that email is an excellent way of preserving what has transpired - that is, in fact, one of the reasons I chose this method. If there is a question of what communications were made, and the content of those communications, forwarding a previously sent or received email is easy, and any email can be printed and appended to the record. With many lawyers in different parts of the country, email seems smart, in keeping with the technology of today, and mirroring what is being done in State and Federal courts with electronic filings and the like. While a trial cannot and will not be conducted by email, it works for the purposes I have outlined.

3. Everything which is emailed to me or Mr. Hodges is retained, and I feel certain that counsel have kept and will keep copies as well -- both for their own records and in case one of us misses something.

4. A record of trial will be prepared in this case and will consist of many things we are all familiar with, primarily testimony and exhibits. One type of exhibit - referred to as an Appellate Exhibit in military practice - will be Review Exhibits. I expect that those items or matters which are denominated as Appellate Exhibits in military practice - generally speaking items to complete the record, but which are not used as evidence on the merits or sentencing - will be Review Exhibits for Commission proceedings.

5. I would expect that if there is a dispute on a matter, or if an email or other writing is part of what counsel wants to offer in motions practice, any party may ask that the item be marked as an RE or offer it as an attachment to an RE. It would probably be unwise to mark every email or writing exchanged between the parties because of the volume involved, but if a counsel thinks it is necessary that an item be marked as an RE, it will be so marked and appended.

6. As to the reference to the emails being "published," I'm not sure of the meaning of that term in this context. After a case is completed, a record of the proceedings will be prepared and forwarded to the Appointing Authority for his action. That is the extent of my publication of documents in this case. As to being published to the public, there is Commission Law on how matters are provided to the public and the role of Public Affairs in that regard. If I missed the meaning, let me suggest counsel wait until we are together in session to discuss it.

7. Incidentally, to assist counsel in identifying and pre-marking trial exhibits, to include REs, I am preparing a POM on that matter (*subsequently issued as POM # 8*.) For those who have problems with Roman numerals (a group which includes the Presiding Officer), you should be pleased to learn that Roman numerals will not be used for REs.

COL Brownback

Office of the Presiding Officer
Military Commission

20 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 4-3: Motions Practice

This POM supersedes POM # 4-2 issued 7 Oct 2004

1. Purpose. This POM establishes the procedures for motions practice before Military Commissions. If a party wishes the Presiding Officer to take action on a matter, it must be presented to the Presiding Officer in accordance with this Memorandum.

2. This POM does not apply to:

a. Service upon anyone other than the Presiding Officer or opposing counsel. As this POM applies only to service of a filing to the Presiding Officer and opposing counsel as to matters to be resolved by the Presiding Officer, it does not constitute service upon the Appointing Authority, the Department of Defense, the Office of General Counsel, the Office of Military Commissions, or any other person or entity other than the Presiding Officer and opposing counsel. With respect to service upon opposing counsel, service is effective only with respect to matters to be resolved by the Commission and the Presiding Officer, and does not constitute service for any other purpose such as to present matters to the Appointing Authority or others for resolution or attention.

b. Formatting filings with respect to witness requests. *See* POM # 10-1.

c. Formatting filings with respect to Access to Evidence, Discovery, and Notice Provisions. *See* POM # 7-1.

d. Formatting filings with respect to Requesting Conclusive Notice to be Taken. *See* POM # 6-2.

e. Wherever another POM specifically provides that this POM, or portions thereof, do not apply.

f. Requests to the entire Commission on the admissibility of evidence as provided in paragraph 6D(1), MCO # 1.

g. Briefs directed by the Presiding Officer. In the Order directing the brief, the Presiding Officer will specify which, if any, provisions of this POM apply.

h. Formatting filings with respect to Requests for Protective Orders or Limited Disclosure. *See* POM # 9-1.

3. Definitions.

a. A "motion," as used in this POM, is the original request from the moving party (the party requesting relief) to the Presiding Officer for any type of relief, or for the Presiding Officer to direct another to perform, or not perform, a specific act.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

c. A “response” is the opposing party’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when sent via email to the correct email address of the recipient(s). If there is a legitimate question whether the email system functioned correctly (bounced email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received. *See* POM # 12 and paragraph 3g(2) below concerning whether a filing is before the Presiding Officer for decision.

g. Receiving filings.

(1) A filing is "received" by the opposing party when it is sent to the proper parties per paragraph 5 below - with the following exceptions:

(a) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(b) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(c) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Chief Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed. *See* paragraph 13b.

(2) A filing is not received, in terms of being before the Presiding Officer for resolution, unless it has been placed in the filings inventory as an active filing. *See* POM # 12.

4. Managing motions practice. The Assistant to the Presiding Officer may not resolve motions or grant extensions, but the Assistant is authorized to manage the processing of motions and other filings and to direct compliance with this POM to include both matters of form and content, without referral of the matter to the Presiding Officer. Only the Presiding Officer may grant a delay or departure from the time required for a filing; however, the Presiding Officer's decision on such matters may be announced to the parties by the Assistant.

5. Sending, serving, and formatting filings. Enclosures 1-3 provide samples of a motion, response, and reply. In addition, as to every filing, unless this POM or another POM specifically provides otherwise:

a. The filing will be sent by email as an attachment, and will be in Microsoft Word or PDF. If a recipient does not have these programs, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. Attachments will not be in "track changes" or "mark-up" format. The pages will be numbered, and the footer will also indicate the number of pages.

b. All emails to the Presiding Officer and the Assistant will be on a single topic. *See* POM # 3-1. In motions practice, a single email will not address or contain more than one filing.

c. The filing will carry the caption of the case on the top left of the first page, and the subject of filing on the right top. (*See* the samples at the enclosures.) The subject shall be usefully descriptive containing the name of the party (prosecution/defense) filing it, the type of filing (motion, response etc.) and a unique and descriptive name of the filing. Generic or non-descriptive subject lines (such as Motion to Dismiss, or Motion for Appropriate Relief) are not helpful and will not be used. Documents received with non-descriptive or unhelpful subject lines will be returned by the Presiding Officer or the Assistant for compliance with this POM. If a filings inventory number has been assigned, it will be on the first line of the subject. Example: A response to P2 in *US v Jones* should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."*

d. The subject line of the email to which the filing is attached will follow the same guidance as paragraph 5c above to assist the parties in managing email files. If a filings inventory number has been assigned, it will be at the beginning of the subject line.

e. The names given to matters that may appear in the filings inventory may not be classified or otherwise protected as the filings inventory is intended to be transmitted through unsecured networks. Accordingly, counsel must therefore ensure that the names of their filings are not in themselves classified or protected.

f. The email and the filing in the form of an attachment will be sent to all opposing counsel, the Presiding Officer, the Chief Prosecutor and their Deputies, the Chief Legal NCOs for the prosecution and defense, and the Assistant. Once filings have been assigned a filings inventory number, the Assistant will send them to the Chief Clerk of Military Commissions (CCMC.)

g. Emails sending a filing and acknowledgement that the filing was received shall be maintained by both senders and receivers. Note, however, that verification that a filing has been filed with the Commission will be as provided by the Filings Inventory as established by POM # 12.

h. Upon receiving a filing counsel shall immediately:

(1) Examine the address lines to ensure that all counsel concerned have been sent the filing. If not, the sender of the email will be immediately notified.

(2) Examine the contents and all attachments to ensure it is complete (such as in the case where one fails to insert an attachment, or the wrong attachment is included.)

(3) Counsel receiving a filing will reply by email, ***only to the sender,*** acknowledging receipt.

i. Citations to authority in filings.

(1) Counsel may, and in many cases must, cite authority or references in their filings. The "Blue Book" (Uniform Citations) shall be used.

(2) A web URL (web page address) is NOT acceptable as a citation because a web site can change, or the web page can become unavailable.

(a) *Exception 1*: A web URL may be included as a citation in a filing provided that the document associated with the web URL is contained in the Commissions Library. In such cases, the URL citation shall be immediately followed with an annotation as follows (contained in the Commissions Library.) Filings with this statement will be returned by the Assistant with compliance with this POM if the document is not, in fact, in the Commissions Library. *See* POM # 14-1 on having items placed into the Commissions Library.

(b) *Exception 2:* A web URL may be included as a citation in a filing if the document associated with the web URL is provided as an electronic attachment. In such cases, the URL will be followed with the annotation (___ pages attached as attachment ___.). Filings with this statement will be returned by the Assistant for compliance with this POM if the document is not, in fact, attached. *See* paragraph 6 below for more information about attachments, their form, and how they are attached and transmitted.

6. Attachments to filings.

a. Counsel may find it beneficial to include attachments to their filings.

b. Attachments are required for any matter that the filing party wishes the Presiding Officer to consider in deciding the matter except:

(1) For items in the Commissions Library.

(2) For reported cases and other legal authority available through Lexis-Nexis or West Law.

(3) If the item has been previously provided in the form of an attachment by either party in any filing with respect to the ***same*** series of filings to which a response, reply, or supplement is being filed. Required attachments filed in different motions shall be attached again.

(4) If the matter has already been marked as an exhibit in a Commissions trial proceeding held on or after Sept 1, 2005.

c. **All attachments to a filing will be sent in the same email as the filing.** As an exception, if such an email would exceed the capabilities of the LAN, addressees of the email should be advised that an attachment will be sent by separate email. This practice will be used judiciously. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM. Parties are welcome to make a filing with all the attachments to the filing merged into a single document.

d. Text attachments to filings will be in Microsoft Word, HTM/HTML, or RTF. Attachments will not be in "track changes" or "mark-up" format. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

e. Before sending an archived file (such as WinZip), get permission from the Assistant or the Presiding Officer.

f. Listing attachments.

(1) The last paragraph of any filing that includes attachments shall state in separate sub-paragraphs the name of the attachment, the number of pages, and that it is part of the email sending the filing. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM.

(2) If a filing is sent that has all attachments merged into a single document (*See* paragraph 6(c) above), the last paragraph of the filing shall indicate that "the following attachments are electronically merged into this filing" and then list all such attachments and the number of pages of each individual attachment in separate sub-paragraphs.

7. Notice of motions.

a. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion using the provisions in paragraphs 5 and 6 above. The notice, contained in an attachment, shall state the specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

b. As an exception to paragraph 7a, a notice of a motion is not required if the party who is required to provide notice is able to file a motion within three duty days of when a notice of motions would ordinarily be due.

c. A notice of motion is not a motion, and it does not place an issue or matter before the Presiding Officer for decision. If a party files a notice of motion but does not file a motion, the Presiding Officer will not take any action on the underlying issue for which notice has been given. *See* also POM # 12, Filings Inventory.

d. Failure to provide timely Notice of Motion under this paragraph may result in waiver of the ability to file a motion. Requests for exceptions to waiver must be made to the Presiding Officer with specific reasons for failure to provide Notice of Motion in a timely fashion.

8. Motions.

a. **Timing**. Ordinarily the Presiding Officer will establish a deadline for the filing of motions by way of an Order.

b. **Format of a motion:** *See* enclosure 1.

c. Waiver. Motions which are not made in a timely fashion shall be waived. Requests for exceptions to waiver must be addressed to the Presiding Officer with motion-specific reasons for failure to make the motion in a timely fashion.

9. Responses.

a. **Timing**. Unless the Presiding Officer provides otherwise, a response is due within 7 calendar days after a motion is received.

b. Format of a response: *See* enclosure 2.

10. Replies.

a. Counsel may submit a reply to a response, however they must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

b. Timing: Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

c. Format for a reply: *See* enclosure 3.

11. Supplements to filings.

a. Supplements may be filed for any reason *provided however*, that a party wishing to file a supplement must first obtain permission from the Presiding Officer briefly stating the reason why a supplement is necessary. Supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. A request to file a supplement is a special request for relief. *See* para 12 below. All the provisions of paragraphs 5 and 6 apply, except that the request may be contained in the body of an email. The request shall briefly state the reason why a supplement is necessary.

c. If the Presiding Officer authorizes a supplement to be filed and one is filed, all the provisions of paragraphs 5 and 6 shall apply in the manner and form (attachment) in which the supplement is sent. The supplement itself shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. Common special requests for relief could address, for example, requests to: supplement a filing, for extension to submit a filing, for an extension of a POM timing requirement, to adjust the "received" date of a filing, to append or attach documents to a previously made filing, an exception to a requirement to digitize attachments, or like matters that do not require involved questions of law or fact. A motion in the form of a special request for relief relieves counsel of the specialized format for filings generally.

b. A motion in the form of a special request for relief will be filed following the requirements of paragraph 5 above except the request may be in the body of an email.

c. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the Presiding Officer.

d. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, because the time for a notice of motion or other filing has passed, or solely to avoid the formatting requirements of paragraph 8b and enclosure 1.

e. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority if any, and why the relief is necessary.

13. Request for extensions of time.

a. Requests to extend the time provisions in this POM shall be in the form of a special request for relief. The request itself may be contained in the body of an email. The provisions of paragraphs 5 and 6 apply.

b. The request may be made by any counsel on the case. It may also be made by the Chief or Deputy Chief Prosecutor, or the Chief or Deputy Chief Defense Counsel, if detailed or civilian counsel on the case are unavailable to receive service of a filing, is unavailable, or otherwise is unable to request an extension.

14. Burdens of proof and persuasion. As a general rule, the burden of proof (production of evidence) and the burden of persuasion in motions practice is on the moving party. In any motion in which the moving party does not believe that the general rule should apply or believes that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide:

a. A statement of the burden of proof (production of evidence) in the particular motion,

b. A statement of the burden of persuasion in the particular motion,

c. The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party, and

d. The legal argument in support of the statement, particularly focusing on Commission Law.

15. Security considerations and exceptions.

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. No party may send any classified or other protected material to the Presiding Officer or the Assistant by email. If there is a need to transmit classified or protected material to the Presiding

Officer or the Assistant, counsel will so advise the Assistant. The Assistant will provide transmission protocols.

c. Filings that contain classified or other protected information. In the event that a motion or filing contains classified or other protected information, the person preparing the filing will send a notice of motion in accordance with paragraph 7 above sufficiently detailed - consistent with not revealing classified or other protected information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

16. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts, that are necessary to resolution of the motion, are in dispute which requires the taking of evidence, or

b. A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Presiding Officer from ruling on the filings alone.

c. The Presiding Officer, in his sole discretion, determines that oral argument is necessary to provide a full and fair trial.

17. Nothing in this POM should be construed to dissuade counsel from an early sharing of information, to include motions and other filings, to ensure a full and fair trial.

Original signed by:

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

3 Enclosures
1. Format for Motion
2. Format for Response
3. Format for Reply

Enclosure 1 to POM # 4-3, Format for a Motion

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	*Note: A filings inventory number is not usually available for the first motion or filing in a series. It will be added by the APO when the filing is received, and included in responses and replies.* **Defense Motion** to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.* .

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer or a statement of the reason why it is not.

2. A concise statement of the relief sought.

3. (Optional): An overview of the substance of the motion.

4 (May be required.) Statement concerning burden of proof. *See* paragraph 14 of this POM.

5. The facts, and the source of those facts (witness, document, physical exhibit, etc). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are or the identity of the source is protected or classified, that status will be noted.

6. Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.

7. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.

8. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. (Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.

9. Additional information not required to be set forth as above.

10. A list of attachments. (*See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.)

(Note: a size 11 font was used to provide this information on a single page. Please use a 12 font in the filing.)

Enclosure 2 to POM # 4-3, Format for a Response

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D 104 [Name of Accused]** **Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit what relief, if any, the responding party believes should be granted.

3. Overview - Only if the motion contains an overview paragraph. This paragraph is not required even if the motion had an overview paragraph.

4. Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. These will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is Protected or classified, that status will be noted. These will correspond to the subparagraph in the motion containing the facts involved.

6. Why the law does not require or permit the relief sought in light of the facts alleged including proper citations to authority relied upon. (*See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.)

7. (May be required): Address this POM's paragraph14 issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.

8. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.

9. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. See POM # 9-1.

10. Additional information not required to be set forth as above.

11. A list of attachments. See paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.

(Note: a size 11 font was used to provide this information on a single page. Please use a 12 font in the filing.)

Enclosure 3 to POM # 4-3, Format for a Reply

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D 104 [Name of Accused]** **Defense Reply** to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.

3. Citations to additional authority if necessary. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.

4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.

5. Additional information not required to be set forth as above.

6. A list of any additional attachments. *See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.

Office of the Presiding Officer
Military Commission

September 19, 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

SUBJECT: Presiding Officers Memorandum (POM) # 5-1 - Spectators at Military Commissions

This POM supersedes POM # 5 dated 2 Aug 2004.

1. Commission Law provides for open Commission proceedings except when the Presiding Officer determines otherwise. Commission Law also charges the Presiding Officer to maintain the decorum and dignity of all Commission proceedings.

2. The enclosed document, "Decorum for Spectators Attending Military Commissions," shall be in force whenever the Commission holds proceedings open to spectators. The enclosure may be used by bailiffs, security personnel, those with Public Affairs responsibilities, and other Commission personnel to inform spectators and potential spectators of the conduct and attire expected.

3. There are other rules that pertain to media personnel that have been prepared and disseminated by Public Affairs representatives. The enclosure does not limit or change those rules.

4. In conjunction with the Joint Task Force Guantanamo Bay, Office of Military Commissions, the responsible Public Affairs Office, security personnel, the Chief Prosecutor, the Chief Defense Counsel, and the Assistant to the Presiding Officer, the Chief Clerk for Military Commissions (CCMC) will be responsible for preparing and issuing spectator seating charts. To the extent possible, the CCMC will allocate specific areas in the courtroom where different persons and entitles may sit, and issue passes to designated personnel who may in turn issue the passes to spectators. The Assistant to the Presiding Officer will assist the CCMC as needed in working with in-court security personnel to resolve spectator issues.

Approved by:

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

M. Harvey
Chief Clerk of Military Commissions

1 Enclosure

Decorum for Spectators Attending Military Commissions
(Enclosure to POM 5-1)

The decorum and dignity to be observed by all at the proceedings of this Military Commission will be the same as that observed in military and federal courts of the United States.

Spectators, including members of the media, are encouraged to attend all open Commission proceedings. The proceedings may be closed by the Presiding Officer for security or other reasons.

The following rules apply to all persons, to include spectators, observers, and trial participants, in the courtroom. Failure to follow these rules may result in being denied access to the courtroom, and could result in a charge of contempt of court and expulsion from commission-related activities at Guantanamo Bay, Cuba. Nothing in this POM, however, prohibits properly appointed JTF security forces from bringing into the courtroom those items, or that equipment, needed in the official performance of their duties as authorized by security plans approved by the Commanding Officer, JTF Guantanamo Bay.

a. All military commission spectators must wear appropriate attire. Generally, casual business attire is appropriate for civilians. Examples of acceptable casual business attire include: long-pants, knee-length skirts, and collared shirts with sleeves. Inappropriate attire would include, but is not limited to, the following: shorts, sleeveless shirts (tank tops, halter tops, etc.), denim jeans, T-shirts, mini skirts, and any accessories or other attire with political slogans. Individuals wearing inappropriate attire will not be permitted to observe courtroom proceedings in the courtroom.

b. All persons and all items entering or present in the courtroom are subject to inspection at any time for contraband or items that are, or could be used as, a weapon or that could pose a security risk.

c. No distractions are permitted during court sessions to include, but not limited to: talking, eating, drinking, chewing gum, standing and stretching, sleeping, using tobacco products, or other disruptions. Due to the hot and humid environment in Guantanamo Bay, clear bottled water with a re-closable lid will be permitted in the courtroom and may be consumed therein. No other beverages or food are permitted in the courtroom while commissions are in session.

d. Spectators are not permitted to interact with trial participants either during sessions or breaks in the proceedings. Trial participants include: the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, and other personnel assisting in the conduct of military commissions. Spectators are also expected to respect the privacy of other spectators during trial recesses and not press for unsolicited interactions.

e. Sketching or artistic renditions in the courtroom while court is in session are not allowed except for that pool sketch artist as arranged through the Public Affairs Office.

f. It is improper for anyone to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. For the same reason, signs, placards, leaflets, brochures, clothing, or similar items that could convey a message about the proceedings are also not allowed in the courtroom or in the courtroom's vicinity.

g. As is customary in court proceedings, spectators will rise when the bailiff announces "All rise."

h. The following items may not be present or brought into the courtroom during any session:

1. Computers, laptops, PDIs, PDAs, pagers, cell phones, tape/CD/ MP3 players, audio recorders, video recorders, cameras, and any and all other types of electronic or battery-operated devices. Not only can these devices be distracting to others in the courtroom, but they pose a substantial security risk. Counsel and their trial assistants, court reporters, and the Closed Circuit TV operator may have computers. The court reporter, the Closed Circuit TV operator and Commission translators may have cameras and audio recorders to be used in the performance of their official duties.

2. Weapons or items that can be used as a weapon to include firearms, knives, explosives of any kind, staplers, letter openers, scissors, and the like.

i. Spectators may bring the following into the courtroom:

1. Legal or writing pads (long or short) with or without pocket covers or portfolios. (Ring binders of any size are not permitted.)
2. Manila folders containing papers.
3. Cardboard accordion folders containing papers.
4. Plastic Velcro-type binders containing bound papers or documents.
5. Pens, pencils, and highlighters.
6. Purses not to exceed 5" X 8" X 3" in size, with or without a carrying strap, containing personal items.

j. Entering and exiting the courtroom will be only through the south entrance. Leaving the courtroom once a session has begun will be limited to extreme emergencies, and every attempt should be made to take comfort breaks during court recesses.

k. Members of the media are reminded they have agreed to certain rules established by Pubic Affairs representatives.

l. Properly-badged Commissions staff personnel participating in a session of the Commission (counsel, translators, paralegals, reporters, and others designated by the JTF Commander, the Assistant, the Presiding Officer, or the Chief Clerk for Military Commissions) will abide by the above guidance with the following exceptions:

1. Papers, documents, exhibits, file folders, file boxes, and other items necessary to presenting or conducting the case may be brought into the courtroom in any container so long as the container or item does not present a security risk as determined by the Assistant in consultation with JTF security personnel. These items are subject to inspection. When inspecting items brought into the courtroom by counsel for the Prosecution or Defense to include their trial assistants, care will be taken to avoid reading or disclosing attorney-client privileged information.

2. Items that are necessary for conducting the trial but might be used as a weapon (scissors, staplers, rulers or the like) will not be brought into the courtroom except as approved *in advance* by the Assistant in consultation with JTF security personnel.

3. Properly-badged Commissions personnel may use the north entrance and enter and leave during recesses. When operationally necessary, and when done in a manner that will not disturb the proceedings, properly-badged Commissions personnel may enter and leave through the north entrance while the Commission is in session.

Commission officials know that spectators appreciate the need for security in any public building, and we ask that you cooperate with security personnel when they screen spectators, and their property.

BY DIRECTION OF THE PRESIDING OFFICER, MILITARY COMMISSION

Office of the Presiding Officer
Military Commission

September 9, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 6-2, Requesting Conclusive Notice to be Taken

This POM supersedes POM # 6-1 dated 31 August 2004

1. Military Commission Order 1 authorizes the Presiding Officer to take conclusive notice of facts that are not subject to reasonable dispute. This POM establishes the process for such requests.

2. When counsel are aware they will request that the Presiding Officer take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Presiding Officer's taking conclusive notice of a certain fact or facts. It is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.

3. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Presiding Officer on motions or the entire Commission on merits or sentencing.

4. If counsel have agreed that conclusive notice should be taken (or have entered into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, the Presiding Officer, and the Assistant. At the point in the proceedings where the conclusive notice (or stipulation) is to be used, the counsel offering the conclusive notice (or stipulation) is responsible for presenting the conclusive notice (or stipulation) to the Presiding Officer or the Commission.

5. The requirements of POM 4-2 do not apply to requests to take conclusive notice. Therefore, if a counsel wants the Presiding Officer to take conclusive notice, but s/he is unable to obtain the agreement of opposing counsel, the counsel desiring that conclusive notice be taken shall:

a. Send an email with an attachment to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel,

b. The attachment shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject: (Matter of the Facts to be Noticed)]. The subject line of the email shall be the same as the title of the attachment.

c. The attachment shall contain the following matters in separately numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested, and the stage(s) of the proceedings to which the request pertains. See paragraph 3 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Presiding Officer in resolving the matter.

6. Counsel receiving a request as stated in paragraph 5.

a. Within three duty days of receiving the request, counsel shall prepare an attachment in reply. This reply will be sent to opposing counsel, the Presiding Officer and the Assistant. The format will be as shown below in separately numbered paragraphs, using the same styling and appropriate subject as provided in paragraph 5b:

(1). That the responding counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the counsel disagrees:

(a). The reasons therefore.

(b). Any contrary sources not cited by the requesting counsel.

(c). Other information to assist the Presiding Officer in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless responding counsel asserts a legal basis why the Presiding Officer should reserve decision on the matter until oral argument can be heard.

7. Replies by the requesting party. The counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 6 above, unless it is to withdraw the request for conclusive notice. If additional information is needed, the Presiding Officer will request it.

8. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to counsel that a party will not agree to a request that conclusive notice be taken, that counsel shall send a request as provided in paragraph 5 above.

c. If counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 5 above.

9. Stipulations of fact. While counsel are free to use stipulations of fact in lieu of agreeing to the taking of conclusive notice, the Presiding Officer has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

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

Office of the Presiding Officer
Military Commission

8 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 7-1 Access to Evidence, Discovery, and Notice Provisions

This POM supersedes POM 7 dated 12 August 2004. POM 7 was titled "Access to Evidence and Notice Provisions"

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain adequate and timely access to evidence; which flows from compliance with notice requirements of Commission Law and compliance with discovery and other orders from the Presiding Officer.. Failure to comply with notice requirements and orders can result in parties being unable to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer.

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law; parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing party has not complied with discovery, notice or an access to evidence requirement.

b. Does not address requests for witnesses (See POM # 10) or "investigative or other resources" as that term is used in Military Commission Order # 1.

c. Does not modify those procedures established by Commission Law with respect to Protected Information.

d. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Discovery Orders. At the appropriate time in the trial process, the Presiding Officer will issue a Discovery Order. A sample is enclosed which will be modified to fit each particular case. Such an order may be issued even though discovery and access to evidence may already be underway.

4. Basic principles:

a. When parties comply with discovery orders and notice and access to evidence requirements, the discovery, notice, and access to evidence process will not ordinarily require the Presiding Officer's involvement.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with discovery orders or notice or access to evidence requirements. The parties should provide such access, evidence or notice in the manner required, and at the time required, as set out in Commission Law, POMs, discovery orders, or other orders of the Presiding Officer. There is ordinarily no reason for the Presiding Officer or the Assistant to receive copies of information that is the subject of discovery, notice, or access to evidence requirements, unless a dispute arises as to whether a party is entitled to discovery, notice, or access.

c. To avoid unnecessary disputes at trial concerning whether discovery has been complied with or access or required notice has been given, the parties should have procedures to ensure they are able to demonstrate compliance with those requirements. It is advisable for the parties to prepare lists of what is or already has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for discovery, access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, discovery orders, or other orders of the Presiding Officer. In the absence of orders by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence, discovery, and required notice issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example, in the case of a request for information, access to evidence, or missed notification, it is professionally courteous to ask opposing counsel to provide the evidence, access or notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that will be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

(4). A party failed to provide information or access required by a discovery order despite a reminder.

c. When any of the situations listed in paragraph 7b, or other issues involving discovery, required notice, or access to evidence arise, the party will prepare a special request for relief using the procedures established in POM # 4-2 but using format as below for the attachment. The email request to the Presiding Officer, cc'ing the Assistant, all opposing counsel, and the Chief Prosecution and Defense Counsel shall contain the information in the format below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum. Such requests will become part of the filings inventory.

(1). Style of the case and name of the request.

(2). One of the following as the case may be:

(a). If notice was due and not given, cite the requirement for the notice, when it was due, efforts to obtain notice, and that notice was not received when due.

(b). If an item, matter, or access was supposed to be provided pursuant to a discovery order, cite the specific provision in the discovery order requiring same, that access or the matter was not provided when due, and efforts to obtain compliance

(c). If a party was required to give access pursuant to Commission Law or other law or order (other than a discovery order) and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

(d). If counsel requested access (other than pursuant to a discovery order) and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

Original Signed by:

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

1 Enclosure

Enclosure 1 to POM 7-1, Sample Discovery Order

	)	
	)	
UNITED STATES OF AMERICA	)	**ORDER**
	)	
	)	
v.	)	**DATE**
	)	
	)	
_____	)	
	)	
	)	

I. The Presiding Officer is aware that the discovery process - though perhaps not by that name - has been ongoing since at least 2004; in other words, parties have been sharing matters that might be used to prepare for trial or at trial. The Presiding Officer finds that to ensure a full and fair trial and to ensure that certain matters are not overlooked while the parties continue to share information, the following ORDER is necessary.

II. This Order does not relieve any party of any requirement to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times frames earlier than Commission Law provides, the Presiding Officer has determined that earlier disclosure is necessary for a full and fair trial.

III. All requirements of this Order are continuing in nature. The time frames set forth below apply to that information known to exist, or reasonably believed to exist, at the time this Order is issued. If information subject to this Order later becomes available that was not known, the party will disclose it as soon as practicable but not later than three duty days from learning that the information exists. In those cases when the item, or knowledge, becomes known after the date of this Order and the party is unable to obtain or produce it, the party shall give written (email) notice to opposing counsel of the nature of the item or knowledge and the time frame when it will be produced.

IV. Items that have already been provided need not be provided again if only to comply with this Order.

V. Listing the name of a witness in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10.

VI. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced. If counsel believe there has not been compliance with this order, or requests that additional information be provided, counsel should use the procedures in POM 4-2 or POM 7-1, as appropriate.

VII. Objections to the wording of this Order, or the authority to issue this Order.

a. If counsel need clarification on the wording or wish to suggest minor fine tuning - neither of which challenges the Presiding Officer's authority to issue a discovery order - the party will send the Presiding Officer, the Assistant, and opposing counsel an email NLT _____with the suggestions in the body of the email.

b. Counsel who object to the Presiding Officer's authority to issue a discovery order, or request modification other than clarification or fine-tuning, shall file a motion in accordance with POM 4-2 NLT _____.

VIII. Failure to adhere to the terms of this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary for a full and fair trial.

IX. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

X. Each of the disclosure requirements shall be interpreted as a requirement to provide the item, preferably in electronic form, to opposing counsel. When disclosure is impracticable because of the nature of the item (a physical object, for example) or is protected or classified so that transmission or delivery of the item is impractical or prohibited, the party shall permit the opposing counsel to inspect the item in lieu of providing it.

XI. A party complies with this order when the lead counsel for a party - or another counsel designated by the lead counsel - has been provided with the item or permitted to inspect it. Counsel may, but are not required to, provide more than one copy of the items required by this Order.

XII. As used in this order, the term "at trial" means during the party's case in chief, whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

XIII. Nothing in this Order shall be interpreted to require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's trial assistants.

XIV. With the exception of item XIVa, the prosecution shall provide to the defense the items listed below not later than _____ calendar days after the date of this Order.

a. Not later than 3 calendar days of the date of this Order, the name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Prosecution.

b. Evidence and copies of all information the prosecution intends to offer at trial.

c. The names and contact information of all witnesses the prosecution intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Evidence that tends to exculpate the accused, or which is directly relevant to the accused's receiving a lenient sentence should sentencing become necessary.

f. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Were sworn to, or written or signed by the accused whether or not to be offered at trial, that is relevant to any offense charged.

3. Were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial, that are relevant to any offense charged.

g. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

XV. With the exception of item XVa, the Defense shall provide to the Prosecution the items listed below not later than _____ calendar days after the date of this Order. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Not later than 3 calendar days of the date of this Order, The name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Defense.

b. Evidence and copies of all information the defense intends to offer at trial.

c. The names and contact information of all witnesses the defense intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

f. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, alibi, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any or a particular offense.

g. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

h. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

IT IS SO ORDERED.

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

Office of the Presiding Officer
Military Commission

September 21, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 8 - 1, Trial Exhibits

This POM supersedes POM 8 dated 12 AUG 04.

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials.

2. Definitions:

a. Exhibit:

(1) A document or object, appropriately marked, that is presented, given, mentioned, or shown to the Presiding Officer, any other Commission Member, or a witness during a session of the Commission.

(2) A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3) Other documents or objects that the Presiding Officer directs be marked as an exhibit or is marked with the Presiding Officer's permission.

b. Prosecution or Defense Exhibits *for identification* are exhibits sponsored by a party and

(1) Intended to be considered on the merits or sentencing, but either not offered into evidence, or offered into evidence and not received, or

(2) Not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing.

d. Review Exhibits are those exhibits:

(1) Presented for or used on a matter other than the issue of guilt or innocence, or a sentence. Motions, briefs, responses, replies, checklists, written instructions by the Presiding

Officer for the Commission members, findings and sentencing worksheets, and other writings used during motions practice are among the most common form of Review Exhibits.

(2) The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like. *See also* POM #4-3 concerning attachments, and POM #14-1 in regard to the Commissions Library.

e. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual use exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit. An exhibit may be used for a dual use only with the permission of the Presiding Officer, and the exhibit must be properly marked to show both uses.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any document or other piece of evidence present in the courtroom which is referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any document or other piece of evidence which is displayed for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record. The parties should be prepared, at trial, to provide hard (paper) copies of PowerPoint presentations and transcripts of audio or audio/video exhibits.

d. When a party marks or offers an exhibit that in its original state was in a language other than English, and the party marking or offering the exhibit has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also mark and provide to opposing counsel an exhibit containing the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form by which a tangible representation of the exhibit shall be included in the record.

f. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, it shall be first shown to the opposing

counsel so that opposing counsel knows the item and its marking, even if the counsel is certain opposing counsel is familiar with the exhibit and its marking.

4. How exhibits are to be marked. *See* enclosure 4.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session, except as directed by the Presiding Officer or the Assistant to the Presiding Officer.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That sequence ***IS*** permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: "Let the record reflect that the Prosecution marked, but did not offer, display, or mention, the following Prosecution Exhibits: 3, 6, and 11." The party will ensure that the reporter retains the marked exhibit, even though it has not been admitted into evidence.

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. Prosecution Exhibit 1 and 3 for Identification are not received. Prosecution Exhibit 2 for Identification is received. Once received, what was Prosecution Exhibit 2 for Identification is now "Prosecution Exhibit 2." The reporter will mark off the words "for Identification" on the exhibit.

d. Enclosure 4 is a guide for marking trial exhibits.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offers into evidence

what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of exhibits that have been marked, and in addition with respect to Prosecution and Defense Exhibits, an annotation showing whether an exhibit has been offered and/or received. Before departing the courtroom after the last session of every day, counsel for both sides shall confer with the court reporter to ensure the log is properly annotated, is correct, and that all exhibits are accounted for.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, the Presiding Officer, or other members of the Commission, all exhibits that have been marked shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer, as directed by the CCMC, shall secure all classified exhibits until the next session. As to unclassified exhibits, the court reporter will inventory all exhibits with the Assistant and turn over such exhibits to him until the next session. *See also* paragraph 7, POM #13-1 which also addresses safeguarding exhibits between sessions.

10. Sample forms.

a. Enclosure 1: Review Exhibits.
b. Enclosure 2: Prosecution Exhibits.
c. Enclosure 3: Defense Exhibits.

Signed by:

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

4 Enclosures

1. Review Exhibits Log
2. Prosecution Exhibits Log
3. Defense Exhibits Log
4. How to mark exhibits

Review Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Filings Inventory number (if applicable)

Prosecution Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Offered	Received

Defense Exhibits Log

US v. _____ Page ___ of ___ Pages

Letter	Description	Mark X if classified or protected	Offered	Received

Enclosure 4, Presiding Officers Memorandum # 8-1, Trial Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page, 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 *OR* RE 1	*First page*: RE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 *OR* Attachment A to RE 3	*First page*: Attachment 1 to RE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.
II. Classified Exhibits Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.		
III. Unclassified, Protected Exhibits Mark the same as I, adding the words on the first page or cover sheet "Protected Information."		

Office of the Presiding Officer
Military Commission

September 14, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 9-1 - Obtaining Protective Orders and Requests for Limited Disclosure

This POM supersedes POM 9 dated 4 October 2004

1. This POM addresses the methods by which counsel may obtain Protective Orders and Limited Disclosure from the Presiding Officer, as authorized by Section 6D(5), Military Commission Order No. 1.

2. Protective Orders - generally. As soon as practicable, counsel for either side will notify the Presiding Officer and the Assistant of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. When counsel agree to a Protective Order. Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done as an attachment to an email, or if during the course of a Commission session, in hard-copy. In preparing the request, counsel shall be attentive to paragraph 6 of this POM.

4. When counsel do not agree to a Protective Order. The procedures in POM # 4-2 do not apply, except where noted. If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order as an email attachment to the Presiding Officer (with a CC to the Assistant) for signature, along with the below information in the format specified below with each item in a separately numbered paragraph. The order shall be styled the same as a filing as provided in POM 4-2 with the name of the document "Protective Order [Subject matter sought to be protected]." The subject of the order shall not itself be protected as the subject will be placed in the filings inventory which is a public document. If necessary, the subject can be a unique number. In preparing the request, counsel shall be attentive to paragraph 6.

(1). The nature of the information sought to be protected. When such information is in document form, it shall be attached.

(2). Why the order is necessary.

(3). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the attachment to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the civilian defense counsel, prior to issuing or signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. Limited disclosure requests. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer and the Assistant an order for the Presiding Officer's signature directing limited disclosure. In preparing the request, counsel shall be attentive to paragraph 6. This order will contain the following in separately numbered paragraphs:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

6. Security considerations and exceptions.

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. No party may send any classified or other protected material to the Presiding Officer or the Assistant by email. If there is a need to transmit classified or protected material to the Presiding Officer or the Assistant, counsel will so advise the Assistant. The Assistant will provide transmission protocols.

c. In the case of orders under this POM that are to be requested or presented when at Guantanamo, the submission to the Presiding Officer may be done in hard copy. In such cases, the parties will consult the SSO and the Assistant as to the handling of the order, and whether it shall be reduced to electronic form.

Signed by:

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

Office of the Presiding Officer
Military Commission

September 30, 2005

SUBJECT: Presiding Officers Memorandum # 10 - 2, Presiding Officer Determinations on Defense Witness Requests

This POM supersedes POM #10-1, dated 20 September 2005.

1. This POM establishes the procedures for the defense to request that the Presiding Officer order the production of a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution. While this POM does not stipulate the format *for an initial request to the Prosecution,* it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Presiding Officer may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the prosecution solely because insufficient information was provided, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer.

2. A request, or noting that a particular witness is needed, in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary on a motion or other filing, not only should that be addressed in accordance with POM #4-3, but *the counsel is also required to file a request* in accordance with this POM.

3. Prosecution "denial" of defense requested witness.

a. If the defense requests, and the prosecution has denied, a defense witness request, the defense shall within 3 duty days of learning of the prosecution's denial - or when there has been prosecution inaction on the request for 3 duty days - submit a "Request for Witness." All the procedures of POM #4-3 shall apply to how this request is formatted, sent, the addressees, and responses and replies thereto except as otherwise provided in this POM (POM #10-2) and the contents of the request which is set forth in paragraph 3c below.

b. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request - [Name of Witness] - US. v. [Name of Case].

c. The heading for the request (attachment) will be as provided at enclosure 1 to POM # 4-3. Each of the below items shall be in a separate, numbered paragraph:

(1) Paragraph 1: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

(2) Paragraph 2: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1 for some suggestions.

(3) Paragraph 3: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated? For example, counsel might state, "On X September 2005, I interviewed the witness, and he personally provided the information in the synopsis."

(4) Paragraph 4: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

(5) Paragraph 5: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

(6) Paragraph 6: Whether the requestor would agree to an alternative to live testimony (See listing below.) to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable, citing to Commission Law. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

(a) Conclusive notice.

(b) Stipulation of fact.

(c) Stipulation of expected testimony.

(d) Telephonic.

(e) Audio-visual.

(f) Video-taped interview.

(g) Written statement.

(7) Paragraph 7: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

(8) Paragraph 8: If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by attaching a c*urriculum vitae* to the request. *See* paragraph 6, POM #4-3. This paragraph must also include a statement of law as to why the expert is necessary or allowable on the matter in question.

(9) Paragraph 9: Other matters necessary to resolution of the request.

4. Action by the prosecution upon receipt of a request.

a. Production of the witness. If the Prosecution and Defense agree that the witness should be produced, the prosecution need not prepare a response to the request. The prosecution should provide a copy of all approved witness requests and lists to the Chief Clerk for Military Commissions to facilitate provision of translator and court reporter services (the court reporters need to accurately spell names in transcripts).

b. Agreement to an alternative to live testimony. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (*see* paragraph 3c(6)(a-g) above) the parties will immediately prepare the agreed upon writing. Once agreement has been reached on an alternative to live testimony and the writing or other matter to be used as an alternative, the prosecution shall notify the Presiding Officer and the Assistant that agreement has been reached, and provide a copy of the approved statement or stipulation to the Presiding Officer and the Assistant.

5. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or if the government and defense cannot agree on an alternative to live testimony or the wording of any writing that would be used as a substitute, the government will prepare and file a response, using the procedures in POM #4-3, within 3 duty days of receiving the request. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

6. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 calendar days before the session in which the witness is first needed to testify. Failure to make requests in a timely manner may cause the witness request to be disapproved by the Presiding Officer, despite other factors which might appear to require the witness' presence.

7. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

Signed by:

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

1 Enclosure
As stated

Enclosure 1 - POM 10

1. The drafting of an adequate synopsis is critical to resolve witness issues.

2. Paragraph 4c(2) of POM 10-1 states:

> {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

3. A proper synopsis serves many purposes:

a. It makes clear what the witness will say - not just the subject or topic of the witness's testimony.

b. It describes how the witness is necessary and how the offered testimony is relevant. The parties may agree concerning what a witness will say, but that doesn't mean that the witness is necessary or the testimony relevant. (Relevant being shorthand here for the reasonable person standard in the President's order.)

c. It permits a realistic opportunity to obtain a satisfactory alternative to the testimony. If the parties agree what a witness will say and that it is relevant, they may agree to a stipulation or other ways for the party to present the testimony. This could be a safeguard for a defense-requested witness who later becomes unavailable.

d. It ensures that the Presiding Officer has sufficient facts to make a decision. The PO knows nothing about the case.

4. Here are several examples to clarify the type of information required for an adequate synopsis:

EX 1. The witness will testify he is an expert in the area of fingerprint comparisons and how those comparisons are performed.
Problem: We know what he will testify *about* or the *subject*, but we do not know what he will *say*, and how his testimony is *relevant*.

EX2. Same as EX 1 above, but adding: The witness will further testify that a latent print found at the alleged crime scene was not that of the defendant.
Problem: OK, I know what he will say, but how is that relevant?

EX3. Same as EX2 above, but adding: The fingerprint was in the purported victim's blood, and there is no evidence that other than one person killed the purported victim.
No Problem: Got it. I know what he will say, and I know how it is relevant to the case. This is something upon which a decision can be made.

Another example.
EX1. The witness will testify that he is an expert in Arabic.
Problem: What is the relevance?

EX2. The witness will testify that he is an expert in the XYZ dialect of Arabic.
Problem: Still don't know the relevance.

EX3. The witness will testify that he is an expert in the XYZ dialect of Arabic, that the accused before the Commission is an XYZ speaker, and that the Prosecution-offered translation of the accused's statement is incorrect.
No Problem: Got it!

Office of the Presiding Officer
Military Commission

September 7, 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

Presiding Officers Memorandum (POM) # 11: Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation during Commission Trials

1. Translators/interpreters (hereafter translators) are present during Commission trial sessions to provide simultaneous translation for those participants who do not understand the language being used by the person speaking (Commission translators.) Additionally, the defense has been provided a translator to assist counsel in communicating with their clients (defense translators.) Despite these measures, there is always the possibility of an incorrect translation. While there may be disagreement among expert translators on the precise translation of a particular phrase or idiom, some translation errors may be significant enough to jeopardize the Commission's responsibility to provide an accused a full and fair trial. If significant translation errors are reported immediately, the mistake can be corrected in time to insure the fairness of the proceedings and the accuracy of the record of proceedings. This POM is designed to insure that:

a. The qualifications of Commission translators are made known to all parties before they perform translation duties;

b. Significant translation errors are identified as soon as possible so that counsel may bring them to the attention of the Presiding Officer and obtain relief, where warranted;

c. Participants know of the need to report significant translation errors; and,

d. The defense and prosecution are aware that a failure to report significant translation errors in a timely manner can result in waiver.

2. Obtaining Commission translators. Neither the Presiding Officer nor the Commission has the authority to procure translators. The Chief Clerk for Military Commissions (CCMC) is responsible for obtaining Commission translators on behalf of the Appointing Authority. The Chief Defense Counsel and detailed defense counsel are responsible for coordinating with the CCMC to arrange for qualified defense translators.

3. *Curriculum vitae* of Commission translators. In all Commission trial sessions in which a Commission translator is used, the CCMC will obtain a written *curriculum vitae* of all proposed Commission translators and provide the same to the Presiding Officer, the Assistant, and all counsel, not less than seven days before the first day of the session in which the Commission translator will be used. If any counsel has any objection to the qualifications of any Commission translator, they will provide that objection, and the basis for it in writing (email), to the CCMC, the Assistant, the Presiding Officer, and opposing counsel within 24 hours of receiving the *curriculum vitae.* During any Commission trial session in which a Commission translator is used, the detailed prosecutor is responsible for ensuring that the *curriculum vitae* of any Commission translators is marked as a Review Exhibit, and that the record reflects any changes in Commission translators.

4. Timely reporting of significant translation errors.

a. If any "participant to a Military Commission" has "any reason to suspect" that there has been a "significant translation error" made by a Commission translator, that participant will notify the Presiding Officer, the Assistant, the CCMC, and opposing counsel using the procedures and time frames established in paragraph 5.

b. "Participant to a Military Commission" means any Commission translator, any defense translator, any counsel detailed to the Commission, any civilian counsel for an accused at a session, the Presiding Officer, any Commission member, or any court reporter.

c. "Reason to suspect" means information that would lead a participant to suspect that a significant translation error occurred. The error may be personally known to the participant, or may have been learned through any other source or by any other means.

d. "Significant translation error" means an error made by a Commission translator that may affect:

(1) The correctness of a ruling on a motion or other request for relief;
(2) The rights of any party to the proceeding;
(3) The correctness of the verdict or sentence; or,
(4) The provision of a full and fair trial.

e. If a counsel, who is a participant as previously defined: (1) has reason to suspect that a significant translation error has occurred, and, (2) fails to make that reason and suspicion known to the Presiding Officer using the procedures and time frames established in paragraph 5, that failure will be considered in deciding whether the counsel, and the party the counsel represents, has waived the error.

5. How suspected significant translation errors are to be reported.

a. If discovered during a Commission trial session, the suspected error will be made known immediately -- interrupting the session to do so if necessary.

b. If discovered after a trial session has concluded, but before the parties have left Guantanamo, the suspected error will be immediately reported to the PO, the Assistant to the Presiding Officer, the CCMC, and opposing counsel in person.

c. If the error is not discovered by a counsel until only after receipt of a draft session transcript as that term is used in POM # 12, the procedures in POM # 12 will be used to document the error.

d. If the error is discovered at any other time, the notification will be made to the Presiding Officer, the Assistant, and the CCMC by the most expeditious means possible, and also by email, as soon as it is known.

6. Translation verification procedure.

a. This procedure will only be used when directed by the Presiding Officer.

b. When implemented by the Presiding Officer, the translation verification procedure will operate as below:

(1) The Presiding Officer will provide the report of the alleged error to the CCMC, all counsel on the case, and the court reporter for the session in question. The Presiding Officer will also direct which alleged errors shall be subject to the translation verification procedure.

(2) The court reporter for the session in question will provide the CCMC with a copy of the audio file for the session in question along with a transcript of the relevant portions of the record of trial.

(3) The CCMC shall obtain the services of a qualified translator. The translator may be a government employee, contractor, or other qualified person.

(4) The verification translator obtained per paragraph 6b(3) above will compare the audio recording and the transcript and note in writing any other-than-minor, insignificant errors in the matters specified by the Presiding Officer per paragraph 6b(1) above, and provide what is believed to be the correct translation. This work will be performed as quickly as possible and the results provided to the CCMC.

(5) The CCMC shall serve the writing prepared in accordance with paragraph 6b(4) above to the Presiding Officer, the Assistant, counsel for the case, and the Appointing Authority as soon as it is received.

(6) Within ten days of receiving the writing prepared in paragraph 6b(5) above, any counsel who wishes relief shall request it in writing to the Presiding Officer, with a copy to the Assistant, the CCMC and opposing counsel, noting what they believe to be a significant translation error, why it is a significant translation error, and how the error shall be corrected. A copy of the audio recording may be made available to the counsel to assist them in any submission.

(7) If, after receiving a writing per paragraph 6b(6) above, opposing counsel believes that there was not a significant translation error, that counsel shall provide such comment within 5 days of receiving the writing described in paragraph 6b(6) above to the Presiding Officer, the Assistant, the CCMC, and opposing counsel. Failure to provide such an answer, however, does not indicate that a significant translation error did occur.

(8) The Presiding Officer will determine the method by which conflicting views are resolved when such conflicts are brought to its attention.

7. Translation verification procedure for sessions held before the effective date of this POM.

a. If any counsel has reason to suspect there has been a significant translation error made during the sessions held in August 2004, they shall follow the procedures in paragraph 5 not later than 10 days from the effective date of this POM.

b. Translation verification procedure for sessions held in November 2004. During the processing of the transcripts for the November 2004 sessions in accordance with POM #13, the presiding officer directed counsel to note significant translation errors. None were noted by any counsel. Notwithstanding, for the November 2004 sessions, if counsel are aware of any significant translation error, they shall also follow the procedures in paragraph 5c not later than 10 days from the effective date of this POM.

c. The Presiding Officer may direct use of the procedures in paragraph 6.

8. Other instructions:

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. With respect to any audio recording of Commission proceeding, whether such recording contains classified or protected information or not, no person shall, with respect to a portion of an audio recording of a Commission proceeding, do any of the following unless directed or permitted by the Presiding Officer or the CCMC:

(1) Copy any portion of the audio recordings. Copying includes electronic, optical, or magnetic copying, transmitting, or moving data from one media to another. Examples of copying include, but are not limited to, placing any portion of the data onto

a network or the Internet, sending the file as an email attachment, or placing, copying, or moving any portion of the data onto any media (CD/DVD/floppy disk/USB storage device etc.)

(2) Permit or request another to make a copy - as that term is used above - of the audio recording or move any portion of the data.

(3) Request another to listen to, or permit another to listen to, any audio recording except for those persons identified in this POM as authorized to receive or listen to the recording.

c. Court reporters may make copies of audio recordings of Commission session as are necessary to perform their duties or in compliance with this POM.

d. Anyone with knowledge of a violation of paragraph 8(b) above, whether the violation was allegedly intentional or inadvertent, shall report it as soon as possible to the Presiding Officer and the CCMC.

Approved by:

Peter E. Brownback III COL, JA, USA Presiding Officer	M. Harvey Chief Clerk for Military Commissions

Office of the Presiding Officer
Military Commission

September 29, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 12 - 1 Filings Inventory

This POM supersedes POM 12 dated 20 October 2004.

1. The Presiding Officer has adopted procedures to allow electronic filing of certain documents (e.g., motions, witness request, other filings, requests for access to evidence, requests for protective orders, requests for limited disclosure orders, and requesting conclusive notice to be taken.) *See* POMs 3-1, 4-3, 6-2, 7-1, and 10-1, current editions. The procedures were adopted because:

a. Most items filed with the Commission are prepared in electronic form.

b. Documents not in electronic form can be easily converted into an electronic file.

c. The counsel, Assistant, court reporters, Presiding Officer and those who need to file and receive filings are often in geographically diverse locations.

d. Electronic filing enables counsel anywhere in the world with email access (to include web based accounts) to make and receive filings.

e. Service of filings by mail or courier is slow and expensive. Some filings are made to and from Guantanamo Bay, Cuba, where service by mail is impractical.

f. Electronic filing is fast, reliable, efficient and creates an electronic file that can be efficiently and quickly shared with others.

g. Electronic filing creates and retains a precise record of the dates and times when filings were sent and received.

2. Electronic filing enables parties to send emails or "CC" (carbon copy) emails to anyone. If a filing is sent to many addressees, it is sometimes difficult to determine the intended or action recipient. In some instances, those who receive large numbers of emails may overlook an email which was intended for them specifically.

3. This POM establishes:

a. Requirements for the Assistant to maintain a "Filings Inventory". The purpose of the Filings Inventory is to set forth which filings and other matters are before the Presiding Officer.

b. Responsibilities for counsel to use filings designations once created and to check the accuracy of a filings inventory, upon receipt, so that counsel are certain of those matters before the Presiding Officer.

4. Establishing the Filings Inventory. The Assistant shall establish and maintain a Filings Inventory for each case referred to the Commission which reflects those filings pending before the Presiding Officer.

a. As soon as the first filing on an issue is received, the Assistant shall assign a *filing designation* using one of four categories below followed by a number: The terms filing number and filing designation may be used interchangeably.

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
PO for a filing or series of filings initiated/directed by the Presiding Officer.
Protective Order for protective orders issued by the Presiding Officer.

Other categories may be added at a later time.

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number *EX:* PE2, D4, PO1, Protective Order 3) shall be unique for each case and the designation shall not be reused.

c. To identify a specific document which has been filed, the filing designation may add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned by the Assistant, plus the name of the accused.

d. The Filings Inventory shall contain an Active Section which lists all filings currently before the Presiding Officer.

e. The Filings Inventory shall also contain a listing of all filings which are no longer before the Presiding Officer. These items shall be placed in the Inactive Section of the Filings Inventory.

5. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference. This includes adding the file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. (*See* also POM # 4-3.) Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."* The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."*

b. Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

c. The names given to matters that may appear on the filings inventory - such as the subject of a motion - will not be classified or otherwise protected as the filings inventory is intended to be transmitted through unsecured networks. Counsel must therefore ensure that the names of their filings are not in themselves classified. (*See* POM # 4-3.)

6. Distribution of the Filings Inventory.

a. As soon as practical after the Assistant receives a filing, the Assistant shall reply to the party making the filing, advising that the Filings Inventory has been annotated. In the case of a filing that initiates a new issue or motion, the reply from the Assistant shall also provide the filing designation.

b. At the request of any party or the Chief Clerk of Military Commissions (CCMC), the Assistant shall provide a copy of the current Filings Inventory as soon as practical.

c. The Assistant shall from time to time, or when directed by the Presiding Officer, distribute copies of the Filings Inventory to the Presiding Officer, all counsel on the case, the Chief Prosecutor and Chief Defense Counsel (and their Deputies and Chief Legal NCOs,) and the CCMC.

d. The Presiding Officer shall ensure that a copy of the current Filings Inventory is marked as a Review Exhibit at the beginning of each session of the Commission, so that parties are free to refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear concerning precisely which filing or issue is being addressed.

7. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure what filings have been received by the Presiding Officer, and what matters are before the Presiding Officer.

a. Counsel will examine each Filings Inventory as it is received and notify the Assistant, Presiding Officer, and opposing counsel of any discrepancies within one duty day. *See* paragraph 5, POM # 4-3 for additional responsibilities when receiving emails containing or referring to filings.

b. If counsel believe they have submitted a filing which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Assistant, Presiding Officer, and opposing counsel, noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above and in paragraph 8 below, the Presiding Officer may elect not to consider that filing.

8. Effect of omission in filings inventory.

a. If a filing or other matter is not on the Filings Inventory, it is not before the Presiding Officer for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the Assistant (*See* paragraph 7c, above.).

b. If counsel believe that a matter should be on the Filings Inventory and have made that known to the Assistant, and the Assistant does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Presiding Officer.

c. Failure to fulfill the responsibilities noted above constitute waiver should the Presiding Officer not address or rule upon a matter that is not on the Filings Inventory.

Original Signed by:

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

Office of the Presiding Officer
Military Commission

26 September 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk of Military Commissions in the form he deems appropriate.

SUBJECT: POM 13 - 1, Records of Trial and Session Transcripts

This POM supersedes POM #13 dated NOV 22, 2004.

1. References:

a. Military Commission Order #1, 30 August 2005.
b. Appointing Authority Memorandum, Subject: Duties and Responsibilities of Chief Clerk of Military Commission, 30 June 2005.
c. Appointing Authority Memorandum, Subject: Duties and Responsibilities of Chief Clerk of Military Commissions-Records, Proceedings and Allied Papers, September 20, 2005.
d. Presiding Officer Memoranda #14-1, Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials, current version.
e. Presiding Officer Memoranda #8-1, Trial Exhibits, current edition.

2. Definitions:

a. *Authenticated record of trial under the provisions of reference a, paragraph 6H(1).* Under reference 1a, the authenticated record of trial includes only the transcripts of the proceedings and exhibits admitted during the trial. A sample authentication page is attached as Enclosure 1.

b. *Record of Commission trial proceedings (Reference 1 c.)* 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. Under the provisions of reference c, the Chief Clerk of Military Commissions (CCMC) may supplement the record of proceedings with certain allied papers.

c. *Session record of proceedings, reference 1a, paragraph 4A(5)(f).* Transcripts of proceedings of individual or time-related sessions of a certain case, will be authenticated by the Presiding Officer and forwarded to the Appointing Authority as soon as possible upon the completion of a given session. A sample authentication page is attached as Enclosure 2.

d. *Authenticated record of a post-trial proceeding under the provisions of reference 1a, paragraph 6H(3).* A complete record of all proceedings, that have been authenticated by the Presiding Officer, of any Commission proceedings in the case that occurs after the Presiding Officer has authenticated the record of trial under the provisions of MCO #1, paragraph 6H(1).

e. *Session transcripts*. The transcript of a portion of an unauthenticated record of trial that reflects the proceedings of a session or sessions of the Commission. There are two types of session transcripts:

(1) *Draft session transcript*. A session transcript that has been reviewed by the Presiding Officer and offered to counsel for comment or correction in accordance with this POM.

(2) *Final session transcript*. A draft session transcript that has been reviewed by counsel within the time frames, and under the conditions, established by this POM, and the Presiding Officer has resolved errata and "significant translation errors (if any), submitted by counsel. This transcript will be authenticated by the Presiding Officer to create the session record of proceedings (Paragraph 1c, above).

f. *Commission translator*. A translator charged with the responsibility to translate into English what is said in another language for the benefit of Commission participants, or to translate for a non-English speaking Commission participant what is spoken in a language the defendant, witness, or other participant does not speak. *See* reference 1d.

g. *Significant translation error*. *See* the definition at paragraph 4d below, and reference 1d.

3. With the assistance of the CCMC, the Assistant will provide draft session transcripts to the Presiding Officer, the prosecution, the defense counsel, and the CCMC. Final session transcripts will be provided to the same persons as drafts were provided. Counsel will use these transcripts solely as an internal reference and to reflect errata and significant translation errors in accordance with this POM and references 1b and 1d. Counsel shall not loan, share, transmit, copy, or otherwise disclose or show to any other person or entity any portion of any draft or final session transcript for any other purpose. The CCMC is responsible for release of transcripts for posting on the Department of Defense website, and to other non-litigant requestors. *See* reference 1b.

4. Review of unclassified, draft session transcripts by counsel.

a. Within ten days of service of a draft session transcript where a Commission Translator was not used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number any significant errors in the draft session transcript. *See* enclosure 3 for the errata sheet to be used.

b. Within 15 days of service of a draft session transcript where a Commission Translator was used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall

provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number and using the errata sheet at enclosure 4:

(1) Any significant errors in the draft session transcript.

(2) Any significant translation errors, the correct translation, how and why the counsel believes the translation was in error, and the necessary relief or correction required, and

(3) A certificate by counsel that the significant translation error did not become known until obtaining the draft session transcript. If that is not the case, then counsel will state why the significant translation error was not raised at an earlier time as required by paragraphs 4 and 5, reference d.

c. Failure to provide an errata sheet, or obtain an extension of time to submit the same from the Presiding Officer, shall indicate that the counsel has no errata to offer and that there are no significant translation errors.

d. The Presiding Officer may use the translation verification procedure in paragraph 6, reference d when a significant translation error is noted.

e. Other duties, responsibilities, and procedures to report, document, and process significant translation errors as provided by reference d are incorporated herein.

5. Review of classified, draft session transcripts by counsel. Review of classified, draft session transcripts shall be done in the same fashion as unclassified draft session transcripts except the session transcript shall be served upon counsel in writing, and the errata or significant translation errors, if any, shall be provided to the Assistant and Presiding Officer in written form according to the instructions provided when a classified draft session transcript is served on counsel. The services of the CCMC may be used in such instances to serve such transcripts on counsel to ensure no breaches of security.

6. Electronic format for records and session transcripts.

a. Records and session transcripts shall be in the format established by reference c.

b. The pagination on draft session transcripts, final session transcripts, and the authenticated records may differ when transcripts are collated. When referring to a page or line number in a draft or final session transcript, counsel should be careful to indicate whether the transcript was a draft or final session transcript.

7. Custody and control of exhibits. During sessions of the Commission, unclassified exhibits shall be maintained for the Presiding Officer by the Commissions Trial Clerk in coordination with the CCMC. When the Commission is not in session, these exhibits shall be maintained for the Presiding Officer by the CCMC. Classified exhibits shall be maintained for the Presiding Officer by that person or those persons designated by the CCMC.

Approved by:

Peter E. Brownback III COL, JA, USA Presiding Officer	M. Harvey Chief Clerk of Military Commissions

4 Enclosures

1. Authentication page for ROT (see para 2a.)
2. Authentication page for draft session transcript per (see para 2e(1)).
3. Errata sheet – other than significant translation errors.
4. Format to submit significant translation errors.

AUTHENTICATION OF
COMMISSION TRIAL PROCEEDINGS

in the case of:

United States v. Tom Allen Smith
a/k/a Steven Allen Smith
a/k/a Robert Allen Smith

(as indicated on the Charge Sheet)

This is to certify that the Pages _____ through _____ are an accurate and verbatim transcript of the proceedings in the above styled case.

_____
Name
Rank
Presiding Officer

_____
Date

AUTHENTICATION OF
FINAL SESSION TRANSCRIPT

in the case of:

United States v. Tom Allen Smith
a/k/a Steven Allen Smith
a/k/a Robert Allen Smith

(as indicated on the Charge Sheet)

This is to certify that the Pages _____ through _____ are an accurate and verbatim transcript of the proceedings held in the above-styled case on _____.

_____
Name
Rank
Presiding Officer

_____
Date

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
Other than Significant Translation Errors

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	**Line(s)**	**Change from**	**Change to**	**Approved**	**Not approved**

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
IF Significant Translation Errors.
(See POM# 11.)

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	**Line(s)**	**Change from**	**Change to**	**Approved**	**Not approved**
How does counsel know the translation was incorrect? (If the same source throughout this errata sheet, the source need only be stated once.)					
Relief requested other than to change the translation as shown above.					
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Office of the Presiding Officer
Military Commission

8 September 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

Presiding Officers Memorandum (POM) # 14-1: Commissions Library

This POM supersedes POM # 14 dated 5 August 2005.

1. This POM, with the concurrence of the Chief Clerk for Military Commissions (CCMC), formally establishes the Military Commissions Library (Commissions Library). The Commissions Library is an electronic collection of cases, resources, and other writings of benefit to counsel, the Presiding Officers, the Review Panel (should that body become involved), and others.

2. Purpose of the Commissions Library. The Commissions Library has many purposes to include:

a. Provides a readily accessible source of the Commissions Library contents to users.

b. Permits users to electronically "cut and paste" selected contents of the Commissions Library into filings or other documents.

c. Permits users to electronically search documents.

d. Alleviates the need for counsel to attach copies of authority cited in their filings if that authority is contained in the Commissions Library. (See POM 4-2.)

e. Permits users to electronically capture and preserve, for possible future use in the Commissions, items that appear on the Internet, because Internet items present at one time can be changed or removed from the Internet without notice.

f. Saves time, space, and other resources by making voluminous materials easily transportable, searchable, and printable

3. Form, location, and access to the Commissions Library.

a. The Commissions Library is in electronic form and can be made available on CD/DVD or other media as well as being hosted on computer servers accessible to users.

b. As the Commissions Library will not contain any classified or protected information, the contents of the Commissions Library may be widely distributed.

c. All personnel assigned or attached to the Office of Military Commissions and all civilian counsel authorized to represent an accused will have access to the Commissions Library. Other personnel will be authorized access on an as-required basis as determined by the CCMC.

4. Commissions Library contents.

a. The Commissions Library will not contain, under any circumstances, any classified or protected information.

b. Filings (see POM # 4-2) included in the filings inventory (see POM # 12) will not be contained in the Commissions Library as those items may contain protected information.

c. Potentially, anything useful as a reference or resource to the practice before a Military Commission may be placed into the Commissions Library. Ordinarily the Commissions Library contains: cases other than those readily available as a published opinion on Lexis-Nexis or similar services; large references to alleviate users from having to have the book with them (MCM or the Military Judges Benchbook, for example) items that appear on the Internet so the correct document is preserved before the document is changed or removed from the Internet; "hard-to-find" items (such as decisions of international tribunals and similar writings); treaties and treatises; law review articles; and like items.

d. While there is no requirement that reported cases decided by a United States court (whether federal, state, or military) be included, the CCMC may decide to include them so that they are readily available, especially for users who are not expert with legal research techniques.

5. Responsibilities.

a. The CCMC is responsible for maintaining the Commissions Library, hosting it on servers accessible to OMC personnel, and making it available on servers at Guantanamo Naval Base when the Military Commission is in session. The Assistant to the Presiding Officers will assist whenever his assistance is required.

b. The CCMC may place any item into the Commissions Library he deems appropriate. As a general rule, once an item has been placed into the Commissions Library, it will not be removed because users may rely upon the item being in the Commissions Library once it has been placed therein. Prior to removing an item, the CCMC will provide notice to all users.

c. The CCMC will place into the Commissions Library anything the Presiding Officer directs be placed therein.

d. Counsel, the Assistant to the Presiding Officers, and others may request that the CCMC place an item into the Commissions Library. Ordinarily, requests will be approved unless the matter is already contained in the library or there is no possible benefit to having the item included.

e. In each instance where a request is made that an item be included, the CCMC will inform the requester whether the request has been approved.

f. The CCMC will provide all users, on an as-needed basis, updates to show what has been added to the Commissions Library.

6. Procedures to include an item into the Commissions Library.

a. A request to include an item into the Commissions Library will be submitted to the CCMC only by electronic mail. No electronic mail will request more than one item be included (i.e., only one item to be included per email.) The electronic mail will include:

(1). In the subject line, "Request to include item in the Commissions Library."

(2). In the body of the email, a description of the item to be included which is suitable for direct inclusion into the Commissions Library index. If the item is one for which there is a generally accepted Blue Book cite, the cite will also be included.

(3). As an attachment, the exact document to be included.

b. A request to include an item into the Commissions Library will not contain just a web address (URL.) Instead, the requester will convert the web page content into a file, and the file will be attached.

c. Acceptable file formats are Microsoft Word, HTML, JPG, BMP, RTF, TIFF, or Adobe Acrobat unless the CCMC permits, on a case by case basis, a different file format.

d. When the electronic form of an item to be included in the Commissions Library is available, the electronic version will be submitted as that form makes use and electronic searching easier.

(1). Requesters will ***not*** take an item that is in electronic form, scan it, and submit the scanned version. For example, if the document is available in Word, send the Word document (or electronically convert it (not scan it) to Adobe Acrobat (PDF.))

(2). A document available in electronic form will not be printed and then scanned as this reduces the usability of the document.

e. It is the responsibility of the requester to ascertain that an item requested to be included in the Commissions Library is not available in electronic form before submitting a scanned document to be included. The CCMC may reject a request that an item be included in the Commissions Library in a scanned, non-electronically-searchable form if the electronic version can be located by the requester.

7. Written copies of contents of the Commissions Library.

a. The Commissions Library is in electronic form.

b. Printed extracts of the Commissions Library used by counsel during a session of the Commission.

(1). Counsel appearing before the Commission may elect to print selected extracts of the Commissions Library to make them available to the Presiding Officer during argument or other sessions of the Commission where special emphasis may be required. This practice should be used judiciously.

(2). If counsel wish extracts of the Commissions Library be made available to the Commission during a session, counsel are responsible for making and providing sufficient copies for the Presiding Officer, each opposing counsel, and a copy for inclusion in the record of trial. If sufficient copies are not made available at the time counsel wishes the Commissions Library extract to be used, the Presiding Officer may deny counsel the opportunity to use the extract.

Approved by:

Peter E. Brownback III COL, JA, USA Presiding Officer	M. Harvey Chief Clerk for Military Commissions

Office of the Presiding Officers
Military Commission
February 16, 2006

SUBJECT: Presiding Officers Memorandum (POM) # 16 –Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses.

1. Commission Law tasks the Presiding Officer with maintaining the decorum and dignity of Commission proceedings. The attached Rules are promulgated to that end.

2. This POM and the enclosed Rules apply to participants in Military Commissions, as defined herein, and shall be in force whenever the Commission holds sessions. This POM supplements POM 5-1.

/s/
Peter E. Brownback III
COL, JA, USA
Chief Presiding Officer

Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses

The below may be referred to as the Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses. "Trial" as used in these Rules includes any session or proceeding of the Commission.

Rule 1: Generally

The decorum and dignity to be observed by all at the proceedings of these Military Commissions will be the same as that observed in military and Federal courts of the United States.

Rule 2: Applicability

These Rules apply to all Commission participants, which includes counsel, non-attorney assistants (to include investigative agents, paralegals, and non-qualified attorney assistants), Commission and Defense translators, court reporters, Foreign Area Consultants or Advisors, and witnesses. As indicated in these Rules, some provisions apply only to the accused. Failure to follow these Rules may result in denial of access to the courtroom or removal from the courtroom, and such failure could result in disciplinary or other action, to include exclusion from Commission proceedings and all commission-related activities.

Rule 3: Attire

a. Military participants. All military participants will wear the appropriate military attire, as follows:

- Army: Class B
- Navy: Summer White
- Marine Corps: Summer Service C
- Air Force: Class B

If a participant desires to wear a different uniform, they must obtain prior approval from the Presiding Officer. If counsel desire to have a witness appear in a different uniform, the counsel will make that arrangement with the Presiding Officer.

b. Civilian participants.

(1) Men. While suit and tie or equivalent is encouraged, civilian counsel, other civilian representatives of a party, and civilian witnesses (except detainees) appearing

before the tribunal will wear, at a minimum, business casual attire. Examples of acceptable business casual attire for men include long-pants and button-up, collared shirts with sleeves, with or without sports jacket.

(2) Women. Acceptable attire for women includes, but is not limited to, either:

(a) Knee-length skirts or dresses and blouses worn with or without a jacket, or

(b) Long pants and blouses with sleeves worn with or without a jacket.

(3) Inappropriate civilian attire includes, but is not limited to, shorts, sleeveless shirts, attire that exposes the mid-drift (tank tops, halter tops, etc.), denim jeans, T-shirts, polo shirts, all hats on men, all ball caps, and mini skirts. Clothing must be clean, without tears, and un-frayed. No clothing or accessories with visible logos of any type (except small and discrete manufacturer's labels) will be worn. Individuals wearing inappropriate attire may be denied participation in courtroom proceedings.

(4) Civilian witnesses may also substitute attire that is the cultural equivalent of business casual attire, consistent with security requirements. In no case, however, may the attire cover the witness's face except as provided in Rule 3d.

c. The accused.

(1) Circumstances might limit the opportunities to obtain appropriate clothing for an accused, and cultural differences could bear on the type and style of clothing that an accused may want to wear during Commission proceedings. Accordingly, defense counsel are responsible for obtaining appropriate attire for an accused. This includes obtaining sufficient clothing in advance of trial to ensure an accused can appear in clean clothing during multi-day sessions.

(2) An accused will appear in business casual attire or, if an accused desires, culturally equivalent attire. In the event the defense counsel cannot with due diligence obtain sufficient appropriate clothing for an accused, the defense counsel will notify the prosecutor sufficiently in advance of trial to allow the prosecutor to obtain the necessary clothing. The prosecutor will then take the actions necessary to obtain clothing.

(3) An accused will not appear at a Commission session wearing prison attire. The accused will not appear at a Commission session in restraints unless coordinated in advance with the Presiding Officer. If security concerns dictate the use of restraints on an accused during a Commission session, the prosecution will first inform the Presiding Officer and the defense of that fact and the justification therefore. If restraints are required during a Commission session, the prosecution, and, in consultation and coordination with the defense, security personnel, and the Assistant, will ensure reasonable measures are taken so that the wearing of restraints is not obvious to the Commission members.

d. Special attire. If any party desires that a witness, due to security needs or in accordance with a protective order, testify in attire or in a manner that conceals their physical features, the parties will first advise opposing counsel and the Presiding Officer of the desired arrangements and the justification therefore.

e. Detainee witnesses. The proper attire and the Rules pertaining to restraints for detainee witnesses shall be the same as provided for an accused, except that the prosecution shall make arrangements for the attire of all detainee witnesses.

Rule 4: Timeliness

a. All participants shall be in the courtroom prepared to proceed at the docketed time. If a case is delayed because the previous case is still ongoing, then counsel shall remain in the same building until their case is called or shall be present at a time determined by the Presiding Officer. If counsel require a short delay in the start time, they shall request it from the Presiding Officer prior to the time proceedings are scheduled to start. When requesting a delay of the start time, counsel will provide an explanation of the need and inform opposing counsel before or contemporaneous with making the request to the Presiding Officer.

b. Except for detainee witnesses, counsel are responsible for the timely appearance of their witnesses in the courtroom. The prosecution is responsible for the timely appearance of any detainee witness.

Rule 5: Conduct of Participants Generally

a. No distractions are permitted during Commission sessions to include, but not limited to, eating, chewing gum, or using tobacco products.

b. Counsel may have water, coffee, tea, or similar beverages at counsel table. Carbonated beverages are not permitted. Counsel will drink from a plain paper, soft plastic, or Styrofoam cup without logos or labels. Cups containing other than water shall have lids. (Note that this Rule concerning beverages for participants differs from that provided for spectators in POM 5-1.)

c. It is improper for counsel or any other trial participant to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. This Rule does not prohibit counsel from making objections or litigating the correctness of the law and rulings, and addressing the credibility of witnesses.

d. Counsel may use computers, PDIs, or PDAs during the proceedings so long as they are silent and are not used to make an audio or video recording of any of the proceedings. Counsel will notify the Assistant to the Presiding Officers prior to any

Commission session before using such devices. Papers, documents, exhibits, file folders, file boxes, and other items necessary to presenting or conducting the case may be brought into the courtroom in any container so long as the container or item does not present a security risk as determined by the Assistant in consultation with JTF security personnel. Counsel will obtain advanced approval of all items to be brought into the courtroom. All items are subject to inspection. When inspecting items brought into the courtroom by counsel for the Prosecution or Defense to include their trial assistants, care will be taken to avoid reading or disclosing privileged information. (See also paragraph L of the enclosure to POM 5-1.)

e. Items that are necessary for conducting the trial but which might be used as a weapon (scissors, staplers, rulers or the like) will not be brought into the courtroom except as approved *in advance* by the Assistant in consultation with JTF security personnel.

f. Properly badged Commission personnel may use the designated OMC entrance and enter and leave during recesses. When operationally necessary, and when done in a manner that will not disturb the proceedings, properly badged Commission personnel may enter and leave through the designated OMC entrance while the Commission is in session.

g. Nothing in these Rules prohibits properly appointed JTF security forces from bringing those items or that equipment into the courtroom that are needed in the official performance of their duties as authorized by security plans approved by the Commanding Officer, JTF Guantanamo Bay.

Rule 6: Civility, Decorum, and Manner of Address

a. The focus of Commission proceedings should be on the facts and the law. Counsel are expected to treat opposing counsel, witnesses, and all personnel associated with the conduct of the proceedings with courtesy, respect, and civility. All communications, whether written or oral, should be couched in civil, non-sarcastic language, focusing on the factual or legal disputes.

b. Military participants, the Presiding Officer and other members, and witnesses will be addressed by their military rank and last or family name. Civilian participants, witnesses, and the accused will be addressed by their last or family name preceded by the appropriate title (for example, Doctor, Professor, Mr., Mrs., Miss, or Ms., etc.). First or given names will not be used.

c. The accused may be referred to as noted above or as "the accused."

Rule 7: Conduct of Counsel

Counsel will be guided in their conduct by the following.

a. Counsel shall direct all argument and responsive statements to the Presiding Officer or members, as applicable, while the Commission is in session and shall not engage in any colloquy or argument with or towards the other party. With permission of the Presiding Officer, counsel may confer quietly in the courtroom outside the hearing of the Presiding Officer, a witness, and the members.

b. Counsel will refrain from interrupting a party except as necessary to voice an objection.

c. Counsel will not interrupt the Presiding Officer.

d. Unless otherwise authorized by the Presiding Officer, counsel shall stand when addressed by or when addressing the Presiding Officer or members and when examining a witness. Unless otherwise permitted by the Presiding Officer, counsel will use the lectern and microphone at counsel table when addressing the Presiding Officer or members and when questioning a witness.

e. During sessions of the Commission, counsel will be seated at assigned counsel tables and no counsel will leave the courtroom without permission of the Presiding Officer.

f. When a counsel is addressing the Commission or examining a witness, all other counsel shall remain seated at counsel table, unless standing to make an objection.

g. Counsel shall not, during trial, state or allude to any matter that counsel has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

h. Except when testifying as a witness, counsel shall not, during trial, assert any personal knowledge of the facts in issue.

i. Counsel shall not, during trial, assert any personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of an accused; but counsel may argue, based on analysis of the evidence, for any position or conclusion with respect to the matter stated therein.

j. Counsel shall not intentionally or habitually violate any established rule of Commission procedure, Presiding Officer Memoranda, Commission Law, or these Rules.

k. In presenting a matter to the Presiding Officer, counsel shall disclose legal authority in the controlling jurisdiction or Commission Law known to counsel to be directly contrary to his or her position and which is not disclosed by opposing counsel.

l. Counsel shall not knowingly disobey these Rules, a ruling, a standing order or order of the Presiding Officer, but may take appropriate good faith action to contest the validity of such Rule, ruling, or order using the procedures in the appropriate POM.

m. Counsel will conduct examination or cross examination, make oral argument, or otherwise address the commission from the lectern and microphone located at counsel table and only one counsel from each side will be allowed to address an issue. Without leave from the Presiding Officer, only the counsel that conducted the examination or cross examination of a witness may make objections - or respond to objections - during the taking of that witness' testimony.

n. Witnesses shall be treated with respect by counsel. Witnesses may not be physically intimidated or otherwise badgered.

o. Unless otherwise permitted by the Presiding Officer, counsel shall question witnesses from the lectern at counsel table. Before approaching any witness, counsel shall obtain the permission of the Presiding Officer. Counsel shall not position themselves so as to block the view of the witness from the Presiding Officer, members, opposing counsel, or the accused. Counsel, upon completing examination of the witness, whether on direct or cross, shall so state, and the Presiding Officer will then direct such further examination of the witness as may be appropriate.

p. Requests for re-reading of questions or answers shall be addressed to the Presiding Officer.

q. If counsel believe an opposing party has acted in an inappropriate or unethical manner, they will make an appropriate motion following the guidelines set forth in POM 4-3. In the event such a motion is made, it will be litigated at the earliest opportunity. It is suggested that, prior to making such a motion, counsel confer with the Chief Prosecutor or Chief Defense Counsel as appropriate.

Rule 8: Conduct of Witnesses and Responsibilities of Counsel Calling a Witness

a. The proponent of a witness is responsible for ensuring that the witness is advised of and complies with these rules. Specifically, counsel will advise their witnesses:

(1) Of these Rules with respect to attire and that the witness may not chew gum or tobacco, wear dark glasses, or use profanity, except as may be required in the presentation of the case;

(2) That they will not engage Commission members or the Presiding Officer in casual conversation;

(3) Of the physical arrangements of the courtroom, where they should go, and how they should conduct themselves;

(4) To be immediately available when called to testify. Counsel should coordinate with each other and the Presiding Officer to reduce, whenever practical, the amount of time a witness is required to wait prior to testifying;

(5) Not to salute the Presiding Officer or the members of the Commission, and

(6) Of information and, to the extent practical, assistance concerning the availability of services such as transportation, parking, lodging, and availability of Commission or defense translators or interpreters.

Rule 9: Objections

The following Rules govern the making of objections during the proceedings, whether before the Presiding Officer alone or with all members present.

a. When making or raising an objection, counsel shall stand and state only the nature and basis of the objection, without further elaboration, unless requested by the Presiding Officer. If Counsel believe it necessary for a full and fair trial, they may request, or the Presiding Officer may direct, a session outside the presence of the other members to argue the merits of an objection.

b. Counsel shall not present argument on an objection without the permission of the Presiding Officer.

c. Argument on objections shall be direct and succinct. Citation to specific authority will only be necessary when required by the Presiding Officer.

d. An objection or argument for the purpose of making a speech, repeating testimony, or attempting to guide a witness, is prohibited.

e. After the Presiding Officer rules on an objection, counsel may not comment or make further argument without the express permission of the Presiding Officer.

Rule 10: Accounting for the parties

Each time the Commission convenes or reconvenes, the Presiding Officer or, if he or she does not do so, the prosecutor shall announce on the record the presence or absence of the parties (e.g, "All parties to the trial who were present when the Commission

closed/recessed are again present ((except the members) (except _____.))" If any party is to be absent, the Presiding Officer and opposing counsel shall be advised in advance. The prosecutor shall focus particular attention on any change in the court-reporter present.

Rule 11: Administering oaths to witnesses

The prosecutor shall administer an oath to tell the truth to each witness called to testify and, unless prohibited by a protective order, shall ensure that the military witness' name, rank, and military organization, or the civilian witness' name and city and state, or country of residence are announced in open session and made part of the record of trial proceedings.

Department of Defense
Military Commission Order No. 1

March 21, 2002

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References:
(a) United States Constitution, Article II, section 2
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")
(c) DoD 5200.2-R, "Personnel Security Program," current edition
(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)
(e) Section 603 of title 10, United States Code
(f) DoD Directive 5025.1, "DoD Directives System," current edition

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials.

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the members and the alternate member or members of each Commission. 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.

(2) Number of Members

Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) **Qualifications**

Each member and alternate member 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. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(b) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(c) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(d) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. **Other Personnel**

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. **The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.**

B. **The Accused shall be presumed innocent until proven guilty.**

C. **A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.**

D. **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).**

E. **The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.**

F. **The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.**

G. **If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.**

H. **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. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.**

I. **The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.**

J. **The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.**

K. **The Accused may be present at every stage of the trial before the Commission, consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that**

justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of

the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;
(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;
(c) Require the production of documents and other evidentiary material; and
(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) **Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.**

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex*parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense

Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

C. Oaths

(1) Members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that 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 to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* **presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.**

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Commission may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte,* **shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer** *ex parte, in camera,* **but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.**

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* **and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.**

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission deliberate and vote on findings in closed conference, the Presiding Officer shall announce the Commission's findings in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross-examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission deliberate and vote on a sentence in closed conference, the Presiding Officer shall announce the Commission's sentence in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

G. Sentence

Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

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. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further

regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

Department of Defense
Military Commission Order No. 2

June 21, 2003

SUBJECT: Designation of Deputy Secretary of Defense as Appointing Authority

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) ("President's Military Order")

(b) Military Commission Order No. 1 (Mar. 21, 2002)

(c) 32 C.F.R. sec. 341.1

1. PURPOSE

This Order implements policy and assigns responsibilities under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order.

2. DESIGNATION OF APPOINTING AUTHORITY

In accordance with the President's Military Order and Military Commission Order No. 1, the Deputy Secretary of Defense, Dr. Paul D. Wolfowitz, is designated as the Appointing Authority.

3. RE-DESIGNATION OF APPOINTING AUTHORITY

The Deputy Secretary of Defense shall not re-designate another as the Appointing Authority without the approval of the Secretary of Defense.

4. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

Department of Defense

Military Commission Order No. 3

February 5, 2004

SUBJECT: Special Administrative Measures for Certain Communications Subject to Monitoring

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

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

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

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

1. PURPOSE

This Order promulgates policy, assigns responsibilities, and prescribes procedures for matters related to monitoring certain communications of persons who are subject to trial by military commission pursuant to references (a) and (b).

2. AUTHORITY

This Order is issued pursuant to section 7(A) of reference (a) and in accordance with references (b), (c), and (d).

3. COMMUNICATIONS SUBJECT TO MONITORING

This Order applies solely to the monitoring of communications (including oral, electronic, written, or any other means) between individuals whom the President has determined to be subject to reference (b) and their defense counsel (including Civilian Defense Counsel, Detailed Defense Counsel, and any interpreter or other person detailed or employed to assist in the defense of such person), for security or intelligence purposes. For purposes of this Order, "monitoring" includes both real-time interception and analysis and recording of the subject communications by any means.

4. POLICIES AND PROCEDURES

A. *Approval of Monitoring.* The Commander of the Combatant Command with control of the detainee, or that commander's designee, shall approve any communications monitoring that may be conducted pursuant to this Order. Communications monitoring conducted pursuant to this Order shall be approved only upon a determination that such monitoring is (1) likely to produce information for security or intelligence purposes

(including information related to the conduct, furtherance, facilitation, or prevention of future terrorist or other illegal acts) or (2) may prevent communications aimed at facilitating terrorist operations.

B. *Notification to Defense Counsel.* In cases in which the Combatant Commander, or designee, determines that communications subject to this Order will be monitored, the Detailed Defense Counsel and Civilian Defense Counsel shall be notified in advance of any monitoring of their communications. The Detailed Defense Counsel and Civilian Defense Counsel may, in turn, notify the individual with whom they are communicating that their communications will be monitored.

C. *Action Agent.* A Department of Defense intelligence collecting entity ("monitoring entity") will conduct any monitoring approved pursuant to this Order.

D. *Review of Monitored Communications.* Monitoring entity personnel shall review any monitored communications for security and intelligence purposes as well as for purposes of assessing distribution restrictions consistent with this Order.

E. *Prohibited Monitoring.* Communications solely between two or more defense counsel shall not be monitored.

F. *Use and Disclosure of Monitored Communications.* Information derived from communications monitored pursuant to this Order shall not be used in proceedings against the individual who made or received the relevant communication; and such information shall not be disclosed to personnel involved in the prosecution or underlying prosecution investigation of said individual. Information related to (1) the conduct, furtherance, facilitation, or prevention of future terrorist or other illegal acts or (2) which may prevent communications aimed at facilitating terrorist operations and derived from monitored communications may be disclosed to appropriate persons other than those involved in such prosecutions.

G. *Reporting Requirements.* The monitoring entity will report promptly to the Combatant Commander, or that commander's designee, any monitored communication deemed relevant to security or intelligence (including information related to the conduct, furtherance, facilitation, or prevention of future terrorist or other illegal acts or acts harmful to the national security). If the Combatant Commander, or designee, is satisfied that a reasonable suspicion exists to believe that such communications are (1) relevant to security or intelligence (including information related to the conduct, furtherance, facilitation, or prevention of future terrorist or other illegal acts) or (2) which may prevent communications aimed at facilitating terrorist operations, he shall report promptly such information through established intelligence or law enforcement reporting channels.

5. EFFECTIVE DATE

This Order is effective immediately.

Paul D. Wolfowitz
Deputy Secretary of Defense

Department of Defense
Military Commission Order No. 4

January 30. 2004

SUBJECT: Designation of Deputy Appointing Authority

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

1. PURPOSE

This order assigns responsibilities under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order.

2. DESIGNATION OF DEPUTY APPOINTING AUTHORITY

Brigadier General Thomas L. Hemingway, U.S. Air Force, is designated as the Deputy Appointing Authority. This designation is in addition to the designation of Brigadier General Hemingway as the Legal Advisor to the Appointing Authority

3. POWERS OF DEPUTY APPOINTING AUTHORITY

The Deputy Appointing Authority has full authority to exercise the authority and perform the duties of the Appointing Authority. While exercising the authority or performing the duties of the Deputy Appointing Authority or the Acting Appointing Authority. Brigadier General Hemingway will obtain legal advice from another attorney in the Office of the Legal Advisor to the Appointing Authority.

4. EFFECTIVE DATE

This Order is effective immediately.

Paul Wolfowitz
Deputy Secretary of Defense

Department of Defense

Military Commission Instruction No. 3

April 30, 2003

SUBJECT: Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors

References:
(a) Military Commission Order No. 1 (Mar. 21, 2002)
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition
(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

1. PURPOSE

This Instruction establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

2. AUTHORITY

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

3. OFFICE OF THE CHIEF PROSECUTOR

A. *General.* The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

B. *Chief Prosecutor.*

1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith.

6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in Section 4(B)(2) of reference (a). The Chief Prosecutor may detail himself to perform such duties.

10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to references (a) and (b).

11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

C. *Prosecutors.*

1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with references (a) and (b).

3) Prosecutors shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Prosecutor.

4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

4. DUTIES AND RESPONSIBILITIES OF THE PROSECUTION

A. *Regular Duties.* The Prosecution shall perform all duties specified or implied in reference (a) as responsibilities of the Prosecution.

B. *Administrative Duties.* The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

C. *Special Duties.* The Prosecution shall perform all other functions, consistent with references (a) and (b), as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

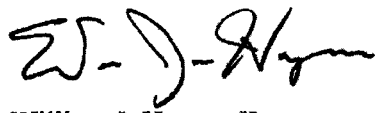
A. *Prohibition on Prosecutors Serving as Defense Counsel.* Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under section 4(C)(3)(a) of reference (a).

B. *Prohibition on Certain Disclosures.* All Prosecutors must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

C. *Statements To The Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.



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

Department of Defense
Military Commission Instruction No. 4

April 30, 2003

SUBJECT: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

References:
(a) Military Commission Order No. 1 (Mar. 21, 2002)
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition
(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

1. PURPOSE

This Instruction establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

2. AUTHORITY

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

3. OFFICE OF THE CHIEF DEFENSE COUNSEL

A. *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

B. *Chief Defense Counsel*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (a) and (b).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (a) and (b) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel.

6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (a) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-client relationship with accused persons or incur any concomitant

confidentiality obligations.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (a) and (b) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (a). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (a), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the

appropriate security clearances.

C. *Detailed Defense Counsel*

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and (b). In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (a); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (a). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

D. *Selected Detailed Defense Counsel*

1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine not to be available because of the nature or responsibilities of their assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (a), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense

Counsel of all duties with respect to that case.

E. *Qualified Civilian Defense Counsel*

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (a).

2) Consistent with Section 6(B) of reference (a), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (a).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (a).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (a) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. *Regular Duties.* The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. *Special Duties.* The Office of the Chief Defense Counsel shall perform such other functions, consistent with references (a) and (b) and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Certain Agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

B. *Prohibition on Certain Disclosures.* All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. *Statements to the Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 4

April 15, 2004

SUBJECT: Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

References:
(a) Military Commission Order No. 1 (Mar. 21, 2002)
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition
(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

1. PURPOSE

This Instruction establishes the responsibilities of the Office of Chief Defense Counsel (OCDC) and components thereof.

2. AUTHORITY

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

3. OFFICE OF THE CHIEF DEFENSE COUNSEL

A. *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions (OMC) and shall be comprised of the Chief Defense Counsel, Deputy Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

B. *Chief Defense Counsel.*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (a) and (b).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (a) and (b) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Appointing Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense an information copy of such requests.

6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (a) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-

client relationship with accused persons or incur any concomitant confidentiality obligations.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (a) and (b) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (a). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (a), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the

supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

C. *Deputy Chief Defense Counsel.*

1) The Deputy Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Deputy Chief Defense Counsel shall have full authority to exercise the authority and perform the duties of the Chief Defense Counsel in the absence of the Chief Defense Counsel.

D. *Detailed Defense Counsel.*

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and (b). In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (a); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (a). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

E. *Selected Detailed Defense Counsel.*

1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine precludes availability because of the

nature or responsibilities of the judge advocate's assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (a), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

F. *Qualified Civilian Defense Counsel.*

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (a).

2) Consistent with Section 6(B) of reference (a), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (a).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (a).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (a) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. *Regular Duties.* The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. *Special Duties.* The Office of the Chief Defense Counsel shall perform such other functions, consistent with references (a) and (b) and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Certain Agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

B. *Prohibition on Certain Disclosures.* All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. *Statements to the Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 4

July 15, 2005

SUBJECT: Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

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

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

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

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

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

(f) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

(g) Military Commission Instruction No. 4 (Aug. 31, 2004)

1. PURPOSE

This Instruction establishes the responsibilities of the Office of Chief Defense Counsel (OCDC) and components thereof. This instruction expressly cancels and reissues reference (g).

2. AUTHORITY

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

3. OFFICE OF THE CHIEF DEFENSE COUNSEL

A. *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions (OMC) and shall be comprised of the Chief Defense Counsel, Deputy Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

B. *Chief Defense Counsel.*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (a) and (b).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (a) and (b) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Appointing Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense an information copy of such requests.

6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (a) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to

perform the duties of Detailed Defense Counsel. The Chief Defense Counsel may receive information protected by the attorney-client privilege, incurring the concomitant obligation of confidentiality, in order to fulfill his responsibilities set forth in section 4(C)(1) of reference (a) and this Military Commission Instruction.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (a) and (b) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (a). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (a), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and

Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

C. *Deputy Chief Defense Counsel.*

1) The Deputy Chief Defense Counsel shall be a judge advocate of any United States armed force or a Department of Defense Civilian Attorney and shall be designated by the General Counsel of the Department of Defense.

2) The Deputy Chief Defense Counsel shall have full authority to exercise the authority and perform the duties of the Chief Defense Counsel in the absence of the Chief Defense Counsel.

D. *Detailed Defense Counsel.*

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and this Instruction. In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (a); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (a). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

E. *Selected Detailed Defense Counsel.*

1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an

instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine precludes availability because of the nature or responsibilities of the judge advocate's assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (a), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

F. *Qualified Civilian Defense Counsel.*

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (a).

2) Consistent with Section 6(B) of reference (a), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (a).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (a).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (a) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. *Regular Duties.* The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. *Special Duties.* The Office of the Chief Defense Counsel shall perform such other functions, consistent with references (a) and (b) and the mission of the Office of the

Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Certain Agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

B. *Prohibition on Certain Disclosures.* All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. *Statements to the Media.* Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 6

April 30, 2003

SUBJECT: Reporting Relationships for Military Commission Personnel

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

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

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

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

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

1. PURPOSE

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

2. AUTHORITY

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

3. POLICIES AND PROCEDURES

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

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

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

3) Chief Prosecutor: The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

4) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

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

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

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

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

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

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

1) Supervise subordinates in the performance of their duties.

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

4. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 8

April 30, 2003

SUBJECT: Administrative Procedures

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

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

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

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

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

1. PURPOSE

This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to references (a) and (b).

2. AUTHORITY

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

3. COMMISSION PERSONNEL

A. *Appointment and Removal of Commission Members.*

1) In accordance with reference (a), the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. 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. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

2) 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. Consistent with reference (a), any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

3) 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. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

B. *Military Commission Security Officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

C. *Other Military Commission Personnel.* The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

4. INTERLOCUTORY QUESTIONS

A. *Certification of Interlocutory Questions.* The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with Section 4(A)(5)(d) of reference (a), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. *Submission of Interlocutory Questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

C. *Effect of Interlocutory Question Certification on Proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

5. IMPLIED DUTIES OF THE PRESIDING OFFICER

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with reference (a). Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with reference (a), may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

6. DISCLOSURES

A. *General.* Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

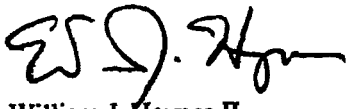
B. *Notifications by the Prosecution.* The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

C. *Notifications by the Defense.* The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

D. *Evidence Related to Mental Responsibility.* If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.

7. EFFECTIVE DATE

This Instruction is effective immediately.



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

Department of Defense
Military Commission Instruction No. 8

August 31, 2004

SUBJECT: Administrative Procedures

References: (a) Military Commission Instruction No. 8 (April 30, 2003)

(b) Military Commission Order No. 1 (Mar. 21, 2002)

(c) 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)

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

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

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

1. PURPOSE

This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to references (b) and (c). This Instruction expressly cancels and reissues reference (a).

2. AUTHORITY

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

3. COMMISSION PERSONNEL

A. *Appointment and Removal of Commission Members.*

1) In accordance with reference (b), the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. 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. In the absence of guidance from the Appointing Authority

regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

2) 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. Consistent with reference (b), any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

3) 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. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

B. *Military Commission Security Officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

C. *Other Military Commission Personnel.* The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

4. INTERLOCUTORY QUESTIONS

A. *Certification of Interlocutory Questions.* Except for determinations concerning protection of information as set forth in Section 6(D)(5) of reference (b) and the probative value of evidence, the full Commission shall adjudicate all issues of fact and law in a trial. Determinations concerning the probative value of evidence are governed by Section 4(c)(3) of reference (c). In accordance with Section 4(A)(5)(d) of reference (b), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. *Submission of Interlocutory Questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

C. *Effect of Interlocutory Question Certification on Proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

5. IMPLIED DUTIES OF THE PRESIDING OFFICER

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with reference (b). Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. Notwithstanding the role of the Presiding Officer and Commission Members in voting on issues of law and fact as set forth of Paragraph 4(A), above, and decisions concerning the probative value of evidence as set forth in Section 4(c)(3) of reference (c), the Presiding Officer shall have independent responsibility for issuing protective orders and deciding upon issues of limited disclosure of information pursuant to Sections 6(D)(5)(a) and (b) of reference (b) and for directing closure of proceedings pursuant to Section 6(B)(3) of reference (b).

6. DISCLOSURES

A. *General.* Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

B. *Notifications by the Prosecution.* The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

C. *Notifications by the Defense.* The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

D. *Evidence Related to Mental Responsibility.* If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.

7. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Military Commission Instruction No. 9

December 26, 2003

SUBJECT: Review of Military Commission Proceedings

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

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

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

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

(e) Section 603 of Title 10 of the United States Code

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

(g) Military Commission Instruction No. 2, current edition

1. PURPOSE

This Instruction prescribes procedures and establishes responsibilities for the review of military commission proceedings.

2. AUTHORITY

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

3. ADMINISTRATIVE REVIEW BY THE APPOINTING AUTHORITY

Pursuant to Section 6(H)(3) of reference (a), the Appointing Authority shall promptly perform an administrative review of the record of trial. Once satisfied that the proceedings of the military commission are administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4) of reference (a) and in accordance with this Instruction. If not so satisfied, the Appointing Authority shall return the case to the

military commission for any necessary supplementary proceedings.

4. REVIEW PANEL

A. *Generally.* A Review Panel shall consist of three Military Officers and shall commence its review of a military commission case upon the forwarding of a record of trial by the Appointing Authority.

B. *Members.* The Secretary of Defense will designate three or more Military Officers, including civilians commissioned pursuant to reference (e), as eligible to serve on a Review Panel. With regard to the internal operations of a Review Panel, civilians appointed as officers shall have the same authority, duties, and responsibilities as any other member of the armed forces serving on the Review Panel. Such officers whose total service under reference (e) and otherwise to the United States is not expected to exceed 130 days during any period of 365 consecutive days shall be special Government employees for the purposes of 18 U.S.C. §§ 202, 203, 205, 207, 208, and 209. Section 973(b) of Title 10, U.S. Code, does not apply to such officers. At least one member of each Review Panel shall have experience as a judge.

1) *Qualifications.*

a. In designating members as eligible to serve on a Review Panel, only individuals who are well qualified by virtue of their experience, impartiality, and judicial temperament shall be chosen.

b. No person shall be eligible to serve on a Review Panel if such person:

(1) Participated in the investigation of the case;

(2) Served as a member of the military commission that heard the case;

(3) Served as prosecutor or defense counsel before such commission; or

(4) Is otherwise incapable of providing an impartial review of military commissions as determined by the Secretary of Defense.

c. No person who has served a term of appointment as a member eligible to serve on a Review Panel may be reappointed to a second term.

2) *Term of Appointment.* The Secretary of Defense will prescribe the term of each Review Panel member, which normally shall not exceed two years. The Secretary of Defense may permanently remove a Review Panel member only for good cause. "Good cause" includes, but is not limited to, physical disability, military exigency, or other circumstances that render the member unable to perform his duties.

3) *Review Panel Composition.* The Military Officers designated by the Secretary of Defense shall select from among themselves the three members of each Review Panel. The three members of each Review Panel may select, at their discretion, one member to act as the President of that Review Panel.

4) *Oath of Office.* An oath (or affirmation) of office shall be administered to each Review Panel member.

a. *Procedure for administering oath.* The following oath (or affirmation) may be administered by the Secretary of Defense, the General Counsel of the Department of Defense, and any person duly authorized to administer oaths, "Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the rules applicable to the review of trials by military commission, all the duties incumbent upon you as a member of this Review Panel (so help you God)?"

C. *Post-Trial Review by the Review Panel.*

1) *Action on the Record of Trial.* After it has completed its review, the Review Panel shall take action as specified in subparagraphs (a) or (b) below:

a. Return the case to the Appointing Authority for further proceedings when a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(1) In cases where the only further proceedings necessitated by the Review Panel's conclusion that a material error of law occurred are proceedings where the charge(s) against the Accused shall be dismissed, the Appointing Authority shall dismiss the charge(s).

(2) In all other cases, the Appointing Authority shall refer the Review Panel's conclusions to the military commission for proceedings consistent with those conclusions.

b. Forward the case directly to the Secretary of Defense with a written opinion, consistent with Section 4(C)(5) of this Instruction, when a majority of the Review Panel has not formed a definite and firm conviction that a material error of law occurred.

(1) As to each finding of Guilty, the Review Panel shall recommend that it be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense. The Review Panel may recommend disapproval of findings of guilty on a basis other than a material error of law.

(2) As to the sentence imposed or any portion thereof, the Review Panel shall recommend that it be approved, mitigated, commuted, deferred, or suspended.

2) *Standard of Review.*

a. *Material Error of Law.* Variance from the procedures specified in reference (a) and its implementing Instructions that would not have had a material effect on the outcome of the military commission shall not constitute a material error of law.

b. Material errors of law may include but are not limited to the following:

(1) A deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial;

(2) Conviction of a charge that fails to state an offense that by statute or the law of armed conflict may be tried by military commission pursuant to references (a), (b), and (g);

(3) Insufficiency of the evidence as a matter of law; and

(4) A sentence that is not consistent with Section 6(G) of reference (a).

3) *Timing of Post-Trial Review.* The Review Panel shall complete its review and forward the record of trial within 30 days of receipt of the record of trial. The Appointing Authority shall ensure that the Review Panel has sufficient time to review the record of trial. Upon written application of the President of the Review Panel, the Secretary of Defense may grant extensions of time.

4) *Scope of Post-Trial Review.*

a. The Review Panel shall review the entire record of trial as defined by Section 6(H)(1) of reference (a), including decisions by the Appointing Authority.

(1) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may consider factual matters included in the record of trial.

(2) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may review sentences as part of its review of the record of trial.

b. The Review Panel shall ordinarily review submissions from the Prosecution and the Defense. In the event that the Review Panel reviews such written submissions, it may also in its discretion invite oral arguments on the written submissions.

c. The Review Panel may in its discretion review any *amicus curiae* submissions, particularly from the government of the nation of which the accused is a citizen. The Review Panel shall ordinarily review any such governmental submissions.

5) *Written Opinions.* The Review Panel shall issue a written opinion in every case, addressing the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction.

a. The written opinion shall include a legal analysis in the form of a memorandum supporting the Review Panel's determination in Section 4(C)(1)(a) and recommendations in Section 4(C)(1)(b) of this Instruction and where it otherwise deems appropriate in the exercise of its discretion.

b. Members of the Review Panel may write a separate opinion concurring with or dissenting from the majority opinion.

c. The written opinions of each Review Panel shall constitute precedent for subsequent opinions of all Review Panels.

D. *Deliberation.* The members of the Review Panel shall deliberate in closed conference and shall not disclose the contents of their deliberations outside their closed conference.

E. *Publication.* Except as necessary to safeguard protected information (as defined by reference (a)), the written opinions of the Review Panel shall be published.

F. *Applicability of 10 U.S.C. § 837(a).* The provisions of 10 U.S.C. § 837(a), prohibiting any attempts to coerce or, by any unauthorized means, influence the action of any military tribunal or reviewing authority, apply to Review Panel members.

G. *Effectiveness, Fitness, or Evaluation Reports.* The consideration or evaluation of the substantive judicial decisions made by a member of a Review Panel is prohibited in preparing effectiveness, fitness, or evaluation reports of a Review Panel member.

H. *Administrative Support.* The Review Panel shall be provided any necessary administrative and logistical support required to perform its duties through the Office of the Appointing Authority.

5. REVIEW BY THE SECRETARY OF DEFENSE AFTER RECEIPT OF THE REVIEW PANEL'S RECOMMENDATION

Pursuant to Section 6(H)(5) of reference (a), the Secretary of Defense will review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of reference (b), forward it to the President with a recommendation as to disposition.

6. FINAL DECISION

Pursuant to Section 6(H)(6) of reference (a), after review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense: 1) The Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or 2) The Secretary of Defense may mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) of reference (a) shall constitute the final decision. Pursuant to Section 6(H)(2) of reference (a), an authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.

7. EFFECTIVE DATE

This Instruction is effective immediately.

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

Department of Defense
Appointing Authority Regulation No. 2

November 17, 2004

SUBJECT: Motion and Interlocutory Question Procedures

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, current edition

(e) Military Commission Instruction No. 9, current edition

1. PURPOSE

This Regulation prescribes rules and procedures for motion practice and certification of interlocutory questions to the Appointing Authority.

2. AUTHORITY

This regulation is issued pursuant to Section 6.3 of reference (b) and Section 7(A) of reference (c) and in accordance with reference (a). The provisions of references (d) and (e) are applicable to this Regulation.

3. MOTIONS

A. *Generally.* A motion is a request to the Presiding Officer for any type of relief. Except for determinations concerning protected information as set forth in Section 6(D)(5) of reference (c), and as provided in Section 5 of reference (d), the full Commission shall adjudicate all issues of law and fact raised by the parties by way of a motion.

B. *Terms and Definitions.* The following definitions apply to motion practice:

1) A "filing" includes a motion, response, reply, supplement, notice of motion, request for special relief, or other communication involved in resolving a

motion, when provided to and received by the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) and opposing counsel, as detailed in Section 3(D) below.

2) A "motion" is the original request from the moving party or the party requesting relief.

3) A "response" is the opponent's answer to a motion.

4) A "reply" is the moving party's answer to a response.

5) A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

C. *Form of Filings.* Each motion, response, reply, and supplement shall contain, at a minimum:

1) A heading which styles the case "United States of America v [name of accused as set forth on the charge sheet.]"

2) A descriptive title, indicating specifically the form of relief sought by the party.

3) A concise statement of the relief sought.

4) A statement of facts pertinent to the issue at bar.

5) A statement of law with references to cases, statutes, or pertinent legal sources.

6) If desired, a written request for the following:

a. A hearing before the military commission, with a list of witnesses, if witnesses are to be called; and/or

b. A request for oral argument.

7) A statement of the burden of proof on any issue necessary to the resolution of the motion and the party on which the burden of persuasion falls.

D. *Acceptable Methods of Service.* Counsel shall ensure filings are served on opposing counsel and the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants). Service of filings shall be accomplished by one of the following methods:

1) *Electronic Mail:* Service may be accomplished using electronic mail. Such filings shall be included as an attachment to, and not in the body of, the electronic mail message. The attached filing shall be a scanned, signed copy of

the motion. Service shall be considered complete when the electronic mail message is sent to opposing counsel and the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants). Electronic mails shall be sent with a request for delivery receipt of the message, indicating that the actual message was received by the recipients. Printed copies of these receipts shall be provided to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants).

2) *Facsimile:* Service may be accomplished by faxing a signed copy of the filing to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) and opposing counsel. A printed receipt of transmission generated by the fax machine shall suffice for proof of service. This receipt shall be provided to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants).

3) The Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) shall maintain copies of all E-mails and fax receipts attesting to service of filings.

4) Counsel for both sides are responsible for notifying the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) of any delay in receiving filings from opposing counsel. The Presiding Officer for good cause may extend dates for responding to filings. Failure to regularly check electronic mail messages or fax transmissions shall not be good cause for a delay in receipt of filings.

E. *Presiding Officer Memoranda.* The Presiding Officer may, in his discretion, promulgate additional rules concerning the form and timing of motions provided such rules do not conflict with this Regulation or the authorities cited in references (a) – (e).

4. PRELIMINARY MOTIONS

A. The following preliminary motions must be raised before a plea is entered:

1) Challenges to jurisdiction;

2) Alleged defects in the form of charges;

3) Severance of charges or separate trials;

4) Inadmissibility of evidence based on facts or law then known to the moving party; or

5) Objections based on the refusal of a request for assignment of counsel or the release of counsel prior to trial.

B. *Timing of Preliminary Motions.*

1) The moving party shall provide the opposing party and the Presiding Officer notice of intent to file a preliminary motion as soon as a decision is made to file the motion.

2) Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, the moving party shall provide to opposing counsel and the Presiding Officer at least 7 calendar days prior to the convening of a Military Commission copies of all preliminary motions the party intends to raise before the Military Commission.

3) Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, the party responding to any motion shall provide to opposing counsel and the Presiding Officer at least 3 calendar days prior to the convening of a Military Commission copies of all replies the party intends to raise before the Military Commission.

5. MOTIONS FOR A FINDING OF NOT GUILTY

Motions for a Finding of Not Guilty may result in a final verdict with respect to a charge. Members of the Commission shall deliberate and vote on motions for a Finding of Not Guilty in closed conference.

6. OTHER MOTIONS

After the charge or charges are referred to a Commission and the Appointing Authority designates a Presiding Officer, either party may at any time move before the Military Commission by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motion should normally be in written form, as specified in Paragraph 3(C), but may be made orally by the moving party at the discretion of the Presiding Officer.

7. RULES OF EVIDENCE GOVERNING MOTION PRACTICE

The following rules shall govern the admissibility of evidence during hearings on motions and use of such evidence:

A. A Commission hearing a motion or question may consider affidavits, witness testimony, argument of counsel, or any other form of information, at its discretion.

B. Evidence submitted by the Prosecution and Defense Counsel in support of a motion or related filing specified in Paragraph 3(B) may be considered by the Commission during the findings portion of trial and, upon a conviction, sentencing, provided that the Presiding Officer, or a majority of the Commission pursuant to Section 6(D)(1) of reference (c), determines that the evidence would have probative value to a

reasonable person. The Prosecution and Defense Counsel need not reintroduce evidence submitted in support of a motion during findings or sentencing. However, the Prosecution and Defense may choose to reintroduce evidence submitted in support of a motion during findings and sentencing in order to ensure completeness, context, or continuity of facts presented.

8. INTERLOCUTORY QUESTIONS

A. *Required Certification of Interlocutory Questions.* In accordance with Section 4(A)(5)(d) of reference (c), the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect the termination of the proceedings with respect to a charge, for decision by the Appointing Authority.

1) An interlocutory question would only effect the termination of the proceedings with respect to a charge if, after consideration of the motion or question that arises during the course of a trial, the Commission reaches a conclusion that would effect a dismissal with respect to that charge.

2) If the Commission reaches a conclusion that would not effect a dismissal with respect to a charge, there is no requirement for certification of an interlocutory question.

B. *Other Interlocutory Questions.* The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. The Presiding Officer may grant and consider argument by the Prosecution and Defense as to whether an issue should be certified as an interlocutory question.

9. PROCEDURES FOR SUBMITTING INTERLOCUTORY QUESTIONS

A. *Generally.* An interlocutory question does not arise until a party to the action, by motion, requests any type of relief from the Presiding Officer.

1) The Presiding Officer shall ensure that the motion is considered by the full Commission and, where appropriate, evidence, witnesses, and arguments of counsel are entertained before a ruling is made on the motion. The Commission shall issue a ruling on the motion before the issue considered is certified to the Appointing Authority as an interlocutory question.

2) A request for interpretation of Commission rules and procedures from the Presiding Officer or parties to an action does not constitute an interlocutory question. If the Presiding Officer has questions concerning Commission rules and procedures, he shall exercise his discretion in interpreting such rules with the interests of a full and fair trial for the Accused in mind. Such determinations by the Presiding Officer do not become interlocutory questions unless challenged by motion by one of the parties to the case, the Commission issues a

ruling on the motion, and the Presiding Officer subsequently decides to certify the issue raised pursuant to subsection 8(B), above.

B. *Commission Procedures Prior to Submitting an Interlocutory Question.*

1) Once the Presiding Officer decides to certify an interlocutory question, the Presiding Officer will notify the Prosecution and Defense whether the certification was required or optional.

2) The Presiding Officer will inform the Prosecution and Defense of the Commission's decision on the issue and the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority. The Presiding Officer will also inform the Prosecution and Defense whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

3) The Presiding Officer, may at his discretion, grant and hear argument from the Prosecution and Defense on the appropriateness of the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority, and whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

C. *Commission Procedures after Receiving a Response from the Appointing Authority.*

1) Once the Presiding Officer receives a response from the Appointing Authority, he will provide the response to the Prosecution, Defense, and other Commission Members and conduct the Commission consistent with the Appointing Authority's response.

2) The Appointing Authority's response and the documents the Appointing Authority considered will be made a part of the Record of Trial and subject to review in accordance with reference (e).

10. MATERIAL SUBMITTED TO THE APPOINTING AUTHORITY

A. When submitting an interlocutory question to the Appointing Authority, the Presiding Officer will provide the following:

1) A memorandum that states:

a. Whether the certification of the interlocutory question was required or optional;

b. The interlocutory question or issues presented to the Appointing Authority;

c. The decision of the Presiding Officer or a majority of the Commission when a member requests reconsideration of the Presiding Officer's decision, on the issue;

d. A list of the documentary or other materials, if any, the Presiding Officer forwarded to the Appointing Authority in conjunction with an interlocutory question; and

e. Whether the Presiding Officer is holding the proceedings in abeyance until receiving a response on the interlocutory question.

2) Portions of the record of trial, including all applicable exhibits that pertain to the certified questions or issues.

B. The Appointing Authority may return the interlocutory question to the Presiding Officer with direction to obtain additional information.

11. INTERLOCUTORY QUESTION CERTIFICATION EFFECT ON PROCEEDINGS

While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

12. OTHER

This Regulation is prospective in application and shall not serve as a basis to challenge or reconsider decisions made prior to the effective date of this Regulation.

13. EFFECTIVE DATE

This Regulation is effective immediately.

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

Office of the Presiding Officer
Military Commission

July 19, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 1 - Presiding Officers Memoranda

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer is establishing Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and the Assistant to the Appointing Authority.

2. Presiding Officer Memoranda (POMs) will also serve as interim Rules of Commission Trial. POMs will be cancelled when the substance of the POM is incorporated into the Rules.

3. If a counsel objects to a procedure established in any POM, such objections should be made within 7 calendar days directly to the Presiding Officer (with a CC to Mr. Hodges).

4. Future POMs, the Rules of Commission Trials, and communications with counsel may refer to "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.

5. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

Signed by:

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

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 1-1 - Presiding Officers Memoranda

This POM supercedes POM # 1 dated 19 July 2004

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer is establishing Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and the Assistant to the Appointing Authority. In general, these POMs are issued to assist the Commission, to include the Presiding Officer, in preparing for and providing a full and fair trial under the provisions of Military Commission Order No. 1, 21 March 2002, paragraph 4A(5), 6A(5), and 6B, and Military Commission Instruction No. 8, paragraph 5.

2. Presiding Officer Memoranda (POMs) will also serve as interim Rules of Commission Trial. POMs will be cancelled when the substance of the POM is incorporated into the Rules.

3. If a counsel objects to a procedure established in any POM, such objections should be made within 7 calendar days directly to the Presiding Officer (with a CC to Mr[redacted]

4. Future POMs, the Rules of Commission Trials, and communications with counsel may refer to "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.

5. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

Original signed by:

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

Office of the Presiding Officer
Military Commission

July 19, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 2 - Appointment and Role of the Assistant to the Presiding Officers

1. Pursuant to Commission Law, the Appointing Authority may detail or obtain personnel to facilitate the trial of cases. At the Presiding Officer's request, the Appointing Authority arranged for Mr. Keith Hodges to be detailed to work directly for the Presiding Officer as the Assistant to the Presiding Officer. As such, Mr. Hodges' duties are to:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officer of Military Commissions in a broad array of legal issues, to include functional responsibility for legal advice and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officer of the Military Commissions, which may require legal analysis of matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers to provide advice in the performance of adjudicative functions. (See ABA Model Code of Judicial Conduct Canon 3B(7))

2. The Presiding Officer authorizes Mr. Hodges to sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, except those that under Commission Law can only be performed personally by the Presiding Officer. As Mr. Hodges and the Presiding Officer work closely together and the Presiding Officer is furnished a copy of every email Mr. Hodges sends, you may also be assured that the Presiding Officer has approved Mr. Hodges' actions.

3. *Any* email you send to the Presiding Officer, CC Mr. Hodges. If you believe there is a legal reason not to CC Mr. Hodges, include that reason in the email to the Presiding Officer.

Signed by:

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

Office of the Presiding Officer
Military Commission

SEP 16, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 2-1 Appointment and Role of the Assistant to the Presiding Officers

This POM supersedes POM # 2, dated July 19, 2004

1. Pursuant to Section 4(D), Military Commission Order No. 1, and Paragraph 3(B)(11), Military Commission Instruction No. 6, an Assistant to the Presiding Officers has been detailed and shall report to the Presiding Officer and work under his supervision to provide advice in the performance of the Presiding Officer's adjudicative functions. The Assistant may act on behalf of the Presiding Officer. The Assistant does not act, and does not have authority to act, on any matter or in any manner, on behalf of the Appointing Authority. (See Appointing Authority Memorandum, SUBJECT Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions, 19 Aug 2004.)

2. Mr. XXXX has been detailed to be the Assistant. His duties are:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on procedural, logistical, and administrative matters and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officer of the Military Commissions, which may require legal or other analysis of procedural, logistical, and administrative matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers to provide advice in the performance of adjudicative functions, *ex parte* if required, with respect to administrative, logistical, and procedural matters. (See ABA Model Code of Judicial Conduct Canon 3B(7)).

d. Act on the Presiding Officer's behalf to make logistical and administrative arrangements.

e. Draft, coordinate, staff, and publish guidelines for Commission Proceedings to include Presiding Officer Memoranda.

f. Process and manage policy, procedure, and similar actions and activities designed to contribute to the efficient operation of the Commission - both current and future operations.

g. Coordinate the integration of operations that affect in-court proceedings with OMC and JTF and other support personnel - to include the bailiff, security personnel, and court reporters - in providing services to the Commission.

h. To sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, or does direct, except those that under Commission Law can only be performed personally by the Presiding Officer or involve the vote or decision of the Commission.

i. Other duties not listed above which are consistent with improving the processes, procedures, administration, and logistics of the Office of the Presiding Officer and the Commissions and which are not inconsistent with paragraph 3 below.

3. The Assistant is *not* authorized to:

a. Communicate or discuss any matter with any Commission member or alternate member (except the Presiding Officer) other than to arrange for their administrative and logistical needs.

b. Be present during any closed conference of the members.

c. Advise the Presiding Officer concerning the decision of any matter that requires the vote of the Commission; however, the Assistant may prepare those documents and drafts necessary or required to *process, record, and disseminate* any decision by the Commission.

d. Provide any substantive advice to the Presiding Officer on any matter that would require a vote or decision by the entire Commission. This prohibition includes any advice on findings, sentence, or motions or requests which require a vote by the Commission.

4. Except as approved in advance in writing by the Presiding Officer, Mr. XXXX is not permitted to perform any duties for the Federal Law Enforcement Training Center or the Department of Homeland Security that involve: advice to law enforcement concerning an active case or investigation; advice on how to detect, investigate, or prosecute alleged acts of terrorism or violations of international law; or any other matter that would create a perception in the minds of a reasonable person that the Assistant's home agency (the Federal Law Enforcement Training Center/Department of Homeland Security) has any part in the Commission process through the actions of the Assistant.

5. **Any** email which is sent to the Presiding Officer will be CC Mr. XXXX. If counsel believe there is a legal reason not to CC Mr. XXXX, counsel shall include that reason in the email to the Presiding Officer.

Signed by:

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

Office of the Presiding Officer
Military Commission

July 19, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 3 - Communications, Contact, and Problem Solving

1. This POM establishes procedures concerning how counsel are to communicate with the Presiding Officer and the Assistant to the Presiding Officer (Mr. XXXX.) The Presiding Officer desires not only to avoid ex parte communications, but to ensure the accused receives a full and fair trial, that procedural matters leading to trial be handled efficiently, and that when counsel need to communicate with the Presiding Officer, it can be done efficiently and expeditiously.

2. The preferred method of communication with the Presiding Officer is email with CCs to opposing counsel and the Assistant. The following email protocols will be followed.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject whenever possible.

c. Identify, in the body of the email, each attachment being sent.

d. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF). Save the email you send in the event there is an issue as to the version of attachments being referred to.

e. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

f. Be attentive to the size of attachments. Send multiple emails with fewer attachments if necessary. Avoid archiving (WinZip) when possible.

g. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

f. If any addressee notices an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email.

3. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

4. The Presiding Officer is responsible to insure that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not being, in her/his opinion, satisfactorily addressed by opposing counsel or by the Appointing Authority must present the problem to the Presiding Officer.

Signed by:

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

Office of the Presiding Officer
Military Commission

July 22, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4: Motions Practice

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer for any type of relief, or for the Presiding Officer to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. The following definitions apply.

a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

b. A “motion” is the original request from the moving party - the party requesting the relief.

c. A “response” is the opponent’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.

g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a

different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.

(2) A concise statement of the relief sought.

(3) (Optional): An overview of the substance of the motion.

(4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.

(6) The name(s) of the file(s) attached to the email that are included in support of the motion.

(7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(8) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. (Note also paragraph 12 below as to required attachments.)

(9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.

(10) Additional information not required to be set forth as above.

c. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.

8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[(Government) (Defense)] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

Signed by:

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

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4-1: Motions Practice

This POM supercedes POM # 4 issued 23 Jul 2004

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, for any type of relief, or for the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. This POM is issued UP DOD MCO No. 1, paragraphs 4A(5)(a)-(d) and 6A(5), and MCI No. 8, paragraph 5. The following definitions apply.

a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

b. A “motion” is the original request from the moving party - the party requesting the relief.

c. A “response” is the opponent’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.

g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.

(2) A concise statement of the relief sought.

(3) (Optional): An overview of the substance of the motion.

(4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.

(6) The name(s) of the file(s) attached to the email that are included in support of the motion.

(7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(8) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited to the Commission. (Note also paragraph 12 below as to required attachments.)

(9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.

(10) Additional information not required to be set forth as above.

c. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.

8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[(Government) (Defense)] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

d. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited that was not previously provided in printed form to the Commission.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

e. The special request for relief will include counsel's statement and rationale concerning whether the Presiding Officer may grant the relief on his own or if the relief sought can be granted solely by the full commission.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone, or

c. The motion requires action by the full commission.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

Original signed by:

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

Office of the Presiding Officer
Military Commission

7 October 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4-2: Motions Practice

This POM supercedes POM # 4-1 issued 12 Aug 2004

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, for any type of relief, or for the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. This POM is issued UP DOD MCO No. 1, paragraphs 4A(5)(a)-(d) and 6A(5), and MCI No. 8, paragraph 5. The following definitions apply.

a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

b. A “motion” is the original request from the moving party - the party requesting the relief.

c. A “response” is the opponent’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.

g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.

(2) A concise statement of the relief sought.

(3) (Optional): An overview of the substance of the motion.

(4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.

(6) The name(s) of the file(s) attached to the email that are included in support of the motion.

(7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(8) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited to the Commission. (Note also paragraph 12 below as to required attachments.)

(9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.

(10) Additional information not required to be set forth as above.

c. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.

8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[(Government) (Defense)] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

d. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited that was not previously provided in printed form to the Commission.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

e. The special request for relief will include counsel's statement and rationale concerning whether the Presiding Officer may grant the relief on his own or if the relief sought can be granted solely by the full commission.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone, or

c. The motion requires action by the full commission.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

20. A notice of motion is not a motion, and it does not place an issue or matter before the Commission for decision. If a party files a notice of motion but does not file a motion, the Commission will not take any action on the underlying issue.

21. Various matters have been presented to the Appointing Authority for his decision and/or action. A request to the Appointing Authority is not a request for the Commission to take action or grant relief.

a. If a party wishes the Commission to grant relief or take action on a matter which has been raised with, or is currently before, the Appointing Authority the party must file a motion or request for other relief in accordance with this POM.

b. If a party has requested the Appointing Authority to grant relief or take action, and that request is denied, the party may request the Commission grant the same or different relief by filing a motion or request for other relief in accordance with this POM. All filings and other matters exchanged between the party and the Appointing Authority will be forward with the motion or request for other relief.

Original signed by:

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

Office of the Presiding Officer
Military Commission

August 2, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 5 - Spectators to Military Commissions

1. Commission Law provides for open Commission proceedings except when the Presiding Officer determines otherwise. Commission Law also charges the Presiding Officer to maintain the decorum and dignity of all Commission proceedings.

2. The attached document, "Decorum for Spectators Attending Military Commissions," shall be in force whenever the Commission holds proceedings open to spectators. The attachment may be used by bailiffs, security personnel, those with Public Affairs responsibilities, and other Commission personnel to inform spectators and potential spectators of the conduct and attire expected.

3. There are other rules that pertain to media personnel that have been prepared and disseminated by Public Affairs representatives. The attachment does not limit or change rules that are applicable to the media.

Signed by:

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

Decorum for Spectators Attending Military Commissions

The decorum and dignity to be observed by all at the proceedings of this Military Commission will be the same as that observed in federal courts of the United States.

Spectators, including members of the media, are encouraged to attend all open Commission proceedings. The proceedings may be closed by the Presiding Officer for security or other reasons.

The following rules apply to all military commission observers in the courtroom. Failure to follow these rules may result in being denied access to the courtroom, and could result in a charge of contempt of court and expulsion from commission-related activities at Guantanamo Bay, Cuba.

a. All military commission observers must wear appropriate attire. Generally, casual business attire is appropriate for civilians. Examples of acceptable casual business attire include: long-pants, knee-length skirts, collared shirts with sleeves, and covered-toe shoes. Inappropriate attire would include, but is not limited to, the following: shorts, sleeve-less shirts (tank tops, halter tops, etc.), denim jeans, T-shirts, mini skirts, any accessories or other clothing attire with political slogans, sneakers or tennis shoes, and sandals. Individuals wearing inappropriate attire will not be permitted to observe courtroom proceedings in the courtroom.

b. No distractions are permitted during active court sessions to include, but not limited to: talking, eating, drinking, chewing gum, standing and stretching, sleeping, using tobacco products, or other disruptions. Due to the hot and humid environment in Guantanamo Bay, bottled water with a re-closable lid will be permitted in the courtroom. No other beverages are permitted in the courtroom while commissions are in active session.

c. Entering and exiting the courtroom will be limited to extreme emergencies, and every attempt should be made to take bathroom breaks during court recesses.

d. Military commission observers are not permitted to interact with trial participants either during active sessions or breaks in the proceedings. Trial participants include: the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, and other personnel assisting in the conduct of military commissions. Military commission observers are also expected to respect the privacy of other military commission observers during trial recesses and not press for unsolicited interactions.

e. Computers, laptops, PDIs, PDAs, pagers, cell phones, Walkmans, audio recorders, video recorders, cameras, and any and all other types of electronic or battery operated devices are not permitted in the courtroom during sessions. Not only can these devices be distracting to others in the courtroom, but they pose a substantial

security risk. Notebooks, pens, pencils, and paper are permitted for note taking, but not sketching or artistic renditions of observations.

g. It is improper for anyone to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. For the same reason, signs, placards, leaflets, brochures, clothing, or similar items that could convey a message about the proceedings are also not allowed in the courtroom or in the courtroom's vicinity.

h. As is customary in courts, spectators will rise when the Commission as a whole, or the Presiding Officer alone, enters or depart the courtroom.

i. Members of the media are reminded they have agreed to certain rules established by the Public Affairs staff.

Commission officials know that spectators appreciate the need for security in any public building, and we ask that you cooperate with security personnel when they screen spectators and their property.

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BY DIRECTION OF THE PRESIDING OFFICER, MILITARY COMMISSION

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 6, Requesting Conclusive Notice to be Taken

1. Military Commission Order 1 permits the Commission to take conclusive notice. This POM establishes the process for Counsel to request the Commission to take conclusive notice. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c) and paragraph 6D(4).

2. When Counsel are aware they will request the Commission to take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Commission's taking conclusive notice of a certain fact. It is unnecessary to involve the Presiding Officer or the Assistant while Counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of agreeing to ask the Commission to take conclusive notice.

3. It is imperative that the matter to which conclusive notice is to be taken is precisely set out using the exact language that will be provided to the Commission. Any agreement or stipulation shall specify whether the facts shall be utilized by the Commission on merits, sentencing (if such proceedings are required,) or both.

4. Once counsel have agreed to take conclusive notice (or enter into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the Counsel who requested the writing (or if jointly requested, both counsel) to opposing counsel, Chief and Deputies of the Prosecution and the Defense, the Presiding Officer, and the Assistant.

5. If Counsel desires that the Presiding Officer take conclusive notice, but is unable to obtain the agreement of opposing Counsel, the Counsel desiring that conclusive notice be taken shall:

a. Send an email to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel, and Chief and Deputies of the Prosecution and the Defense.

b. The body of the email, or an attachment, shall be styled in the name of the case and be titled “Request to Take Conclusive Notice - [Subject] [Us v. last name of Accused].” The subject line of the email shall be the same as the title.

c. The content of the email, whether in the body or an attachment, shall contain the following matters in separate numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested. See paragraph 3 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Presiding Officer in resolving the matter.

6. The counsel receiving a request as stated in paragraph 5 shall:

a. Within three duty days of receiving the email in paragraph 4 above (the definition of "received" shall be as provided in POM #4), the Opposing party shall "reply all" to the email set out in paragraph 4 above and answer in the following, separately numbered paragraphs:

(1). That the responding Counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the Counsel disagrees:

(a). The reasons therefore.
(b). Any contrary sources not cited by the requesting Counsel.
(c). Other information to assist the Presiding Officer in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless there is a legal basis why the Commission should reserve decision on the matter until oral argument can be heard.

7. Replies by the requesting party. Counsel who originally requested the conclusive notice will not reply to the email sent in accordance with paragraph 6 above unless it is to withdraw their request for conclusive notice. If additional information is needed, the Presiding Officer will request it.

8. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to Counsel that a party will not agree to a request that conclusive notice be taken, that Counsel shall send a request as provided in paragraph 5 above.

c. If Counsel have not resolved a request to take conclusive notice within ten duty days of the date set for the first session of the Commission, they shall send the request as provided in paragraph 5 above.

9. Stipulations of fact. While Counsel are free to use stipulations of fact in lieu of agreeing on the taking of conclusive notice, the Commission has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

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

Office of the Presiding Officer
Military Commission

August 31, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 6-1, Requesting Conclusive Notice to be Taken

1. This POM supersedes POM 6 dated 12 August 2004.

2. Military Commission Order 1 permits the Commission to take conclusive notice. This POM establishes the process for such requests. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c) and paragraph 6D(4).

3. When Counsel are aware they will request the Commission to take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Commission's taking conclusive notice of a certain fact. It is unnecessary to involve the Presiding Officer, the Assistant, or the Commission while Counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.

4. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Commission on merits, sentencing (if such proceedings are required,) or both.

5. If counsel have agreed to take conclusive notice (or enter into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the Counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, Chief and Deputies of the Prosecution and the Defense, the Presiding Officer, and the Assistant. At the trial where the conclusive notice or a stipulation is to be used, the counsel offering the stipulation or conclusive notice is responsible for presenting the conclusive notice or stipulation to the Commission.

6. If Counsel desires that the Commission take conclusive notice, but s/he is unable to obtain the agreement of opposing Counsel, the Counsel desiring that conclusive notice be taken shall:

a. Send an email to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel, and Chief and Deputies of the Prosecution and the Defense.

b. The body of the email, or an attachment, shall be styled in the name of the case and be titled “Request to Take Conclusive Notice - [Subject] [Us v. last name of Accused].” The subject line of the email shall be the same as the title.

c. The content of the email, whether in the body or an attachment, shall contain the following matters in separate numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested. See paragraph 4 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Commission in resolving the matter.

7. The counsel receiving a request as stated in paragraph 6 shall:

a. Within three duty days of receiving the email in paragraph 6 above (the definition of "received" shall be as provided in POM #4-1), the Opposing party shall "reply all" to the email set out in paragraph 6 above and answer in the following, separately numbered paragraphs:

(1). That the responding Counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the Counsel disagrees:

(a). The reasons therefore.
(b). Any contrary sources not cited by the requesting Counsel.
(c). Other information to assist the Commission in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless there is a legal basis why the Commission should reserve decision on the matter until oral argument can be heard.

8. Replies by the requesting party. Counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 7 above unless it is to withdraw the request for conclusive notice. If additional information is needed, the Commission, acting thru the Presiding Officer for administrative ease, will request it.

9. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to Counsel that a party will not agree to a request that conclusive notice be taken, that Counsel shall send a request as provided in paragraph 6 above.

c. If Counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 6 above.

10. Stipulations of fact. While Counsel are free to use stipulations of fact in lieu of agreeing on the taking of conclusive notice, the Commission has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

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

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 7 - Access to Evidence and Notice Provisions

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain access to evidence. Failure to provide access to evidence as provided for by Commission Law can result in parties not being able to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer. This POM is issued under the provisions of MCO No. 1: paragraph 4A(5)(a), (b), and (c); paragraph 6A(5), including subparagraphs (a), (c), and (d); and paragraph 6B(1) and (2).

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law, and parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing has not complied with an access to evidence requirement.

b. Establishes time frames for providing access or notifications when modification of the time frames is within the discretion of the Presiding Officer.

c. Does not address requests for witnesses or "investigative or other resources." (MCO #1, Section 5H.)

d. Does not modify those procedures established by Commission Law with respect to Protected Information.

e. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Basic principles:

a. When parties comply with access to evidence requirements and the parties provide what Commission Law requires at the time stated by Commission Law, POMs, or orders of the Presiding Officer, the access to evidence process will not ordinarily require involvement by the Presiding Officer or the Assistant.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with access to evidence requirements. The parties should provide that access in the manner required, and at the time required, as set out in Commission Law, POMs, orders of the Presiding Officer, or otherwise by direction of the Presiding Officer. There is

ordinarily no reason for the Presiding Officer or the Assistant to receive copies or access to that information that is the subject of complying with access to evidence requirements unless a dispute arises as to whether a party is entitled to access to evidence.

c. To avoid unnecessary disputes at trial concerning whether access has been given to certain information, the parties should have procedures to ensure they are able to demonstrate that access has been given to evidence. Because much access to evidence has probably been given before the publication of this POM, it is advisable for the parties to prepare lists of what has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, Docketing Request ORDERS, other ORDERS, or other direction. In the absence of direction by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example in the case of a missed notification, it is professionally courteous to ask opposing counsel to provide the notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that should be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

c. When any of the situations listed in paragraph 7b, or other issues involving access to evidence arise, the party will prepare a *special request for relief* using the format generally as provided in POM #4. The email request to the Presiding Officer, Assistant, opposing counsel, and the Chief Prosecution and Defense and their deputies shall contain the information below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum:

(1). Style of the case.

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 8 - Trial Exhibits

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c).

2. Definitions:

a. Exhibit:

(1). A document or object, appropriately marked, that is presented, given, or shown to the Presiding Officer, other Commission Members, or a witness during a session of the Commission.

(2). A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3). Other documents or objects that the Presiding Officer directs be marked as an exhibit.

b. Prosecution or Defense Exhibits for identification are exhibits sponsored by a party and (1) intended to be considered on the merits or sentencing, if sentencing proceedings are required, but either not yet offered into evidence, or offered into evidence and not received, or (2) not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing if sentencing proceedings are required.

d. Review Exhibits are those exhibits:

(1). Presented to the Presiding Officer or other Commission members for consideration on a matter other than the issue of guilt or innocence, or a sentence if there are sentencing proceedings. Motions, briefs, responses, replies, checklists, and other writings used during motions practice are among the most common form of Review Exhibits.

(2). The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like.

e. Attachments are documents referred in, and attached to, a Review Exhibit. Prosecution and Defense exhibits shall not have pages marked as attachments unless so marked in the original form of the exhibit.

f. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual purpose exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any exhibit referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any exhibit that is displayed during an open session for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form in which the exhibit shall be included in the record.

d. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, during a session of the Commission, it shall be first shown to the opposing counsel so opposing counsel knows the item and its marking.

4. How exhibits are to be marked. See attachment B.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That ***IS*** permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: "Let the record reflect that the Prosecution marked, but did not offer or mention, the following Prosecution Exhibits: 3, 6, and 11."

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. PE 1 and 3 for ID are not received. PE 2 for ID is received. Once received, what was PE 2 for ID is PE 2.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offers into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of whether an exhibit has been offered or received. Counsel may, and are encouraged to, confirm with the reporter and the Presiding Officer of the status of an exhibit.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, or the Commission, all exhibits that have been mentioned on the record, offered, or received, and all Review Exhibits, shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer shall secure all exhibits until the next session.

8. Sample form. Counsel are welcome to use the form at attachment A to assist in marking and managing their exhibits.

Original signed by:

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

Exhibit Log. US v. _____ Page ___ of ___ Pages

# / Ltr	Description	Ref'd to on record	Offered	Received	Confirm with reporter

Attachment B, Presiding Officers Memorandum # 8, Trial Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 *OR* RE 1	*First page*: RE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 *OR* Attachment A to RE 3	*First page*: Attachment 1 to RE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.
II. Classified Exhibits Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.		
III. Protected Information Mark the same as I, adding the words on the first page or cover sheet "Protected Information."		

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 9 - Obtaining Protective Orders and Requests for Limited Disclosure

1. This POM addresses Protective Orders and Limited Disclosure pursuant to Section 6D(5), Military Commission Order No. 1. Whether a Protective Order is granted or disclosure is limited is a decision for the Presiding Officer without involvement of other Commission members. See Section 5, Military Commission Instruction # 8 dated 31 August 2004.

2. **Protective Orders - generally.** As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. **When counsel agree to a Protective Order**. Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done by email, or if during the course of a Commission session, in writing.

4. **When counsel do not agree to a Protective Order**. If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order to the Presiding Officer for signature along with the below information in writing. The below information may be transmitted in any format convenient to include in the body of an email:

(1). Why the order is necessary.

(2). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the requested information to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the Detailed civilian counsel, prior to signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. **Limited disclosure requests**. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer the following materials. An Order for the Presiding Officer's signature directing limited disclosure that contains the following information:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

Signed by:

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

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 10 - Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony

1. This POM governs how counsel may obtain a decision from the Presiding Officer, or the Commission, to obtain witnesses or alternatives to live testimony. It also contains the procedure to request to depose a witness.

2. This POM establishes the procedures for requesting the Commission to produce a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution or the Appointing Authority. While this POM does not stipulate the format *for an initial request to the Prosecution or the Appointing Authority,* it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Commission may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the government, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer or the Commission.

3. A request, or noting that a particular witness is needed (or needs or should be deposed), in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary or should be deposed on a motion or other filing, not only should that be addressed in accordance with POM #4-1, but *the counsel is also required to file a request* in accordance with this POM.

4. If the defense requests, and the prosecution has denied, a defense request, the defense shall within 3 duty days of learning of the government's denial - or when there has been inaction by the government on the request for 3 duty days - submit a "Request for Witness (or a Request for a Deposition)" as outlined below to opposing counsel, the Presiding Officer, and the Assistant. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request (or Request for a Deposition) - [Name of Witness] - US. v. [Name of Case]. Counsel may forward the request either by attachment or in the body of an email. Each of the below items shall be in a separate, numbered paragraph:

a. Paragraph 1: {Style.} A formal document is unnecessary. An attachment or email shall be styled: Witness Request (or Request for a deposition) - [Name of Witness] - US. v. [Name of Case].

b. Paragraph 2: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

c. Paragraph 3: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

d. Paragraph 4: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated?

e. Paragraph 5: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

f. Paragraph 6: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

g. Paragraph 7: Whether the requestor would agree to an alternative to live testimony to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

(1). Conclusive notice.

(2). Stipulation of fact.

(3). Stipulation of expected testimony.

(4). Telephonic.

(5). Audio-visual.

(6). Video taped deposition.

(7). Video-taped interview.

(8). Written statement.

h. Paragraph 8: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

i. Paragraph 9 If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by appending a *curriculum vitae* to the request. This

should also include a statement of law as to why the expert is necessary or allowable on the matter in question.

j. Paragraph 10: Other matters necessary to resolution of the request.

5. **Action by the government upon receipt of a request - government agreement**. If the government and defense agree that the witness should be produced or deposed, the government need not prepare a response to the request. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (conclusive notice, stipulation, or statement), the parties will immediately prepare the agreed upon writing. Once agreement has been reached on the request (and the writing), the prosecution shall notify opposing counsel, the Presiding Officer, and the Assistant that agreement has been reached.

6. **Action by the government upon receipt of a request - government does not agree**. If the government will not produce the requested witness or does not agree to a deposition, or if the government and defense cannot agree on the wording of any writing that will be a substitute, the government will prepare a response within 3 duty days of receiving a request and file it with opposing counsel, the Presiding Officer, and the Assistant. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

7. **Timing**. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 business days before the session in which the witness is first needed to testify.

8. **Resolution by the Presiding Officer**. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

9. **If the Presiding Officer does not approve the request**, the defense shall give notice within 3 duty days if they intend to request the entire Commission to grant the request in accordance with MCO #1, Section 6D(2)(a).

Signed by:

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

Office of the Presiding Officer
Military Commission

September 20, 2005

SUBJECT: Presiding Officers Memorandum # 10 - 1, Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony

This POM supersedes POM #10 dated October 4, 2004.

1. This POM governs how counsel may obtain a decision from the Presiding Officer to obtain witnesses or alternatives to live testimony. It also contains the procedure to request to depose a witness.

2. This POM establishes the procedures for requesting that the Presiding Officer produce a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution. While this POM does not stipulate the format *for an initial request to the Prosecution*, it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Presiding Officer may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the prosecution solely because insufficient information was provided, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer.

3. A request, or noting that a particular witness is needed (or needs to be or should be deposed), in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary or should be deposed on a motion or other filing, not only should that be addressed in accordance with POM #4-3 or current version, but *the counsel is also required to file a request* in accordance with this POM.

4. Prosecution "denial" of defense requested witness.

a. If the defense requests, and the prosecution has denied, a defense witness request, the defense shall within 3 duty days of learning of the prosecution's denial - or when there has been prosecution inaction on the request for 3 duty days - submit a "Request for Witness (or a Request for a Deposition)." All the procedures of POM #4-3 shall apply to how this request is formatted, sent, the addressees, and responses and replies thereto except as otherwise provided in this POM (POM #10-1) and the contents of the request which is set forth in paragraph 4c below.

b. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request (or Request for a Deposition) - [Name of Witness] - US. v. [Name of Case].

c. The heading for the request (attachment) will be as provided at enclosure 1 to POM # 4-3. Each of the below items shall be in a separate, numbered paragraph:

(1) Paragraph 1: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address, telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

(2) Paragraph 2: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1 for some suggestions.

(3) Paragraph 3: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated? For example, counsel might state, "On X_September 2005, I interviewed the witness, and he personally provided the information in the synopsis."

(4) Paragraph 4: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

(5) Paragraph 5: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

(6) Paragraph 6: Whether the requestor would agree to an alternative to live testimony to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable, citing to Commission Law. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

(a) Conclusive notice.

(b) Stipulation of fact.

(c) Stipulation of expected testimony.

(d) Telephonic.

(e) Audio-visual.

(f) Video taped deposition.

(g) Video-taped interview.

(h) Written statement.

(7) Paragraph 7: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

(8) Paragraph 8: If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by attaching a c*urriculum vitae* to the request. *See* paragraph 6, POM #4-3. This paragraph must also include a statement of law as to why the expert is necessary or allowable on the matter in question.

(9) Paragraph 9: Other matters necessary to resolution of the request.

5. Action by the prosecution upon receipt of a request.

a. Production of the witness. If the Prosecution and Defense agree that the witness should be produced or deposed, the prosecution need not prepare a response to the request. The prosecution should provide a copy of all approved witness requests and lists to the Chief Clerk for Commissions to facilitate provision of translator and court reporter services (the court reporters need to accurately spell names in transcripts).

b. Agreement to an alternative to live testimony. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (conclusive notice, stipulation, or statement), the parties will immediately prepare the agreed upon writing. Once agreement has been reached on an alternative to live testimony and the writing or other matter to be used as an alternative, the prosecution shall notify the Presiding Officer and the Assistant that agreement has been reached, and provide a copy of the approved statement or stipulation to the Presiding Officer.

6. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or does not agree to a deposition, or if the government and defense cannot agree on an alternative to live testimony or the wording of any writing that would be used as a substitute, the government will prepare and file a response, using the procedures in POM #4-3, within 3 duty days of receiving the request. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

7. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 calendar days before the session in which the witness is first needed to testify. Failure to make requests in a timely manner may cause the witness request to be disapproved by the Presiding Officer, despite other factors which might appear to require the witness' presence.

8. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

Signed by:

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

1 Enclosure
As stated

Enclosure 1 - POM 10

1. The drafting of an adequate synopsis is critical to resolve witness issues.

2. Paragraph 4c(2) of POM 10-1 states:

> {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

3. A proper synopsis serves many purposes:

a. It makes clear what the witness will say - not just the subject or topic of the witness's testimony.

b. It describes how the witness is necessary and how the offered testimony is relevant. The parties may agree concerning what a witness will say, but that doesn't mean that the witness is necessary or the testimony relevant. (Relevant being shorthand here for the reasonable person standard in the President's order.)

c. It permits a realistic opportunity to obtain a satisfactory alternative to the testimony. If the parties agree what a witness will say and that it is relevant, they may agree to a stipulation or other ways for the party to present the testimony. This could be a safeguard for a defense-requested witness who later becomes unavailable.

d. It ensures that the Presiding Officer has sufficient facts to make a decision. The PO knows nothing about the case.

4. Here are several examples to clarify the type of information required for an adequate synopsis:

EX 1. The witness will testify he is an expert in the area of fingerprint comparisons and how those comparisons are performed.
Problem: We know what he will testify *about* or the *subject*, but we do not know what he will *say*, and how his testimony is *relevant*.

EX2. Same as EX 1 above, but adding: The witness will further testify that a latent print found at the alleged crime scene was not that of the defendant.
Problem: OK, I know what he will say, but how is that relevant?

EX3. Same as EX2 above, but adding: The fingerprint was in the purported victim's blood, and there is no evidence that other than one person killed the purported victim.
No Problem: Got it. I know what he will say, and I know how it is relevant to the case. This is something upon which a decision can be made.

Another example.
EX1. The witness will testify that he is an expert in Arabic.
Problem: What is the relevance?

EX2. The witness will testify that he is an expert in the XYZ dialect of Arabic.
Problem: Still don't know the relevance.

EX3. The witness will testify that he is an expert in the XYZ dialect of Arabic, that the accused before the Commission is an XYZ speaker, and that the Prosecution-offered translation of the accused's statement is incorrect.
No Problem: Got it!

Office of the Presiding Officer
Military Commission

October 24, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 12 - Filings Inventory

Note -- On the effective date of this POM 12, POM 11 was in the developmental stage and had not yet been issued.

1. The Presiding Officer previously adopted a process so that documents (e.g., motions, witness request, other filings) could be filed by email. See POMs 3, 4-2, 6, 7, and 10. This process was adopted because:

a. Most items filed with the Commission are prepared in electronic form.

b. Documents not in electronic form can be easily converted into an electronic file.

c. The counsel, Assistant, members, court reporters, Presiding Officer and those who need to file and receive filings are often in geographically diverse locations.

d. Electronic filing enables counsel anywhere in the world with email access (to include web based accounts) to make and receive filings.

e. Service of filings by mail or courier is slow and expensive. Some filings are made to and from Guantanamo Bay, Cuba where service by mail is impractical.

f. Electronic filing is fast, reliable, efficient and creates an electronic file that can be efficiently and quickly shared with others.

g. Electronic filing creates and retains a precise record of dates and times on which filings and other actions took place.

2. A problem is that electronic filing enables parties to send emails or "CC" (carbon copy) emails to anyone. If a filing is sent to many, it is sometimes difficult to know who the intended or action recipient is. Similarly, those who receive large numbers of emails may overlook an email that was intended for them specifically.

3. This POM establishes a requirement for the Assistant to maintain a "Filings Inventory" (in progress, prior to the date of this POM, as a "Motions Inventory.") The purpose of the Filings Inventory is to make clear what filings (motions, responses, replies, attachments, and other filings) are before the Presiding Officer or the Commission. The *NOTES* section on previously issued Motions Inventory is superseded by this POM.

4. Establishing the Filings Inventory. The Assistant shall establish a Filings Inventory for each case referred to the Commission reflecting those filings pending before the Presiding Officer or the Commission.

a. As soon as the first filing on an issue is received, the Assistant shall assign a *filing designation* with one of 4 below categories followed by a number:

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
PO for a filing or series of filings initiated/directed by the Presiding Officer.
C for a filing or series of filings initiated/directed by the Commission as a body.

Other categories may be added at a later time.

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number *EX:* PE2, D4, PO1, C1) shall be unique for each case and the designation shall not be reused.

c. To identify a specific document that was filed, the filing designation may add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned by the Assistant.

d. The Filings Inventory shall also contain a listing of filings that had a designation but are no longer active before the Commission or the Presiding Officer. These items shall be placed in the inactive section of the Filings Inventory.

5. Filing designation and future communications or filings. Once a filing designation has been assigned, all future communications - written or by email - to that series of filings will use the filing designation as a reference. This includes adding the file designations to the style of all filings and the file names to ALL attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response."*
* The filename of the attachment in the above email should read *"P2 Jones - Defense Response."*
* The filename of a document that is an attachment to the response should read *"P2 Jones - Defense Response - attachment - CV of Dr Smith."*

Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

6. Distribution of the Filings Inventory.

a. As soon as practical after the Assistant receives a filing, the Assistant shall reply advising that the Filings Inventory has been annotated. In the case of a filing that initiates a new issue or motion, the Assistant shall also provide the filing designation.

b. At the request of any party, the Assistant shall provide a copy of the current Filings Inventory as soon as practical.

c. The Assistant shall from time to time, or when directed by the Presiding Officer, distribute copies of the Filings Inventory.

d. The Presiding Officer shall ensure that a copy of the current Filings Inventory is attached at the beginning of each session of the Commission as a Review Exhibit so that parties are free to refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear precisely which filing or issue is being addressed.

7. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure what filings have been received by the Presiding Officer or the Commission, and therefore what matters are pending before the Presiding Officer or the Commission.

a. Counsel will examine each Filings Inventory as it is received and notify the Assistant, Presiding Officer, and opposing counsel of any discrepancies within one duty day.

b. If counsel believe they have submitted a filing that is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Assistant, Presiding Officer, and opposing counsel noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above, the Presiding Officer or the Commission may elect not to consider that filing before the Presiding Officer or the Commission.

8. Filings in the Inactive Section of the Filings Inventory. If a filing is moved to the inactive section of a Filings Inventory due to the decision of the Presiding Officer, and counsel wish that the full Commission review the decision as one that the full Commission is empowered to decide, that counsel shall file a motion to have the Commission consider the matter. (This motion shall receive a new filing designation.) The new filing:

a. Shall contain as an attachment ALL previous filings (and their attachments) by ALL parties on the matter as well as the decision of the Presiding Officer that moved the action to the inactive section of the Filings Inventory.

b. Be styled and filed in accordance with POM 4-2.

c. Contain in the body of the motion that:

(1). The party wishes that the previous and attached (and listed) filings be considered by the entire Commission,

(2). The authority - to include the section of Commission Law if applicable - that indicates the matter is one that the full Commission must or may decide, and

(3). The reasons why the Presiding Officer's actions in moving the action to the inactive section were in error.

d. Responses and replies shall follow the procedure established in POM 4-2 except:

(1). Given the matter has been previously examined by counsel, the time to respond or reply shall be 2 duty days,

(2). Counsel may submit a response in the body of an email if only to say they adopt the matters they previously submitted on the matter before the matter was moved to the inactive section, and

(3). If the response is limited to only adopting matters previously submitted, no reply shall be allowed.

9. Objections to this POM. Counsel who object to the procedures in this POM must do so not later than 3 duty days after the effective date following the procedures in POM 4-2. A notice of motion is not required.

Original Signed by:

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

Office of the Presiding Officer
Military Commission

November 22, 2004

SUBJECT: POM 13 - Records of Trial and Session Transcripts

1. Reference: Military Commission Order # 1, paragraph 6H(1).

2. Definitions:

a. *Authenticated record of trial under the provisions of MCO #1, paragraph 6H(1).* A complete record of all proceedings in a case that has been authenticated by the Presiding Officer when the case has been completed whether by verdict (in the case of acquittal of all charges), sentence (in the case of a finding of guilty,) or other final action terminating the proceedings.

b. *Authenticated record of a post-trial proceeding under the provisions of MCO #1, paragraph 6H(1).* A complete record of all proceedings, that have been authenticated by the Presiding Officer, of any Commission proceedings in the case that occurs after the Presiding Officer has authenticated the record of trial under the provisions of MCO #1, paragraph 6H(1).

c. *Session transcripts.* The transcript of a portion of an unauthenticated record that reflects the proceedings of a session or sessions of the Commission. There are two types of session transcripts:

(1) *Draft session transcript*. A session transcript that has been reviewed by the Presiding Officer and offered to counsel for comment or correction in accordance with this POM.

(2) *Final session transcript*. A draft session transcript that has been reviewed by counsel within the time frames, and under the conditions, established by this POM, and the Presiding Officer has resolved errata submitted by counsel.

d. *Commission translator*. A translator charged with the responsibility to translate into English what is said in another language for the benefit of Commission participants, or to translate for a non-English speaking Commission participant what is spoken in a language the defendant, witness, or other participant does not speak.

e. *Significant translation error.* An error made by a Commission Translator reflected in a session transcript that may affect the:

(1) Correctness of a ruling on a motion or other request for relief;

(2) Rights of any party to the proceeding;

(3) Correctness of the verdict or sentence; or,

(4) Provision of a full and fair trial.

3. The Assistant will provide draft session transcripts to the Presiding Officer, Commission members, the prosecution, and the defense counsel. Final session transcripts will be provided to the same persons as drafts were provided and also to the Appointing Authority. Counsel and members will use these transcripts solely as an internal reference and to reflect errata and significant translation errors in accordance with this POM. Counsel and members shall not loan, share, transmit, copy, or otherwise disclose or show to any other person or entity any portion of any draft or final session transcript for any other purpose.

4. Review of unclassified, draft session transcripts by counsel.

a. Within ten days of service of a draft session transcript where a Commission Translator was not used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number any significant errors in the draft session transcript. Failure to provide an errata sheet, or obtain an extension of time to submit the same from the Presiding Officer, shall indicate that the counsel has no errata to offer.

b. Within 20 days of service of a draft session transcript where a Commission Translator was used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number:

(1) Any significant errors in the draft session transcript.

(2) Any significant translation errors, the correct translation, how and why the counsel believes the translation was in error, and the necessary relief or correction required.

Failure to provide an errata sheet, or obtain an extension of time to submit the same from the Presiding Officer, shall indicate that the counsel has no errata to offer and that there are no significant translation errors.

5. Review of classified, draft session transcripts by counsel. Review of classified, draft sessions transcripts shall be done in the same fashion as unclassified draft session transcripts except the session transcript shall be served upon counsel in writing, and the errata or significant translation errors, if any, shall be provided to the Assistant and Presiding Officer in written form according to the instructions provided when the draft session transcript is served on counsel.

6. Electronic format for records and session transcripts.

a. The court reporters for Commission sessions may change from one session to another for the same case. When reporters for different Services are used, the software used to create the record may be different or incompatible, and the software may be unavailable to the parties. Once the record or session transcript is prepared, counsel and others may wish access in electronic form.

b. Records and session transcripts shall be in Microsoft Word™ to maximize the ability to use them.

c. The pagination on draft session transcripts, final session transcripts, and the authenticated records may differ when transcripts are collated. When referring to a page or line number in a draft or final session transcript, counsel should be careful to indicate whether the transcript was a draft or final session transcript.

Original signed by:

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

2 Enclosures
1. Errata sheet – other than significant translation errors.
2. Format to submit significant translation errors.

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
Other than Significant Translation Errors

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	**Line(s)**	**Change from**	**Change to**	**Approved**	**Not approved**

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
Other than Significant Translation Errors

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	**Line(s)**	**Change from**	**Change to**	**Approved**	**Not approved**
How does counsel know the translation was incorrect? (If the same source throughout this errata sheet, the source need only be stated once.)					
Relief requested other than to change the translation as shown above.					
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Office of the Presiding Officer
Military Commission

5 August 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

Presiding Officer Memorandum (POM) # 14: Commissions Library

1. This POM, with the concurrence of the Chief Clerk for Military Commissions (CCMC), formally establishes the Military Commissions Library (Commissions Library). The Commissions Library is an electronic collection of cases, resources, and other writings of benefit to counsel, the Presiding Officers, other Commission Members, the Review Panel should that body become involved, and others.

2. Purpose of the Commissions Library. The Commissions Library has many purposes to include:

a. Provides a readily accessible source of the Commissions Library contents to users.

b. Permits users to electronically "cut and paste" selected contents of the Commissions Library into filings or other documents.

c. Permits users to electronically search documents.

d. Alleviates the need for counsel to attach copies of authority cited in their filings if that authority is contained in the Commissions Library. (See POM 4-2.)

e. Permits users to electronically capture and preserve, for possible future use in the Commissions, items that appear on the Internet, because Internet items present at one time can be changed or removed from the Internet without notice.

f. Saves time, space, and other resources by making voluminous materials easily transportable, searchable, and printable

3**. Form, location, and access to the Commissions Library.**

a. The Commissions Library is in electronic form and can be made available on CD/DVD or other media as well as being hosted on computer servers accessible to users.

b. As the Commissions Library will not contain any classified or protected information, the contents of the Commissions Library may be widely distributed.

c. All personnel assigned or attached to the Office of Military Commissions and all civilian counsel authorized to represent an accused will have access to the Commissions Library. Other personnel will be authorized access on an as-required basis as determined by the CCMC.

4. Commissions Library contents.

a. The Commissions Library will not contain, under any circumstances, any classified or protected information.

b. Filings (see POM # 4-2) included in the filings inventory (see POM # 12) will not be contained in the Commissions Library as those items may contain protected information. The Assistant to the Presiding Officers will maintain the filings inventory until such time as the Record of Trial is authenticated.

c. Potentially, anything useful as a reference or resource to the practice before a Military Commission may be placed into the Commissions Library. Ordinarily the Commissions Library contains: cases other than those readily available as a published opinion on Lexis-Nexis or similar services; large references to alleviate users from having to have the book with them (MCM or the Military Judges Benchbook, for example) items that appear on the Internet so the correct document is preserved before the document is changed or removed from the Internet; "hard-to-find" items (such as decisions of international tribunals and similar writings); treaties and treatises; law review articles; and like items.

d. While there is no requirement that reported cases decided by a United States court (whether federal, state, or military) be included, the CCMC may decide to include them so that they are readily available, especially for users who are not expert with legal research techniques.

5. Responsibilities.

a. The CCMC is responsible for maintaining the Commissions Library, hosting it on servers accessible to OMC personnel, and making it available on servers at Guantanamo Naval Base when the Military Commission is in session. The Assistant to the Presiding Officers will assist whenever his assistance is required.

b. The CCMC may place any item into the Commissions Library he deems appropriate. As a general rule, once an item has been placed into the Commissions Library, it will not be removed because users may rely upon the item being in the Commissions Library once it has been placed therein. Prior to removing an item, the CCMC will provide notice to all users.

c. The CCMC will place into the Commissions Library anything the Presiding Officer directs be placed therein. Requests by other Commission Members to the Presiding Officer that an item be included will be approved by the Presiding Officer and sent to the CCMC.

d. Counsel, the Assistant to the Presiding Officers, and others may request that the CCMC place an item into the Commissions Library. Ordinarily, requests will be approved unless the matter is already contained in the library or there is no possible benefit to having the item included.

e. In each instance where a request is made that an item be included, the CCMC will inform the requester whether the request has been approved.

f. The CCMC will provide all users, on an as-needed basis, updates to show what has been added to the Commissions Library.

6. Procedures to include an item into the Commissions Library.

a. A request to include an item into the Commissions Library will be submitted to the CCMC only by electronic mail. No electronic mail will request more than one item be included (i.e., only one item to be included per email.) The electronic mail will include:

(1). In the subject line, "Request to include item in the Commissions Library."

(2). In the body of the email, a description of the item to be included which is suitable for direct inclusion into the Commissions Library index. If the item is one for which there is a generally accepted Blue Book cite, the cite will also be included.

(3). As an attachment, the exact document to be included.

b. A request to include an item into the Commissions Library will not contain just a web address (URL.) Instead, the requester will convert the web page content into a file, and the file will be attached.

c. Acceptable file formats are Microsoft Word, HTML, JPG, BMP, or Adobe Acrobat unless the CCMC permits, on a case by case basis, a different file format.

d. When the electronic form of an item to be included in the Commissions Library is available, the electronic version will be submitted as that form makes use and electronic searching easier.

(1). Requesters will ***not*** take an item that is in electronic form, scan it, and submit the scanned version. For example, if the document is available in Word, send the Word document (or electronically convert it (not scan it) to Adobe Acrobat (PDF.))

(2). A document available in electronic form will not be printed and then scanned as this reduces the usability of the document.

e. It is the responsibility of the requester to ascertain that an item requested to be included in the Commissions Library is not available in electronic form before submitting a scanned document to be included. The CCMC may reject a request that an item be included in the Commissions Library in a scanned, non-electronically-searchable, form if the electronic version can be located by the requester.

7. Written copies of contents of the Commissions Library.

a. The Commissions Library is in electronic form.

b. At the direction of the Presiding Officers or at the request of any member of the Commission, the Assistant to the Presiding Officers will print out selected items in the Commissions Library for the use of all members of the Commission. Commission members may not write on or highlight these documents. The Assistant to the Presiding Officers is responsible for maintaining the written copies of documents contained in the Commissions Library that the Presiding Officer directs, or any Commission member requests, be available in written form.

c. Commission members may also print those matters in the Commissions Library they wish for their own personal use. A member may make his own notes on these personal documents, but may not read or show their notes to any other member. Further, each member will safeguard these personal documents and destroy them when no longer needed.

d. Printed extracts of the Commissions Library used by counsel during a session of the Commission.

(1). Counsel appearing before the Commission may elect to print selected extracts of the Commissions Library to make them available to members of the Commission during argument or other sessions of the Commission where special emphasis may be required. This practice should be used judiciously.

(2). If counsel wish extracts of the Commissions Library be made available to the Commission during a session of the Commission as provided above, counsel are responsible for making and providing sufficient copies for each member of the Commission, each opposing counsel, and a copy for inclusion in the record of trial. If sufficient copies are not made available at the time counsel wishes the Commissions

Library extract to be made available to the Commission, the Presiding Officer may deny counsel the opportunity to use the extract.

e. While the Commissions are not in session, the CCMC, assisted by the Assistant to the Presiding Officers, will insure that the matters printed for the Commission are safe-guarded. After all sessions before a given Commission are concluded, the APO will transfer the printed matters to the CCMC for use by subsequent Commissions.

Approved by:

Peter E. Brownback III COL, JA, USA Presiding Officer	M. Harvey Chief Clerk for Military Commissions