# RECORD OF TRIAL

## COVER SHEET

### IN THE
### MILITARY COMMISSION
### CASE OF

## UNITED STATES
## V.
## ALI HAMZA AHMAD SULAYMAN AL BAHLUL

**ALSO KNOWN AS:**

**ALI HAMZA AHMED SULEIMAN AL BAHLUL**
**ABU ANAS AL MAKKI**
**ABU ANAS YEMENI**
**MOHAMMAD ANAS ABDULLAH KHALIDI**

## NO. 040003

## VOLUME ___ OF ___ TOTAL VOLUMES

**1ST VOLUME OF REVIEW EXHIBITS (RE):**
**RES 121-140 (JAN. 11, 2006 SESSION)**
**(REDACTED VERSION)**

# *United States v. Ali Hamza Sulayman al Bahlul*, NO. 040003

## INDEX OF VOLUMES

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

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

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

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| 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) |
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| VII* | Review Exhibits 1-6; 101-120 (Aug. 26, 2004 and Jan. 11, 2006 sessions) |
| VIII* | Review Exhibits 121-140 (Jan. 11, 2006 session) |

* Interim volume numbers. Final numbers to be added when trial is completed.

# UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—2ND VOLUME OF REVIEW EXHIBITS

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**Hodges, Keith**

**From:** Hodges, Keith
**Sent:** Friday, December 09, 2005 3:36 PM
**To:** [redacted]

**Cc:** [redacted]

**Subject:** Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba

1. Colonels Brownback and Chester have scheduled a trial term for Military Commissions during the week of 9 Jan 2006 at Guantanamo Bay, Cuba.

2. Counsel in US v. al Bahlul and US v. Khadr will be prepared to attend conferences at the call of the respective Presiding Officers during the period 1200 hours, 9 Jan through 12 Jan.

3. A session will be held in the case of United States v. al Bahlul at 1000, 10 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

4. A session will be held in the case of United States v. Khadr at 1000, 11 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

5. This trial term docket is subject to change, however the first session in a specific case will not be held earlier than as indicated in paragraphs 3 and 4 above.

6. The Presiding Officers anticipate that if sessions other than those indicated in paragraphs 3 and 4 above are held, the latest session would be on 12 Jan. However, all parties must realize that the trial term will not end until each Presiding Officer is satisfied that a further session during the trial term would be of no additional benefit.

7. Parties will be kept advised of any changes so that travel and other logistical arrangements can be made.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

## Hodges, Keith

**From:** Hodges, Keith [redacted]
**Sent:** Tuesday, December 13, 2005 1:50 PM
**To:** [redacted]
**Cc:** Pete Brownback; Hodges, Keith
**Subject:** RE: Request for excusal from week of 9 January sessions in US valBahlul

The Presiding Officer has reviewed LT [redacted] request and he advises that the appearance of detailed prosecution counsel at this session is a matter within the province of the Chief Prosecutor and the Lead Prosecutor on the case.

Both the Lead Prosecutor and the Chief Prosecutor know what business we plan to conduct at the January sessions, and the Prosecution must be prepared to conduct all of it at that session.

FOR THE PRESIDING OFFICER

Keith H. Hodges

---

From: Hodges, Keith [redacted]
Sent: Mon 12/12/2005 2:41 PM
To: [redacted] Hodges, Keith
Cc: Swann, Robert, Mr, DoD OGC; [redacted] Davis, Morris, COL, DoD OGC; ; Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: RE: Request for excusal from week of 9 January sessions in US v al Bahlul

ALL:

I am only the Assistant to the Presiding Officer. Emails for decision by a Presiding Officer must always be sent to that Presiding Officer and me.

I added COL Brownback's email address in the TO: block. No need to send to him again.

Keith Hodges

---

From: [redacted]
Sent: Mon 12/12/2005 9:06 AM
To: 'Hodges, Keith'
Cc: Swann, Robert, Mr, DoD OGC; [redacted] Davis, Morris, COL, DoD OGC; Fleener, Tom, MAJ DoD GC; Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: Request for excusal from week of 9 January sessions in US v al Bahlul

Mr Hodges,

I respectfully request to be excused by the Presiding Officer from the 9 January session to be held in the case of the United States v al Bahlul.

Very Respectfully,

[redacted]
Prosecutor, Office of Military Commissions Department of Defense
Phone [redacted]
Fax: [redacted]

**Hodges, Keith**

**From:** Hodges, Keith [redacted]
**Sent:** Friday, December 16, 2005 11:28 PM
**To:** Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** Presiding Officer's Reply: RE: PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

---

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

---

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer with information to be used to plan Commission proceedings, should you be directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be

able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

---

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC Parrish's email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Friday, December 16, 2005 5:08 PM
**To:** [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] 'Hodges, Keith'
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----
**From:** [redacted]
**Sent:** Tuesday, December 13, 2005 13:13
**To:** Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; Lahoste, [redacted] Fleener, Tom, MAJ DoD GC; [redacted] OGC; Hodges, Keith

**Subject:** PO 101 ( al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

**Lt Col** [redacted]
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]
SIPR: [redacted]

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

16 December 2005

TO: Colonel Peter Brownback, Presiding Officer

SUBJECT: Required Response to Presiding Officer's Resumption of Proceedings Order - United States v. al Bahul

1. On November 16, 2005 you requested all counsel provide a calendar showing the dates they were unavailable or unable to work on Commission matters. You also requested each lead counsel recommend a trial schedule.

2. While I have been detailed to represent Mr. al Bahul, he has never requested nor accepted my representation. Further, he has explicitly stated his desire to represent himself. Consequently, I am unable to form an Attorney/Client relationship with Mr. al Bahul.

3. It is my opinion that Mr. al Bahul is presently serving as his own counsel and as such these docketing matters should be presented to him. I respectfully request you cause all documents to be translated into Arabic, so that Mr. al Bahul can understand them and act accordingly. In the meantime, I will be forwarding all matters to him, excepting classified or otherwise protected information.

4. I understand that I have been ordered to attend the 10 January session and I intend to comply with that order. However, because Mr. al Bahul is representing himself, I will not be preparing *voir dire* or drafting any motions. Regarding my schedule, please note I will be attending the Law of War course during the last week of January.

5. Pursuant to paragraph 8 of your resumption of proceedings order, I am undertaking efforts to secure ethical guidance regarding forced representation of criminal defendants. As soon as I am able to determine my ethical duties and analyze the various options, I will inform you.

6. Since I am not yet certain what, if anything, I am ethically entitled to do with respect to representing the accused, I point out to the Commission that on 10 January I am neither acting for the accused nor seeking to assure that his rights are protected. Since the accused is barred from self-representation and, at his request, will have no lawyer seeking to act on his behalf on 10 January 2006, there is no conceivable way for the accused to exercise any rights provided him.

7. I ask that this letter be made part of the official record of the 10 January 2006 proceeding.

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

**Hodges, Keith**

**From:** [redacted]

**Sent:** Tuesday, December 13, 2005 1:13 PM

**To:** Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted] Hodges, Keith

**Subject:** PO 101 ( al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

**Attachments:** Prosecution Response - PO 101 110.pdf

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<<Prosecution Response - PO 101 110.pdf>>

**Lt Col** [redacted]
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]
SIPR: [redacted]

| UNITED STATES OF AMERICA<br><br>v.<br><br>ALI HAMZA SULAYMAN AL BAHLUL | **PO 101 – al Bahlul**<br><br>**Prosecution Response to Presiding Officer's Resumption of Proceedings Order**<br><br>**December 13, 2005** |
|---|---|

1. Pursuant to paragraph 7c of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to propose a trial schedule.

a. The Prosecution proposes the following trial schedule:

(1) 10 January 2006: First session to determine counsel rights, voir dire the Presiding Officer, and set a litigation schedule. [7c(1)]

(2) 30 January 2006: Motions not dependent on opposing party's compliance with discovery. [7c(2)]

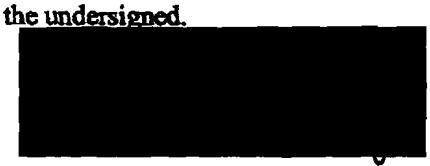
(3) 13 February 2006: Responses to motions.

(4) 27 February 2006: Discovery obligations completed (subject to continuing obligations with regard to discovery). [7c(3)]

(5) 28 February 2006: Voir dire prospective members; litigate motions requiring hearing before Presiding Officer. [7c(4)]

(6) 11 April 2006: Commence presentation of evidence on the merits. [7c(5)]

2. The point of contact for this response is the undersigned.



Lt Col, USAFR
Prosecutor

**Hodges, Keith**

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Monday, December 19, 2005 12:36 PM
**To:** 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** PO 101 ( al Bahlul) - calendar (Fleener)
**Attachments:** Calendar.pdf

-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Friday, December 16, 2005 23:28
**To:** Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Hodges, Keith
**Subject:** Presiding Officer's Reply: RE: PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

---

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

---

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer with information to be used to plan Commission proceedings, should you be

directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

---

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC [redacted] email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Friday, December 16, 2005 5:08 PM
**To:** [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] 'Hodges, Keith'
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----
**From:** [redacted]
**Sent:** Tuesday, December 13, 2005 13:13
**To:** Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted] Hodges, Keith

**Subject:** PO 101 ( al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

**Lt Col** [redacted] **USAFR**
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]
SIPR: [redacted]

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

19 December 2005

TO: Colonel Peter Brownback, Presiding Officer
SUBJECT: Required Response to Presiding Officer's 12/16/05 email - United States v. al Bahul

1. Pursuant to paragraph 7b of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to provide a calendar showing the dates in which they are unavailable to attend a session or work on Commission matter. I am filing this memorandum, not as Mr. al Bahul's counsel, rather under the condition that I am ordered to represent him and if that order is lawful therefore forcing my representation upon him.

2. I am currently scheduled to attend the Law of War course in Charlottesville, VA during the last week of January.

3. Notwithstanding paragraph 7(d), I prepared this document in memorandum form so as to avoid any appearance of serving as Mr. al Bahul's counsel.

4. I am the point of contact. I can be reached at [redacted]

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

**Hodges, Keith**

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Monday, December 19, 2005 12:38 PM
**To:** 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order
**Attachments:** PO 101-Defense Response to Presiding Officer's Resumption of Proceedings Order.pdf

---Original Message---
**From:** Hodges, Keith [redacted]
**Sent:** Friday, December 16, 2005 23:28
**To:** Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Hodges, Keith
**Subject:** Presiding Officer's Reply: RE: PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

---

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

---

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer

with information to be used to plan Commission proceedings, should you be directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

---

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC [redacted] email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Friday, December 16, 2005 5:08 PM
**To:** [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] 'Hodges, Keith'
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----
**From:** [redacted]
**Sent:** Tuesday, December 13, 2005 13:13
**To:** Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Piesner, Tom, MAJ DoD GC; [redacted] Hodges, Keith

**Subject:** PO 101 ( al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

**Lt Col** [redacted] **USAFR**
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]
SIPR: [redacted]

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

19 December 2005

TO: Colonel Peter Brownback, Presiding Officer
SUBJECT: Required Response to Presiding Officer's 12/16/05 email - United States v. al Bahul

1. Pursuant to paragraph 7c of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to propose a trial schedule. I am filing this memorandum, not as Mr. al Bahul's counsel, rather under the condition that if I am ordered to represent him and if that order is lawful therefore forcing my representation upon him, the dates below would be the earliest possible dates I could be prepared.

a. Answer to 7(c)(1). This appears to be moot as a date has already been set for the first session.

b. Answer to 7(c)(2). 1 April 2006

c. Answer to 7(c)(3). Prosecution only

d. Answer to 7(c)(4). 1 May 2006

e. Answer to 7(c)(5). 1 September 2006

2. Notwithstanding paragraph 7(d), I prepared this document in memorandum form so as to avoid any appearance of serving as Mr. al Bahul's counsel.

3. I am the point of contact. I can be reached at [redacted]

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

**Hodges, Keith**

**From:** Hodges, Keith [redacted]
**Sent:** Tuesday, December 20, 2005 10:09 AM
**To:** Fleener, Tom, MAJ DoD GC; Hodges, Keith; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** RE: PO 101 - POs Reply to MAJ Fleener email of 19 Dec 2005

MAJ Fleener,

The Presiding Officer has directed me to send you the below.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

MAJ Fleener,

1. I have not ordered you to represent Mr. al Bahlul. You were detailed to represent Mr. al Bahlul by COL Sullivan's memorandum of 3 November 2005. I have not been advised that COL Sullivan, or other competent authority, has released you from your detail.

2. I have ordered you to perform certain functions which a detailed counsel is required to perform. None of those functions have required you to represent Mr. al Bahlul. Specifically, being prepared to conduct voir dire does not require you to represent Mr. al Bahlul, though it does require you to be prepared to represent him if you are required to do so.

3. During or after the 10 January 2006 session, you may be required to represent Mr. al Bahlul. I do not know at this time whether or not you will be required to do so. This is why the language from my earlier email which you cited is conditional. "One of the outcomes of that [January trial term] session is that ***you could be*** ordered to represent Mr. al Bahlul, and ***if*** that is the case, you will either conduct voir dire or waive your opportunity to do so."

6. Mr. al Bahlul has not been and is not being threatened or "further threatened" with forfeiture of voir dire if you "do not not [sic] commence representation of him now and prepare voir dire." You have been told that the opportunity may arise to conduct voir dire, and you may take advantage of that opportunity. You may decide to conduct voir dire with or without being prepared. I am not directing you to represent him through preparing to conduct voir dire. You just have been given the courtesy of knowing what might occur so you may plan - and be prepared - accordingly.

7. As you know, I have requested an opinion from The Judge Advocate General of the United States

Army on your situation. I hope to have their opinion in hand before the 10 January session.

8. A copy of your email and this reply will be added to the filings inventory.

Peter E. Brownback III
COL, JA
Presiding Officer

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Monday, December 19, 2005 3:32 PM
**To:** 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** RE: PO 101

Colonel Brownback,

Your November 16 order regarding resumption of proceedings required that counsel indicate a date when voir dire could occur. It did not require or order preparation of voir dire questions.

Your 16 December 2005 e-mail is confusing.

You state in numbered paragraph 4 the following: "You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so." This response recognizes that I have sought opinions as to whether I can ethically and lawfully represent Mr. al Bahlul over his objection, and absent a finding that he is unable to defend himself or has demonstrated thorugh his conduct that he will disrupt the proceedings. Your response indicates that "you [meaning I] could be ordered to represent Mr. al Bahlul." At that time, I would have to make a judgment as to whether the order is lawful and binding upon me, and if I concluded that it was I would then do what is necessary and proper to represent Mr. al Bahlul. However, no such order has been made. So, I ask you explicitly whether you are:

(1) ordering me now to represent Mr. al Bahlul, (2) even though I have not appeared before you and have not had a hearing on the ethics/legal issue I have raised, and 3) you have not addressed the issue I have raised and issued any opinion that purports to be binding, and whether you are (4) further threatening Mr. al Bahlul with forfeiture of voir dire if I do not not commence representation of him now and prepare voir dire.

I request an immediate and direct answer to this question. I must know without there being any uncertainty or ambiguity whether you have now ordered me to represent Mr. al Bahlul.

Tom Fleener

-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Monday, December 19, 2005 14:55
**To:** Fleener, Tom, MAJ DoD GC; Hodges, Keith; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** PO 101 D

Today MAJ Fleener sent two emails and each email had an attachment.

Both emails and their respective attachments have been added to the filings inventory as PO 101 D. That filing is attached.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Monday, December 19, 2005 12:38 PM
**To:** 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Friday, December 16, 2005 23:28
**To:** Fleener, Tom, MAJ DoD GC; [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Hodges, Keith
**Subject:** Presiding Officer's Reply: RE: PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

---

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

---

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer with information to be used to plan Commission proceedings, should you be directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

---

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC [redacted] email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers



[redacted]

Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Friday, December 16, 2005 5:08 PM
**To:** [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] 'Hodges, Keith'
**Subject:** PO 101 ( al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----
**From:** [redacted]
**Sent:** Tuesday, December 13, 2005 13:13
**To:** Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted] Hodges, Keith

**Subject:** PO 101 ( al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

**Lt Col** [redacted] **USAFR**
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]
SIPR: [redacted]

**Hodges, Keith**

**From:** Pete Brownback[redacted]
**Sent:** Tuesday, January 03, 2006 4:34 PM
**To:** Fleener, Tom, MAJ DoD GC; 'Hodges, Keith'; [redacted]; Sullivan, Dwight, COL, DoD OGC; [redacted] LNC, DoD OGC; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted];
**Subject:** Re: Attire and Grooming for Accused at Sessions of the Commission

Mr. Hodges,

Please make this email and the two emails below into a Review Exhibit.

COL Brownback

---- Original Message ----
**From:** Fleener, Tom, MAJ DoD GC
**To:** 'Hodges, Keith' [redacted] DoD OGC ; Sullivan, Dwight, COL, DoD OGC ; [redacted] Davis, Morris, COL, DoD OGC ; Swann, Robert, Mr, DoD OGC ; [redacted] Fleener, Tom, [redacted]
**Sent:** Tuesday, January 03, 2006 3:09 PM
**Subject:** RE: Attire and Grooming for Accused at Sessions of the Commission

I am not making plans to attend to grooming.

Tom Fleener

-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Tuesday, January 03, 2006 13:26
[redacted]
**Subject:** Attire and Grooming for Accused at Sessions of the Commission

1. In past sessions of the Commission, arrangements have been made to ensure the accused's physical appearance in a session of the Commission was consistent with a full and fair trial considering security requirements and the logistical challenges of being at Guantanamo. For example, unless reason is given otherwise and a Presiding Officer directs, accused will not be in the courtroom during a session of the Commission in restraints. In some cases, defense counsel have made special arrangements to attend to an accused's grooming (hair cut) and have even arranged for purchased civilian attire so the accused did not appear in the courtroom in "prison attire."

RE 127 (al Bahlul)
Page 1 of 2

2. If defense counsel wish to attend to these needs and need the assistance of the government or JTF personnel, you are invited to make your request to Mr. Harvey. Time is of the essence.

3. If defense counsel have no plans or do not wish to attend to the accused's grooming or appearance, they will notify the Chief Defense Counsel, Mr. Harvey, the APO, and the respective Presiding Officer immediately. The Presiding Officers have an interest in lending their good offices to ensuring a full and fair trial.

FOR THE PRESIDING OFFICERS
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

Office of Military Commissions
Office of the Chief Defense Counsel
1600 Defense Pentagon
Room 3B688
Washington, D.C. 20301

Iowa State Bar Assoc.
In Care of Mr. [redacted]

January 3, 2006

Dear Mr. [redacted]

My name is Major Tom Fleener. I am an Army Reserve JAG Officer who has been ordered to active duty to represent one of the Guantanamo Bay detainees before a military commission. I am an Iowa lawyer, license number 14805. In the formal request that follows, I respectfully seek answers to three questions: the first involves a military lawyer's order to represent a client who declines such representation; the second involves a military lawyer's participation in proceedings before a military tribunal, where that tribunal's procedures depart substantially from customary, domestic and international standards of due process; and the third asks whether the convergence of conditions under the first two questions affects the answers to either of those questions. Accordingly:

1. May a military lawyer obey the order of a military tribunal to represent a person charged with criminal offenses before the tribunal, when (1) that person has declined representation by counsel, (2) the tribunal has made no particularized finding that the person has been or will be disruptive to the tribunal or is mentally or physically incapable of representing himself, (3) the tribunal has made no finding that appointing standby counsel would be inadequate to protect against disruption of the proceedings, and (4) the tribunal's decision to deny the person's claim to represent himself, or to choose his own counsel is based on a categorical assertion that national security and logistical concerns prohibit both courses, without regard to whether reasonable, less-restrictive means may be available?

2. May a military lawyer obey the order of a military tribunal to represent a person before a military commission, when the rules of the tribunal depart significantly from

customary, domestic and international standards for due process? More specifically, the rules of the tribunal permit (1) non-disruptive defendants to be excluded from their own commission proceedings and testimonial hearsay admitted, in contrast to the Confrontation clause, (2) statements obtained through torture or other coercive means to be admitted into evidence, (3) the admission of all evidence that is "probative to a reasonable person," regardless of the prejudicial effect such evidence may have, (4) the death penalty to be imposed with as few as seven panel members and no requirement that aggravating factors be charged or proven, and (5) the accused's trial to be delayed indefinitely?

3. Does either your answer to question 1 or 2 change if the conditions outlined in both questions are applicable to the proceeding?

## Background

On September 18, 2001, Congress authorized the President to use all necessary and appropriate force against those nations, organizations or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 .... (Encl. 1). Pursuant to that apparent authorization, the President issued a Military Order (Encl. 2). That Military Order has served as the basis for the military commissions at Guantanamo Bay.

On July 23, 2003, President Bush determined that Sulayman al Bahul was subject to the military commission process. (Encl. 3).

In early 2004, Army Major Mark Bridges and Navy Lieutenant Commander Phil Sundel were detailed to represent Mr. al Bahul. This detailing was made pursuant to DoD Military Commission Order No. 1. Paragraph 4C. (Encl 4. - please note, the MCO #1 was revised on August 1, 2005, but the applicable provisions have not changed).

Later in 2004, during the initial session of Mr. al Bahul's proceeding before the military commission, he announced that he wished to represent himself and explicitly refused to accept Major Bridges and Lieutenant Commander Sundel as his counsel. Consequently, both attorneys sought to withdraw. Chief Defense Counsel, Colonel Will Gunn denied this request as the MCO required detailed military defense counsel at all times. The attorneys then sought amendments to the commission's rules governing the accused's rights to select counsel. (Encl. 5).

The issue of the right of self-representation was briefed several times. On September 2, 2004, the defense wrote a memorandum of law on the topic (Encl. 6). Their

memorandum concluded that Mr. al Bahul had a right to represent himself and that this right was universally accepted. On October 1, 2004, the prosecution wrote a response to the defense memorandum of law (Encl. 7). In their response, the prosecution concurred with the defense position that Mr. al Bahul had a right of self-representation and joined the defense in their initial request to have the rules amended to comport with both domestic and international law. The defense submitted three additional documents in support of the position – shared by defense and prosecution – that the commission's procedure needed to be changed to allow for self-representation (Encls. 8-10).

On July 14, 2005, despite both the prosecution and the defense joining in the request to amend the rules to allow for self-representation, the Appointing Authority denied the request (Encl. 11). Shortly thereafter, as they had not established an attorney/client relationship with Mr. al Bahul, both Major Bridges and Lieutenant Commander Sundel departed the Office of the Chief Defense Counsel for other assignments.

On September 14, 2005, Colonel Dwight Sullivan, Chief Defense Counsel, Office of Military Commissions, met with Mr. al Bahul in Guantanamo Bay. During that meeting, Colonel Sullivan told Mr. al Bahul that he would be assigning me to Mr. al Bahul's case. Mr. al Bahul told Colonel Sullivan that he would not accept me as his lawyer (Encl. 14).

On November 1, 2005, I was ordered to active duty from my civilian job as an Assistant Federal Public Defender in Cheyenne, Wyoming (Encl. 12). On November 3, 2005, Colonel Sullivan detailed me to represent Mr. al Bahul (Encl 13).

On November 22, 2005, the Presiding Officer in charge of Mr. al Bahul's commission sent an email to Colonel Sullivan questioning the ethical propriety of my actions – or lack of action – on behalf of Mr. al Bahul. (Encl. 15).

On November 28, 2005, the Presiding Officer issued a lengthy directive to me regarding my duties to Mr. al Bahul (Encl. 16). Page 4, paragraph 7 of his email specifically instructed me to seek advice on the potential ethical dilemma from the state bar associations of which I am a member, The Judge Advocate General of the US Army, and the DoD General Counsel. Accordingly, I am making this request.

I am licensed to practice law in Iowa and Wyoming. I am also admitted to practice in the District of Wyoming and the Court of Appeals for the 10th Circuit. As you are aware, the Judge Advocate General does not license attorneys, instead he certifies them as being qualified to practice in military court. This certification depends on the attorney being licensed to practice before the highest court of any State.

In addition to this request of you, I am requesting opinions from the State of Wyoming; the Department of Defense; The Judge Advocate General of the U.S. Army; the American Bar Association and the National Association of Criminal Defense Lawyers (NACDL). For your review, I am enclosing a prior opinion offered by the

NACDL for you to review (Encl. 17) as it outlines some of the other considerations a defense attorney faces, outside but related to the question I am asking you.

If you have any additional questions for me or need anymore information, please call my cell at [redacted] or email me at [redacted] as I will be away from my office often. My fax number is [redacted] I would appreciate receiving your opinion by fax. Again, I thank you for your assistance in this matter and await your opinion.

Sincerely,

Tom Fleener
Major, Judge Advocate
General's Corps
U.S. Army Reserves

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Ads make this free service possible.

107th Congress

# S. J. Res. 23[107]: Authorization for Use of Military Force

Introduced: Sep 14, 2001
Sponsor: Sen. Thomas Daschle [D-SD]
Status: Enacted
Last Action: Sep 18, 2001: Became Public Law No: 107-40.

Return to Bill Status | Download PDF | Full Text on THOMAS

S. J. Res. 23

One Hundred Seventh Congress
of the
United States of America
AT THE FIRST SESSION

Begun and held at the City of Washington on Wednes
the third day of January, two thousand and one

Joint Resolution
To authorize the use of United States Armed Forces ag
for the recent attacks launched against the

Whereas, on September 11, 2001, acts of treacherous viol
committed against the United States and its citizens; a
Whereas, such acts render it both necessary and appropri
the United States exercise its rights to self-defense a
United States citizens both at home and abroad; and
Whereas, in light of the threat to the national security
policy of the United States posed by these grave acts o
and
Whereas, such acts continue to pose an unusual and extra
threat to the national security and foreign policy of t
States; and
Whereas, the President has authority under the Constitut
take action to deter and prevent acts of international
against the United States: Now, therefore, be it
Resolved by the Senate and House of Representatives

RE 128 (al Bahlul)
Page 5 of 107

United States of America in Congress assembled,
SECTION 1. SHORT TITLE.
This joint resolution may be cited as the ``Authoriz
Use of Military Force''.
SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FOR
(a) IN GENERAL.--That the President is authorized to
necessary and appropriate force against those nations, o
tions, or persons he determines planned, authorized, com
or aided the terrorist attacks that occurred on Septembe
or harbored such organizations or persons, in order to p
any future acts of international terrorism against the U
by such nations, organizations or persons.
(b) WAR POWERS RESOLUTION REQUIREMENTS.--
(1) SPECIFIC STATUTORY AUTHORIZATION.--Consiste
section 8(a)(1) of the War Powers Resolution, the Co
declares that this section is intended to constitute
tory authorization within the meaning of section 5(b
War Powers Resolution.
S. J. Res. 23--2

(2) APPLICABILITY OF OTHER REQUIREMENTS.--Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

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For Immediate Release
Office of the Press Secretary
November 13, 2001

## President Issues Military Order

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 govern-ment 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.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

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[redacted]

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE SECRETARY OF DEFENSE
2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Ali Hamza Ahmed Suleyman al-Bahlul, Department of Defense Internment Serial No. [redacted], who is not a United States citizen:

(1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al-Qaida;
- (b) 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
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

(2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Ali Hamza Ahmed Suleyman al-Bahlul shall be subject to the Military Order of November 13, 2001.

DATE: July 3 2003
White House Office-controlled Document

DECLASSIFIED IAW
JTF-GTMO-JZ OCG, 10 JUN 2004
DECLASSIFIED ON: 25 AUG 2004

Review Exhibit 2

Page 1 of 1

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# 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**
**OFFICE OF MILITARY COMMISSIONS**
**1931 JEFFERSON DAVIS HIGHWAY, SUITE 103**
**ARLINGTON, VIRGINIA 22202**

11 May 2004

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

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

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

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

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

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

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

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

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

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

Very respectfully,

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

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

1. Purpose of Memorandum.

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

2. Facts.

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

After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*"). The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request

Before the military commission on 26 August 2004, Mr al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18. Mr. al Bahlul went on to state that if he is prohibited

from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel Transcript at 11, 16, 17, 19.

3 Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice. Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993) Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975)

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings ICCPR, Article 14(3)(d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c), Bassiouni at 283 Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct

his own defense."[1] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[2]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired*. Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

*Faretta*, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

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[1] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings), Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

[2] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm)

*Id* at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

*Faretta*, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), §14. Similarly, §§ 16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." The Law of Lawyering, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d);

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremberg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[3] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[4]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land") The ICCPR has been signed and ratified by the United States.[5] Furthermore, the President has

[3] Rule 7(a), Medical Case, Rule 7(a), Uniform Rules, note 1, infra.
[4] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 2, infra
[5] http://www unhchr ch/pdf/report pdf

ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg 68,991 (1996). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1. Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, 2002 edition, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11. Some Salient Features*, 28 Yale J Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

4. Attached Files.

A. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v al Bahlul*"

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

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

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| UNITED STATES OF AMERICA<br><br>v.<br><br>ALI HAMZA AHMAD SULAYMAN AL BAHLUL | ) | PROSECUTION RESPONSE TO DEFENSE MEMO FOR SELF-REPRESENTATION AND RIGHT TO CHOICE OF COUNSEL<br><br>1 October 2004 |

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Prosecution joins the Defense in their implied requested relief to amend Commission Law and permit the Accused to represent himself in these Commission proceedings conditioned upon standby counsel being appointed. Standby counsel need to be available to.

a. Assist the Accused in his Defense consistent with the desires of the Accused,
b. Represent the Accused at closed sessions involving classified or otherwise protected information;
c. Take over the representation should the Accused forfeit his right to represent himself.

3. Agreed Upon Facts. The Prosecution does not dispute the factual assertions contained in the Memorandum of Law submitted by the Defense on 2 September 2004.

4. Additional Facts. Mr. al Bahlul appeared before the Military Commission on 26 August 2004. During this appearance, the following was established:

a. The Accused clearly stated that he wished to represent himself before the Military Commission (transcript pages 6-7);
b. Other than his refusal to rise when the Commission members entered and exited the courtroom, the Accused was respectful during the Commission proceedings (see transcript in its entirety);
c. The Accused is 36-years-old and has 16 years of formal education (transcript page 12);
d. The Accused stated clearly that while under no pressure from the American government, he wanted to state that he is an al Qaida member (transcript page 14);
e. The Accused gave his word that he would not be loud or disruptive and that he would not make inflammatory statements if permitted to represent himself (transcript page 16)

5. Legal Authority.

a. Military Commission Instruction No. 4
b. Military Commission Order No. 1
c. Faretta v. California, 422 U.S. 806 (1975)
d. Brady v. United States, 397 U.S. 742 (1970)
e United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir 1997)
f McKaskle v. Wiggins, 465 U.S. 168 (1984)
g. United States v. Davis, 285 F 3d 378, 383 (5th Cir. 2002)
h. United States v Betancourt-Arroyoche, 933 F.2d 89, 95 (1st Cir 1991)
i. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987)
j. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000)
k. Patterson v. Illinois, 487 U.S 285,299 (1988)
l. Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998)
m. United States v. Lane, 718 F.2d 226, 233 (1983)
n United States v Bin Laden, 58 F Supp 2d 113, 121 (S.D.N Y. 1999)
o Illinois v Allen, 397 U S 337 (1970)
p. United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir 2001)
q. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D Va.)
r. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998)
s United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972)
t. Barham v Powell, 895 F.2d 19, 23 (1st Cir. 1990)
u. President's Military Order of November 13, 2001, Section 4(c)(2).
v Hair v. Agee, 453 U.S. 280, 309-10 (1981)
w. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring)
x. McQueen v Blackburn, 755 F 2d 1174, 1177 (5th Cir. 1985)
y Rauterson v. Wainwright, 732 F 2d 803, 808 (11th Cir 1984)
z. Prosecutor v. Vojislav Seselj, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No · IT-03-67-PT, 9 May 2003
aa. Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000
bb Rule for Court-Martial 502
cc. United States v. Jackson, 54 M J. 527, 535 (N.M Ct. Crim App. 2000)
dd. United States v. Steele, 53 M.J 274 (2000)
ee. Frazier v. Heebe, 482 U S. 641, 645 (1987)
ff. United States v. Gruenow, 546 F.2d 844, 847 (10th Cir 1976);
gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976),
hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir 1976)
ii. Rule 1 16(c) of Navy Judge Advocate General Instruction 5803.1B

6. Analysis

a. Current Military Commission Law Does not Permit Self-representation

Military Commission Instruction (MCI) No 4 clearly delineates that an accused cannot represent himself before a Military Commission. Section 3(D) (2) of this Instruction states that "Detailed Defense Counsel shall represent the Accused before Military Commissions" and that counsel "shall so serve notwithstanding any intention

expressed by the Accused to represent himself." While not worded as unambiguously or as strongly, Sections 4(C)(4) and 5(D) of Military Commission Order (MCO) No. 1 do nothing to contradict MCI No 4.

The Prosecution concurs with the analysis of the Chief Defense Counsel in his Memorandum of 26 April 2004 where he denied the Defense Counsel's request to withdraw from representing Mr. al Bahlul (Attached).

The Prosecution joins the Defense in their prior request that the Military Commission Instructions be amended to permit self-representation. As will be discussed in detail below, such an amendment will align Commission practice with U.S Domestic and International Law standards.

b. There is a Right to Self-representation under United States Domestic Law.

Although not binding on Commission proceedings, the right to self-representation is recognized under United States domestic law and in other judicial systems and there are compelling reasons to permit self-representation at Commission trials

The United States Supreme Court has recognized that a criminal defendant has a Constitutional right to represent himself in a criminal proceeding. Faretta v. California, 422 U.S. 806 (1975). A defendant may waive his right to counsel so long as the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S 742 (1970); Johnson v. Zerbst, 304 U.S 458, 468 (1938); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel McKaskle v Wiggins, 465 U.S. 168 (1984); United States v. Davis, 285 F 3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence in capital case against express wishes of defendant).

Mr. al Bahlul has 16 years of formal education and demonstrated that he is very articulate and intelligent during his preliminary hearing. He did express that he only had a rudimentary understanding of the English language Regardless, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal training or language abilities. United States v Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused who knows and appreciates what he is relinquishing and yet *intelligently* chooses to forego counsel and represent *himself*, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original).

c. A Detailed Inquiry is Required Before Self-representation is Permitted

In United States Federal District Courts, a detailed inquiry of the defendant is required before he is permitted to represent himself. Singleton, 107 F.3d at 1096. If *pro se* representation is permitted before a Military Commission, this safeguard should also be adopted.

An effective assertion of the right of self-representation "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). To constitute a knowing, intelligent and voluntary waiver, the defendant must be aware of the disadvantages of self-representation Patterson v. Illinois, 487 U.S. 285,299 (1988); see e.g., Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramifications of self-representation).

An important facet of making a knowing, intelligent and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, the Seventh Circuit held in United States v. Lane, that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited legal access to research facilities away from the prison in which he was detained. 718 F.2d 226, 233 (1983). This inquiry is of significant importance in this case as Mr. al Bahlul does not possess nor will he qualify for the required security clearance necessary to review certain classified materials that have already been provided by the Prosecution as part of the discovery process

Based upon prior admissions to investigators as well as his own assertion during his initial hearing before the Commission, the Accused is an al Qaida member. He has previously stated that he fully supports Usama bin Laden's *fatwa* calling for the killing of American civilians. He has stated that all those killed in the World Trade Center on September 11th were legitimate targets. He has further admitted to pledging *bayat* to Usama bin Laden and stated that he joined al Qaida because he believed in the cause of bin Laden and the war against America. He acknowledges that he will kill Americans at the first opportunity upon release from detention

It is clear that under these unique circumstances, measures must be taken to safeguard information in the interests of national security The investigation of al Qaida and its members is an ongoing endeavor and the concerns over the premature or inappropriate disclosure of classified information are heightened. See United States v Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) (government's terrorism investigation ongoing thereby increasing possibility that unauthorized disclosures might place additional lives in danger). The accused must fully comprehend the limitations required due to national security concerns and give an affirmative waiver with respect to these limitations before being permitted to proceed *pro se*.

The Prosecution has provided a proposed colloquy as an attachment to this response. While we acknowledge that a colloquy was commenced during the Accused's

initial hearing before the Commission, we feel that there must be a more in-depth inquiry before the Accused could qualify to engage in self-representation.

d. The Right to Self-representation is not Absolute and Can Be Forfeited

The Supreme Court in Faretta held that the right to self-representation is not absolute and may be forfeited by a defendant who uses the courtroom proceedings for a deliberate disruption of their trial. 422 U.S. at 834; McKaskle v Wiggins, 465 U.S. 168, 173 (1984) (defendant forfeits right to represent himself if he is unable or unwilling to abide by the rules of procedure or courtroom protocol); Illinois v Allen, 397 U.S. 337 (1970); United States v Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (right to self-representation forfeited when right being asserted to create delay in the proceedings) The right of self-representation is not "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834 n 46. Forfeiture of the right to proceed *pro se* occurred recently in the high visibility prosecutions of Zacarias Moussaoui (inappropriate and disruptive behavior) and Slobodan Milosevic (Milosevic case being tried before International Criminal Tribunal for the former Yugoslavia (ICTY) and right was forfeited based on poor health of Milosevic). See Moussaoui, Criminal No. 01-455-A. Court Order of November 14, 2003 (E.D. Va.)

Based on his demonstrated behavior at his initial hearing as well as his personal promise on the record, the Accused appears willing to abide by courtroom rules and protocol. There is currently no indication that the Accused's approach to his self-representation will change. However, should he become disruptive, the Commission and/or Appointing Authority should not hesitate to revoke his ability to proceed *pro se*. The Commission should be positioned to be able to continue the Commission trial if things change and the Accused proves to be unable to represent himself. For this and other reasons discussed below, standby counsel should be appointed.

e. Standby Counsel Should be Appointed

Once a court has decided to allow a person to proceed *pro se*, the court may, if necessary, to protect the public interest in a fair trial, appoint standby counsel. McKaskle, 465 U.S. at 173. Once standby counsel are appointed, trial courts are given broad discretion in delineating their responsibilities and defining their roles. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998). This may be done over the objection of the defendant McKaskle, 465 U.S. at 184. Clear in all cases where standby counsel are present, is the notion that such counsel must be prepared to step into the representative mode should the defendant lose the right of self-representation. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir 1972). The only limitation to the role of standby counsel is that the participation cannot undermine the right to self-representation or the appearance before the jury as one who is defending himself. McKaskle, 456 U.S. at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v Powell, 895 F.2d 19, 23 (1st Cir. 1990). They have assisted with other substantive matters throughout the trial. McKaskle, 465 U.S. at 180 ("Counsel made

motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.").

Standby counsel cannot however interfere with the defendant's control of the case. They may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

The appointment of standby counsel is crucial in this case because of the interplay of classified material with this prosecution While the Prosecution does not intend to admit any classified evidence as part of its cases on the merits or sentencing, classified materials have been provided as part of the discovery process Standby counsel would be needed to review such information and make appropriate motions pertaining to such information. Such motions may include requests for unclassified summaries of the information they deem pertinent that could then be provided to the Accused.

In the Federal system, the role of standby counsel with respect to classified information is less intrusive to the accused's right of self-representation because such issues are normally resolved outside the presence of the jury. As the entire Commission panel is both the finder of fact and law, trial sessions dealing with issues involving classified information may be conducted in the Accused's absence before the entire Commission panel. See President's Military Order of November 13, 2001, Section 4(c)(2)

Members of this Military Commission were chosen based upon their experience and maturity. They have all had command as well as combat experience. They will already be involved in the litigation of motions and will be exposed to evidence they otherwise would not have seen had they solely been traditional finders of fact. Any impact that exposure to standby counsel litigating classified matters on the Accused's behalf will certainly not outweigh the benefit to the Accused of meeting his desire to proceed *pro se*.

While the right of self-representation is universally recognized, "it is not a suicide pact " Haig v Agee, 453 U.S. 280, 309-10 (1981). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the Accused's ability to represent himself in this case. Cf. United States v. Dennis, 341 U S 494, 519 (1951) (Frankfurter, J , concurring). What is of the utmost importance is that the Accused be advised of these lawful limits before he waives his right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; - McQueen v. Blackburn, 755 F 2d 1174, 1177 (5th Cir. 1985) (court must be satisfied accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving); Faulkner v Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel"). If the Accused can show that he fully understands that he will not have access to classified information and he voluntarily continues to assert his desire for self-representation, he should be permitted to proceed *pro se*

In summary, standby counsel should be appointed regardless of the Accused's desires. They are needed to assist the Accused consistent with his desires, represent the Accused on matters related to classified information and be prepared to assume full representation should the accused forfeit his right to represent himself.

f Right of Self-representation under International Law

The Prosecution agrees with the Defense assertion that the right of self-representation is fully recognized under International Law. The Prosecution does contend that the Defense Memorandum is at times misleading as it implies that various international treaties mandate this Commission to permit self-representation. They fail to note that with respect to many of the treaties they mention, the United States is either not a party, or did not ratify these documents. See, Additional Protocol I to the Geneva Conventions; American Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms.

With respect to the International Covenant on Civil and Political Rights (ICCPR), the United States has signed and ratified this treaty However its applicability and binding effect on the United States is not as simple and straightforward as the Defense opines. A lengthy discussion on this issue is unnecessary at present as the Prosecution believes that the right to self-representation should be provided to give what has been recognized as a fundamental right both domestically and internationally.

g. Standby Counsel and Forfeiture of the Right to Self-representation are Recognized Under International Law

In Prosecutor v Vojislav Seselj, the ICTY recognized that a counsel can be assigned to assist an accused engaging in self-representation on a case by case basis in the interests of justice "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No : IT-03-67-PT, 9 May 2003 paras 20-21. Noting that the right to self-representation is a starting point and not absolute, the Tribunal asserted its fundamental interest in a fair trial related to its own legitimacy in justifying the appointment of standby counsel Id.

The recognition of the appropriateness of imposition of defense counsel on an accused was emphasized in a decision of the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000 para 24 Similar to our present case, Barayagwiza instructed his attorneys "not to represent him in the courtroom" and as a result they initially remained passive and did not mount a defense Id. at para 17 These attorneys requested to withdraw from representation and their request was denied by the Trial Chamber. Id at paras 17-20. Viewing the accused's actions as a form of protest and an attempt to obstruct the proceedings, counsel were deemed to be under no obligation to follow the accused's instructions to remain passive Id. at paras 21-24. In his concurring opinion, Judge Gunawardana opined that the counsel should more appropriately be classified as "standby counsel" whose obligations were not just to protect the interests of the accused, but also the due

administration of justice. Barayagwiza, Concurring and Separate Opinion of Judge Gunawardana (relying on Article 20(4) of the ICTR Statute)

h. The Accused's Alternative Request to be Represented Exclusively by an Attorney from Yemen should be Denied

Section 4(C)(3)(b) of MCO No. 1 requires a civilian attorney representing an accused to be: (1) a United States citizen; (2) admitted to practice law in a State, district, territory, or possession of the United States, or before a Federal court; (3) has not been subject to any sanction or disciplinary action . . (4) has been determined eligible for access to SECRET information; and (5) agrees in writing to comply with all regulations or instructions for counsel. It is clearly evident that a Yemen citizen attorney who is not eligible to practice law in the United States does not meet these criteria

Additionally, the Accused's first fallback request is not in accord with Section 4(C)(3)(b) of MCO No.1 as his request for representation is conditioned upon his current detailed military Defense Counsel having absolutely no role in his representation. This conflicts directly with MCO No 1 where it states that representation by a Civilian Defense Counsel will not relieve Detailed Defense Counsel of their duties specified in Section 4(C)(2). Similarly, even a cleared Civilian Counsel is not guaranteed the ability to be present at closed Commission proceedings MCO No 1 Section 4(C)(3)(b); MCI No 4, Section 3(F).

There are sound reasons for the requirements imposed on civilian counsel. As explained by the Presiding Officer in the Accused's initial hearing, there is great importance in counsel having expertise in military law, military terminology, and the ability to argue by analogy to federal, U.S military and international law (transcript pages 7-9) Furthermore, as already demonstrated by the Defense's attempt to utilize a non-citizen interpreter in this case, it can take upwards to a year (if ever) to do the background investigation necessary for an appropriate security clearance to be granted. Several months have already been lost in the trial preparation process awaiting the granting of this clearance (which has still not been obtained). Protocol and procedures cannot be disregarded when it comes to national security. The time commitment for obtaining a security clearance would not be consistent with Section 4(A)(5)(c) of MCO No. 1 where the Presiding Officer is tasked to ensure an expeditious trial where the accommodation of counsel does not delay the proceedings unreasonably.

In the court-martial setting, Rule for Court-Martial 502(d)(3) requires that a civilian counsel representing an accused be "[a] member of the bar of a Federal court or of the bar of the highest court of a State." Absent such membership, the lawyer must be authorized by a recognized licensing authority to practice law and must demonstrate to the military judge that they have the demonstrated training and familiarity with criminal law applicable to courts-martial. RCM 502(d)(3)(B) For practical purposes, the civilian counsel must in fact be a lawyer who is a "member in good standing of a recognized bar." United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct Crim App 2000) The Prosecution is unaware of any caselaw questioning the propriety of these conditions. The decisions of military and other federal courts reflect that admission to practice is a

right and justice." Any request for a Yemen attorney to act as a foreign attorney consultant should be looked upon favorably assuming all preconditions are met.

8. Attached Files

a. Chief Defense Counsel Memorandum dated 26 April 2004
b. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
c. Proposed colloquy.

[redacted]
Commander, JAGC, USN
Prosecutor

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|---|---|---|
| UNITED STATES OF AMERICA | ) | DEFENSE REPLY |
| | ) | |
| v. | ) | RIGHT TO SELF-REPRESENTATION; |
| | ) | |
| ALI HAMZA AHMAD SULAYMAN AL BAHLUL | ) | RIGHT TO CHOICE OF COUNSEL |
| | ) | |
| | ) | 8 October 2004 |

1. Timeliness of Motion.

This reply is being filed within the timeline established by the Presiding Officer

2. Legal Authority.

a. *United States v. Ray*, 933 F.2d 307 (5th Cir 1991)
b. *McKaskle v. Wiggins*, 465 U.S 168 (1984)
c. ABA Standards for Criminal Justice, Standards 4-3.9 and 6-3.7, <http://www.abanet.org/crimjust/standards/home.html>
d. Military Order of Nov 13, 2001, 66 Fed Reg 57,833 § 4(c)(2) (Nov. 16, 2001)
e. Military Commission Order (MCO) No. 1
f. *Arizona v Fulminante*, 499 U.S. 279 (1991)
g. Rule for Courts-Martial (RCM) 502
h. *Sorrano v. Hoskin*, 9 M.J. 221 (C.M.A. 1980)
i. *United States v. Jackson*, 54 M.J. 527 (2000)
j. *United States v. Steele*, 53 M.J. 274 (2000)
k. *United States v Grismore*, 546 F.2d 844 (10th Cir. 1976)
l. *United States v Whitesel*, 543 F 2d 1176 (6th Cir 1976)
m. *United States v. Kelley*, 539 F.2d 1199 (9th Cir. 1976)
n. *Frazier v. Heebe*, 482 U.S 641 (1987)
o. Military Commission Instruction (MCI) No. 8

3 Analysis.

a. Standby Counsel.

As the government correctly notes, the practice of appointing standby counsel to assist the *pro se* defendant has been recognized by domestic and international courts. Although useful in such cases, "the proper role of standby counsel is quite limited." *United States v Ray*, 933 F.2d 307, 312-13 (5th Cir. 1991), *citing McKaskle v Wiggins*, 465 U.S. 168, 177-78 (1984).

> Standby counsel does not *represent* the defendant. The defendant represents himself, and may or may not seek or heed the advice of the attorney standing by. As such, the role of standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense.

*United States v. Ray*, 933 F 2d at 313 (emphasis in original).

If the military commission determines that appointment of standby counsel is appropriate, the commission must be cognizant of the limited authority of standby counsel to speak for the accused. The commission must also define the role of standby counsel, consistent with the desires of the accused, so that all parties understand the responsibilities of standby counsel.

**(1) Defining the Role of Standby Counsel**

In exercising its discretion, the commission should consider the desires of the accused in defining the parameters of standby counsel's role. The American Bar Association (ABA) Standards for Criminal Justice differentiate between standby counsel appointed to "actively assist" a pro se accused and standby counsel whose duty it is to assist "only when the accused requests assistance." Standard 4-3.9, *Obligations of Hybrid and Standby Counsel* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/dfunc_blk.html>

If an accused desires no assistance, then the latter, more passive role should be assumed by standby counsel. In this passive role, standby counsel should only be required to "bring to the attention of the accused matters beneficial to him . . but should not actively participate in the conduct of the defense." Standard 4-3.9(b). If on the other hand the accused desires assistance, standby counsel should be authorized to "actively assist" the accused, but should nonetheless allow the accused to "make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case." Standard 4-3.9(a). In order to avoid confusion, the court should "notify both the defendant and standby counsel of their respective roles and duties." Standard 6-3.7(b), *Standby Counsel for Pro Se Defendant* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/trialjudge.html>.

**(2) Defining the Role of the "Unwanted" Standby Counsel in the Context of Military Commission Proceedings.**

Although the accused should first be consulted regarding his desires, it is likely that he will object to the appointment of standby counsel. If so, any significant role played by standby counsel during military commission proceedings will undermine the accused's right to self-representation. Standby counsel's role should be limited to providing advice on routine procedural and evidentiary matters, and basic courtroom protocol.

In *McKaskle v Wiggins*, the Supreme Court addressed the role of standby counsel who is present at trial "over the defendant's objection." 465 U.S. 168, 170 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, the court recognized that limits must be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

*McKaskle v. Wiggins*, 465 U.S at 178 (emphasis in original).

Unlike the ordinary criminal trial where issues of law are decided by a judge, outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)("the military commission sit[s] as the triers of both fact *and* law") Thus, all proceedings before a military commission will be in the presence of the "jury." The ever-present military commission "jury" is a major limitation on the role which can be played by standby counsel.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle v Wiggins*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183. When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

**(3) Standby Counsel Cannot Represent the Accused at Closed Sessions Without the Accused's Consent.**

Without the consent of the accused, representation by standby counsel during closed sessions, from which the accused has been excluded, would violate the accused's right to self-representation. Closed sessions of commission proceedings are allowed for a variety of reasons. MCO No. 1, para. 6 B.(3)(proceedings may be closed to protect

classified information or other information protected by law; the physical safety of participants; intelligence and law enforcement sources, methods, or activities; and other national security interests) Participation by standby counsel, on behalf of the accused, at these merits-phase, closed proceedings would undermine the notion that the accused was representing himself and would prevent the accused from making important tactical and strategic decisions regarding his defense. Such a role would violate not only part two of the *McKaskle* test, but part one as well by "effectively allow[ing] counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance." *McKaskle v. Wiggins*, 465 U.S. at 178. Such a role would also signal that the military commission "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v Fulminante*, 499 U.S. 279, 310 (1991)(discussing impact on a criminal trial of a structural defect such as denial of the right to self-representation).

Excluding the accused from the courtroom violates international and domestic standards of a fair trial on many levels, not the least of which include the accused's self-representation rights. Furthermore, representing an accused over his objections at a closed hearing and outside of the accused's presence presents difficult ethical issues which standby counsel would need to resolve with his state bar and military ethics advisors.

b Choice of Counsel

The Prosecution readily admits that domestic and international law recognize an accused's right to self-representation In deference to this fact, the Prosecution agrees that "an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with standards established for the United States domestic courts as well as Customary International Law."

Similarly, the Prosecution does not appear to dispute that domestic and international law recognize an accused's right to representation by counsel of his choice. Indeed, the Prosecution does not even address, let alone question, the international authority for this right. Curiously, though, the Prosecution does not believe that this right deserves the same recognition, and opposes an amendment to bring the military commission into line with this standard. The Prosecution's arguments opposing this amendment, however, are both woefully incomplete and unconvincing.

In arguing that foreign counsel should not be allowed to appear before a military commission the Prosecution relies in large part on RCM 502(d)(3). The Prosecution draws an analogy between qualifications that apply to a civilian lawyer seeking to appear before a court-martial and qualifications it believes should apply to a civilian lawyer seeking to appear before a military commission It then concludes that "[f]or practical purposes, the civilian counsel must in fact be a lawyer who is a 'member in good standing of a recognized bar,'" apparently seeking to imply that only a domestic state or federal bar qualifies as a "recognized bar"

Contrary to this implication, however, the Rules for Courts-Martial specifically contemplate allowing foreign attorneys to appear. The Discussion section immediately following RCM 502(d)(3)(B) states "[i]n making such a determination – *particularly in the case of civilian counsel who are members only of a foreign bar* – the military judge should also inquire . . . " (emphasis added). The Discussion section is not binding authority, but it is unquestionably relevant. Although the Prosecution does not acknowledge it, the fact is that the very RCM it cites in opposition to foreign counsel appearing before a military commission actually supports the view that choice of counsel, even including choice of foreign counsel, is a right that should be respected.

Further, the Court of Appeals for the Armed Forces (then the Court of Military Appeals) addressed this very issue over 20 years ago, and held that "a member of a local bar in a foreign country may be qualified to represent a military accused at a court-martial." *Soriano v. Hoskins*, 9 M.J. 221, 222 (C.M.A. 1980). The Court went on to write that "[i]t is the military judge assigned to the court-martial who must make the determination whether such a lawyer is minimally qualified to act as civilian counsel." *Id.* Finally, in direct contradiction of the Prosecution's argument the Court stated "[w]e do not anticipate that the military judge will establish any *per se* disqualification with respect to any recognized foreign bar or act on an individual basis in a niggardly fashion." *Id.*

Significantly, none of the cases cited by the Prosecution actually dealt with foreign attorneys. Rather, the cases arose in the context of domestic civilian attorneys accused of providing ineffective assistance of counsel (*United States v. Jackson*, 54 M.J. 527 (2000); *United States v. Steele*, 53 M.J. 274 (2000)), or people requesting to be represented by lay persons (*United States v. Grimmett*, 546 F.2d 844, 847 (10th Cir. 1976); *United States v. Whitesel*, 543 F.2d 1176, 1177-81 (6th Cir. 1976); *United States v. Kelley*, 539 F.2d 1199, 1201-03 (9th Cir. 1976). While one of the cases the Prosecution cited does have relevance, that case stands for the proposition that rules precluding otherwise qualified attorneys from practicing in a particular court should be related to legitimate objectives. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987)(error to prohibit attorney residing in one state from practicing in federal court in another state when attorney qualified to practice law in state courts of both states). *Frazier*, therefore, appears to support Mr. al Bahlul's request more than it does the Prosecution's opposition.

The Prosecution's remaining arguments against recognition of this right are similarly unpersuasive. While a security clearance for a foreign counsel might take a significant amount of time, the Prosecution is already aware that such need not be the case – Mr. Kenny, the Foreign Attorney Consultant for Mr. David Hicks, was able to obtain a security clearance allowing him to participate in military commission proceedings within a matter of weeks. Further, although we have been waiting quite some time for a security clearance for a foreign national interpreter we seek to hire, there is every reason to believe that the process might have been much quicker had a government official associated with the military commissions taken a personal interest. Since the clearance request has instead been delegated to an inexperienced civilian firm

operating under contract, it is not clear that such a lengthy process is inevitable. Finally, even a slow clearance procedure does not justify continuing to bar foreign attorneys. Almost every aspect of the painfully slow military commission process has moved to date according to the Government's timetable. Given that, the Prosecution's reliance on MCO No. 1's provision against unreasonable delay is scant support for denying Mr. al Bahlul's right to representation by counsel of his choice.

The military commission is certainly free to reserve the right to decide whether a particular civilian counsel is qualified. Recognizing that there are differences in laws and procedures between military commissions and the laws of Yemen, however, hardly supports the Prosecution's conclusion that allowing a Yemeni attorney to appear before the commission "may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused." Being qualified to conduct cases before the courts of a defendant's country was sufficient to permit a counsel to represent persons at Nuremberg[1], and little more than that is required by RCM 502 (d)(3)(B). There is no reason to accept the view that all Yemeni attorneys are by definition incompetent to provide representation before a military commission. Mr al Bahlul's right to find a qualified Yemeni attorney to represent him should be recognized

c. The Military Commission Must Rule on Mr. al Bahlul's Requests

Section 4(A)(5)(d) of MCO No. 1 and paragraph 4(A) of MCI No. 8 authorize the Appointing Authority to decide interlocutory questions certified by the Presiding Officer. Both provisions state that a question "the disposition of which would affect a termination of proceedings with respect to a charge" is a mandatory question that "shall" be certified to the Appointing Authority Both provisions also allow that the Presiding Officer "may" certify other interlocutory questions that the Presiding Officer deems appropriate.

With respect to the latter class of questions, the Appointing Authority has determined that a Presiding Officer can exercise his discretionary authority to certify interlocutory matters only after the full military commission has ruled on the question Memoranda from Appointing Authority to Presiding Officer on Interlocutory Questions 1-5 of 5 October 2004. This is based on the military commission's role as the adjudicator of all questions of fact and law *Id.* Consequently, if the disposition of an issue cannot affect a termination of proceedings with respect to a charge, the matter is not properly raised as a discretionary interlocutory question until after it has been addressed by the full commission *Id*

Of the two classes of interlocutory matters, any questions involving Mr. al Bahlul's representation requests would be discretionary. Mr. al Bahlul challenges the legality of military commission procedures that are inconsistent with domestic and international law. Regardless of how these challenges are decided, there is no way that the outcome might affect a termination of the proceedings against him. Whoever

[1] Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case; Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

represents him, Mr. al Bahlul will still be facing the same charge. Thus, these matters do not qualify for mandatory interlocutory certification, and any certification of the issues must follow the procedures established for discretionary questions.

Since the issues raised by Mr. al Bahlul's representation requests fall squarely within the military commission's power and obligation to decide questions of law, no interlocutory certification procedure is available until after the commission has discharged its duty.[2] Contrary to the Presiding Officer's apparent intent to pass these issues directly to the Appointing Authority, therefore, the military commission must decide the legality of the challenged rules first.

d. Timely Resolution of Mr. al Bahlul's Requests is Critical

Despite concerns recently expressed by the Chief Defense Counsel, Mr. al Bahlul continues to be denied the opportunity to participate in the on-going process addressing legal matters affecting the military commissions. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commissions in the case of Ali Hamza Ahmad Suleyman al Bahlul," of 23 September 2004. The issues that have been and soon will be addressed are critical to the development of the military commission process, and the decisions will substantively impact Mr. al Bahlul's rights in that process. *Id.* Apparently, the longer resolution of Mr. al Bahlul's representation issues are delayed the longer he will be shut out of the development process. Consequently, the military commission should expeditiously address the legal questions posed by Mr al Bahlul's representation requests

4. Attached Files.

a. Memoranda from Appointing Authority to Presiding Officer, Interlocutory Questions 1-5, of 5 October 2004.

b. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commission in the case of Ali Hamza Ahmad Suleyman al Bahlul," of 23 September 2004

| | |
|---|---|
| /s/ | /s/ |
| Philip Sundel | Mark A. Bridges |
| LCDR, JAGC, USN | MAJ, JA |
| Detailed Defense Counsel | Assistant Detailed Defense Counsel |

[2] Counsel acknowledge that there may be practical difficulties involved with the military commission passing on legal matters prior to voir dire and challenges. Such difficulties would not change the nature of the underlying legal questions, however, and cannot justify interlocutory certification in violation of established procedures, although they might be evidence of a structural defect in the process. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991)(participation of trial judge who was not impartial affected entire course of trial.)

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | MEMORANDUM OF LAW: |
| | ) | |
| v. | ) | RIGHT TO SELF-REPRESENTATION; RIGHT TO CHOICE OF COUNSEL |
| ALI HAMZA AHMAD SULAYMAN AL BAHLUL | ) | |
| | ) | 22 October 2004 |

1 Timeliness.

This pleading is being filed within the timeline established by the Presiding Officer.

2 Relief Sought

Mr al Bahlul wishes to represent himself If he is denied that right, Mr. al Bahlul desires to be represented by a Yemeni attorney of his own choosing. Mr. al Bahlul does not wish to be represented by detailed defense counsel.

3. Facts

a During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him.

b Instead, he stated that he intended to represent himself before the commission

c. Consistent with Mr al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel

d. The Chief Defense Counsel denied the request to withdraw on 26 April 2004

e. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes

f The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No 4, para 3D(2).

g See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

h. After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v al Bahlul*").

i. The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

j Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18.

k. Mr. al Bahlul went on to state that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing Transcript at 10, 18-19.

l Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

4. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances " M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused *Faretta v California*, 422 U S. 806, 821 (1975)

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings [1] ICCPR, Article 14(3)(d), AMCHR, Article

[1] The United States has ratified the ICCPR (http://www.unhchr.ch/pdf/report.pdf) The AMCHR and CPHRFF are cited as evidence of customary international law.

8(2)(d), CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[2] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[3]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821 The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . provided for court appointment of counsel, *but only if the accused so desired* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . At *no* point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . has

[2] Rule 2(d), Nuremberg Trial Proceedings Vol 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 5 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

[3] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm)

> evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

*Faretta*, 422 U.S. at 825-26 (footnotes and internal citations omitted)

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer Indeed, even where counsel was permitted, the general practice continued to be self-representation

*Id* at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . The right to defend is personal . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law '

*Faretta*, 422 U S. at 834 (internal citation omitted)

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's *Model Rules of Professional Responsibility*, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed ), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d), AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[4] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[5]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v Alabama*, 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the

[4] Rule 7(a), Medical Case, Rule 7(a), Uniform Rules, note 2, infra
[5] Article 9(e), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 3, infra

right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States Furthermore, the President has ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998) The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a)

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004) The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."), Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures

followed by military commissions must comply with the law of war, whether it be codified or customary

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled ")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

5. Attached Files

a. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v al Bahlul*."

6. Oral argument.

Counsel take no position on whether oral argument is required.

7. Legal authority

a. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993)
b. *Faretta v California*, 422 U.S. 806, 821 (1975)
c. International Covenant on Civil and Political Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
d. American Convention on Human Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
e. Convention for the Protection of Human Rights and Fundamental Freedoms (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
f. Statute of the International Criminal Tribunal for the Former Yugoslavia (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

g. Statute of the International Criminal Tribunal for Rwanda (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

h. Nuremberg Trial Proceedings Rules of Procedure (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

i. Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

j. Uniform Rules of Procedure, Military Tribunals, Nuremberg (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

k. *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000)

l. *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.)

m. *Powell v. Alabama*, 287 U.S. 45, 53 (1932)

n. *Wheat v. United States*, 486 U.S. 153, 159 (1988)

o. U.S. Constitution

p. Executive Order 13,107, 61 Fed.Reg. 68,991 (1998) (http://www.archives.gov/federal_register/executive_orders/executive_orders.html)

q. Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004)

r. Department of Defense Directive Number 5100.77 (http://www.dtic.mil/whs/directives/)

s. Department of Defense Directive Number 2310.1 (http://www.dtic.mil/whs/directives/)

t. Field Manual 27-10, The Law of Land Warfare, July 1956 (http://www.usapa.army.mil/)

u. Article 21, UCMJ, 10 U.S.C. Section 821

v. Manual for Courts-Martial

w. Geneva Conventions (1949), Additional Protocol I (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

x. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003) (http://www.ilsresearch.org/ihl/)

/s/
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MAJ, IA, USA
Assistant Detailed Defense Counsel

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| UNITED STATES OF AMERICA | ) | DETAILED DEFENSE |
| | ) | COUNSEL'S ANSWERS |
| | ) | TO PRESIDING |
| v. | ) | OFFICER'S QUESTIONS |
| | ) | ON THE ISSUE OF |
| | ) | SELF-REPRESENTATION |
| ALI HAMZA AHMAD SULAYMAN AL BAHLUL | ) | |
| | ) | 22 October 2004 |

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

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

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

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

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

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

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

The Appointing Authority has already acted on this issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

JUN 14 2005

MEMORANDUM FOR CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

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

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

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

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

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

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

cc:
Presiding Officer
Chief Prosecutor for Military Commissions

DEPARTMENT OF THE ARMY
HEADQUARTERS, 90th Regional Readiness Command
8000 Camp Robinson Road
North Little Rock, Arkansas 72118-2205

ORDERS 05-298-00001 25 October 2005

FLEENER THOMAS ARTHUR
[redacted]
CHEYENNE, WY 82009-5801

[redacted] MAJ
0022 JA DET LSO DET 10 (WR4HYA)
MESQUITE, TX 75149-4798

You are ordered to Active Duty as a member of your Reserve Component unit for the period indicated unless sooner released or unless extended. Proceed from your current location in sufficient time to report by the date specified. You enter active duty upon reporting to unit home station.

Report to: 0022 JA DET LSO DET 10 (WR4HYA), 612 EAST DAVIS STREET, MESQUITE, TX 75149-4798 Report On: 01 November 2005
Report to: Fort Belvoir, BLDG 213, RM B-100, Fort Belvoir, VA 22066 Report On: 01 November 2005
Period of active duty: 365 Days
Purpose: Mobilization for ENDURING FREEDOM (OTHER THAN HOMELAND) (2001-PRESENT)
Mobilization category code: "V"
Additional instructions: (01, 02, 03, 04, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 20) See page 2

FOR ARMY USE
AUTHORITY: 5TH ARMY Permanent Order 05-293-036 DTD 20 OCT 2005
Accounting classification:
2162010.0000 01-1100 P1W1C00 11**/12** VFRE F3203 5570 S12120
2162020.0000 01-1100 P135198 21**/22**/25** VFRE F3203 S12120(OEF)
Sex: M
MDC: PM06
PMOS/AOC/ASI/LIC: 27A
HOR: CHEYENNE, WY
PEBD: 24 June 1987
DOR: 01 March 2003
Security clearance: TOP SECRET WITH SENSITIVE COMPARTMENTED INFORMATION
Comp: USAR
Format: 165

**********
* OFFICIAL *
* 90th Regional Readiness Command *
**********
THOMAS D. MCCLUNG
COL, DL
DEPUTY CHIEF OF STAFF

DISTRIBUTION: M1 PLUS
INDIVIDUAL CONCERNED (4)
FAMILY ASSISTANCE OFFICER (1)
MPRJ
FILE (ORIGINAL + 1)

ORDERS 05-298-00001 25 October 2005

Additional instructions:

01. Sure pay is mandatory. Soldier must bring the appropriate documentation to support the requirement to authorize sure pay to the bank.
02. Early reporting is not authorized.
03. Unaccompanied baggage shipment is not authorized.
04. Movement of household goods and dependents is not authorized.
05. Travel by privately owned vehicle is not authorized.
06. Rental car is not authorized.
07. Nontemporary storage of household goods is authorized.
08. Excess accompanied baggage is not to exceed 120 pounds.
09. Bring with you complete military clothing bag and appropriate personal items.
10. Soldier will handcarry (if available) complete MPRJ, health and dental, training, and clothing records.
11. Bring copies of rental or mortgage agreement, marriage certificate, birth certificate, birth certificate of natural children, or documentation of dependency or child support.
12. Bring copies of family care plan, wills, powers of attorney, and any other documentation affecting the soldiers pay or status.
13. Personnel requiring eye correction will bring two pairs of eyeglasses and eye inserts for a protective mask.
14. Government quarters and mess will be used.
15. Call 1-800-336-4590 (National Committee for Employer Support of the Guard and Reserve) or check online at www.esgr.org if you have questions regarding your employment/reemployment rights
16. Your family members may be eligible for TRICARE (military health care) benefits.For details call 1-888-DoD-CARE (1-888-363-2273) or go to web address https://www.tricare.osd.mil/reserve/ or email TRICARE_help@amedd.army.mil
17. In an effort to share information between soldiers, employers and the Department of Defense on their rights, benefits and obligations, mobilized USAR soldiers are strongly encouraged to provide employer information at https://www.dmdc.osd.mil/udpdri/ows/rc.home
18. NA
19. NA
20. If upon reporting for active duty you fail to meet deployment medical standards (whether because of a temporary or permanent medical condition), then you may be released from active duty, returned to your prior reserve status, and returned to your home address, subject to a subsequent order to active duty upon resolution of the disqualifying medical condition. If, upon reporting for active duty, you are found to satisfy medical deployment standards, then you will continue on active duty for a period not to exceed the period specified in this order, such period to include the period (not to exceed 25 days) required for mobilization processing.

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

3 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Major Thomas A. Fleener, JA, USAR

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4.C and 5.D of Military Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. al Bahlul by a competent authority.

2. In your representation of Mr. al Bahlul, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.

3. You are directed to inform Mr. al Bahlul of his rights before a Military Commission. In the event that Mr. al Bahlul chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel as his own expense, you shall inform me as soon as possible.

4. In the event that you become aware of a conflict of interest arising from the representation of Mr. al Bahlul before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by the Department of Defense General Counsel.

5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. al Bahlul.

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

cc:
Colonel Morris Davis
Brigadier General Thomas L. Hemingway
Mr. [redacted]

**Hodges, Keith**

**From:** Sullivan, Dwight, COL, DoD OGC[redacted]
**Sent:** Thursday, December 01, 2005 11 25 AM
**To:** 'Hodges, Keith'
**Subject:** RE US v al Bahlul - Representation

14 September 2005

—Original Message—
**From:** Hodges, Keith[redacted]
**Sent:** Thursday, December 01, 2005 11:22
**To:** Sullivan, Dwight, COL, DoD OGC
**Subject:** RE: US v. al Bahlul - Representation

Thank you, COL Sullivan

Would you please advise the date that Mr al Bahlul provided you this information

Thank you

Keith Hodges

---

**From:** Sullivan, Dwight, COL, DoD OGC[redacted]
**Sent:** Thursday, December 01, 2005 11:14 AM
**To:** 'Hodges, Keith'
**Subject:** RE: US v. al Bahlul - Representation

When I met with Mr al Bahlul, he said the following and specifically authorized the transmission of this information to others

He said he would not accept Major Fleener as his lawyer. He also specifically directed that Major Fleener not visit him in the camps.

Mr al Bahlul also made other statements concerning potential representation, but he did not clearly authorize disclosure of those statements to others

Semper Fi,
Dwight

—Original Message—
**From:** Hodges, Keith[redacted]
**Sent:** Thursday, December 01, 2005 10:48
**To:** Sullivan, Dwight, COL, DoD OGC
**Subject:** US v. al Bahlul - Representation

COL Sullivan,

Would you mind, please, sending me a reply email concerning what Mr al Bahlul told you with respect to his desires as to counsel I believe you told me that Mr al Bahlul authorized you to make this matter public

Message

Thank you

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]



12/1/2005

**Hodges, Keith**

**From:** Hodges, Keith
**Sent:** Tuesday, November 22, 2005 6 17 PM
**To:** [redacted]
**Cc:** Hodges, Keith, Brownback, Peter COL PO[redacted]
**Subject:** FW Representation Concerns - US v Al Bahlul - PO 102 B

Your attention is invited to the below email from the Presiding Officer

This email will be placed on the filings inventory as PO 102 B

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Pete Brownback[redacted]
**Sent:** Tuesday, November 22, 2005 5:02 PM
**To:** [redacted]
**Subject:** Representation Concerns - US v. Al Bahlul

Mr Hodges,

Please send this email to the Chief Defense Counsel and MAJ Fleener

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence

COL Brownback

**COL Sullivan**

**1. In addition to our telephone conversation of 16 November with myself and MAJ Fleener in Guantanamo and you in Washington, I have provided you a copy of PO 101. I also cc'd you on a letter I sent to MAJ Fleener today.**

**2. It is obvious that I have concerns about insuring that Mr. Al Bahlul is provided representation in accordance with Commission Law. It is also obvious that I am concerned about MAJ Fleener's "legal-ability" to provide that representation. I am not in any way commenting**

upon his professional abilities or capabilities; instead, I am concerned that he may feel that his ethical responsibilities outweigh his duties under Commission Law and your detailing memorandum of 3 November 2005.

3. I do not claim to know the reaction of MAJ Fleener's state bar(s) to his perceived ethical dilemma. Nor do I know what The Judge Advocate General of the United States Army or the General Counsel of the Department of Defense will say about his ethical dilemma. However, I do need to know what actions MAJ Fleener and you are going to take concerning representation of Mr. Al Bahlul. I realize that there may be a delay of some sort in making a decision, but the delay can not be unnecessarily prolonged.

4. Commission Law puts certain responsibilities upon all parties in the commission process, including you, MAJ Fleener, and myself. It is not my responsibility to represent or provide a judge advocate to represent Mr. Al Bahlul. However, it is my responsibility to bring his case to trial in an expeditious manner. Currently, the issue of representation is the major problem I face in docketing the case. Whatever resolution MAJ Fleener reaches, I must know it as soon as possible.

5. I am not MAJ Fleener's supervisor; I am, however, the one appointed to the commission established to try a person whom he has been detailed to represent. As such, my concerns are focused upon trying Mr. Al Bahlul, whereas, until this issue is resolved, you and MAJ Fleener may have a different focus. Be that as it may, none of us will be able to reach a resolution until the initial question is answered: Does Mr. Al Bahlul want to have MAJ Fleener represent him?

6. I was surprised when informed that while MAJ Fleener was in Guantanamo with an OMC-provided translator, he did not see his client. If there is something in the JTF procedures which kept him from seeing his client, I need to know so that I can take whatever measures that are available to me to insure it does not happen again.

7. Not only have I read all of the paperwork contained in PO 102, I also participated in the discussion on the record with Mr. Al Bahlul. However, that was in late August of 2004 - as recently as 27 October 2005, certain attorneys have stated in court filings that Mr. Al Bahlul did want representation - at least in a habeas corpus proceeding. At this point in time, no one knows what Mr. Al Bahlul wants in connection with MAJ Fleener. The only way in which we are going to know anything is for MAJ Fleener to meet with his client.

8. Please advise soonest whether you believe anything I have raised above is somehow inconsistent with how you see our individual and collective responsibilities.

COL Brownback

**Hodges, Keith**

**From:** Hodges, Keith [redacted]
**Sent:** Monday, November 28, 2005 10 49 AM
**To:** Fleener, Tom, MAJ DoD GC, Hodges, Keith, Davis, Morris, COL, DoD OGC, Swann, Robert, Mr, DoD OGC [redacted] Sullivan, Dwight, COL, DoD OGC, [redacted] Harvey, Mark, Mr, DoD OGC
**Subject:** PO 102 C - RE Representation and Docketing Concerns - US v Al Bahlul

MAJ Fleener

1 Thank you for the reply - and numbering the paragraphs

2 Who is [redacted]

ALL This email and the two below emails will be placed on the Illegs inventory as PO 102 C

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Monday, November 28, 2005 10:32 AM
**To:** 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
**Subject:** RE: Representation and Docketing Concerns - US v. Al Bahlul

Colonel Brownback and others,

Ill number my responses to correspond to your questions/statements/concerns in the earlier email

1) Iowa and Wyoming

2) I consider when I intend to see Mr al Bahul, or whether I intend to see Mr al Bahul to be privileged Please understand though, the translator who was with us at Gitmo belonged to a different defense team I also believe that the prisoner she was there to support has a conflict with Mr al Bahul

3) I am not aware of any logistical reasons why I would be unable to see Mr al Bahul I dont think JTF allows them to use the phone, so that makes it extremely difficult to speak with folks If there was some way we could be able to speak with the prisoners by phone that would really save alot of time

4) Concur

5) Concur

6) I am in the process now of determining my ethical duties

7) This is taking some time, but I am working on it Thank you for the offer of writing a letter Im not sure if I need one, but will keep you informed

8) Concur

Major Tom Fleener

---Original Message---
From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 18:13
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer

This email will be placed on the filings inventory as PO 102 A

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

---

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence

COL Brownback

Message

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Suleyman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III
COL, JA
Presiding Officer

**NACDL ETHICS ADVISORY COMMITTEE**
Opinion 03-04 (August 2003)
Approved by the Board of Directors at the
NACDL Annual Meeting, Denver, CO, August 2, 2003

***Question Presented:***

The NACDL Ethics Advisory Committee has been asked by the NACDL Military Law Committee the following question: Given the restrictions placed on civilian defense counsel, what are a criminal defense attorney's duties to the client before a Military Commission at Guantanamo Bay under 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), and its implementing instructions issued April 30, 2003?

***Digest:***

It is NACDL's position, by unanimous vote of the Board of Directors on August 2, 2003 having considered MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B, although it says it is not, in spite of the clear language of the MCI's.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the serious and unconscionable risks involved in violating Annex B, including possible indictment, *see* note 35, *infra*, every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.

A military or civilian lawyer representing an accused person before a military commission at Guantanamo Bay under the 2001 Military Order must provide a zealous and independent defense, notwithstanding the severe limitations imposed on counsel and the denials of due process and attorney-client confidentiality and privilege by the Military Commission Instructions. The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits on counsel imposed by the government, in violation of the UCMJ and treaties the United States has signed guaranteeing rights to the accused before these commissions. Criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions.

A military or civilian lawyer appearing before a military commission at Guantanamo Bay under the 2001 Military Order should not be involved unless the lawyer is qualified to handle death penalty cases in the lawyer's local jurisdiction or in the federal or military courts. Counsel must assume that every one of these cases is presumptively a death penalty case, even though the rules do not require, as in the civilian courts, that the government provide timely notice that it is a death penalty case or even allege an aggravating circumstance to support the death penalty that the government will seek to prove beyond a reasonable doubt.

If counsel appearing before a military commission has an ethical quandary that cannot be resolved, the lawyer should consult with their state bars. Defense counsel are cautioned, however, that if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret because a breach of security could lead to defense counsel being indicted. One must assume that defense counsel's calls from Guantanamo Bay will be monitored, too.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is prosecuting, and it gains no respect from the international community, and even its own citizens.

***Ethical Rules, Federal Regulations, Statutes, and Constitutional Provisions Involved:***

U.S. Const., Art. I, § 8 (war powers in Congress) & Art. II, § 2 (President is commander-in-chief)
"Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
28 U.S.C. § 530B
28 C.F.R. § 77.3
Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*
Geneva Conventions of 1949, III (GPW), IV (civilians)
Military Commission Order No. 1 (March 21, 2002)
Military Commission Instructions (April 30, 2003):
- No. 4: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel
- No. 5: Qualification of Civilian Defense Counsel and Annex B (Affidavit and Agreement of Civilian Defense Counsel) (as amended, undated)

Manual for Courts Martial, Preamble ¶ 2 (2000)
Rules of Professional Conduct (1983):
- Preamble: A Lawyer's Responsibilities
- Rule 1.1 (competence)
- Rule 1.6 (confidentiality)
- Rule 1.7(b) (personal conflict of interest)
- Rule 1.16 (declining or terminating representation)

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003)

***Opinion:***

## I. INTRODUCTION

### A. NACDL's Previous Committee Positions on The Question Presented

The Military Law Committee has raised a difficult question that has been touched on in an NACDL Board of Directors resolution of May 4, 2002 (quoted *infra*), and is related to our comments to the Department of Justice in opposition to the adoption of 28 C.F.R. § 501.3 in December 2001[1] **and Ethics Advisory Opinion of November 2002[2] involving the duty of an attorney to a client when the attorney learns that attorney-client communications are subject to monitoring under § 501.3. We concluded as to the latter:**

> **A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protects attorney-client communications from disclosure to the government.**

**NACDL Ethics Advisory Committee Op. 02-01, at 1 (Nov. 2002).[3]**

### B. NACDL Board Resolution on Military Commissions, May 4, 2002

The NACDL Board of Directors passed the following resolution on Military Commissions on May 4, 2002 where we have already questioned the constitutionality, violations of human rights treaties, and fundamental fairness of the government's plan for the current system of military commissions:

**Resolution of the NACDL Board of Directors**
**Regarding Military Commissions**

WHEREAS the National Association of Criminal Defense Lawyers, whose

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[1] http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument.

[2] http://www.nacdl.org/public.nsf/freeform/attorneyclient?opendocument.

[3] *See generally* Ellen S. Podgor & John Wesley Hall, Essay, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, __ GEO.J.LEGAL ETHICS ___ (Vol. 17, No. 1, 2003) (discussing NACDL's positions in opposition to the promulgation of 28 C.F.R. § 501.3 in NACDL's position paper and NACDL Op. 02-01).

members have dedicated their professional lives to defending the Constitution of the United States, supports efforts to bring to justice those responsible for the September 11, 2001 attack on our country;

WHEREAS the rest of the world will note how we treat those persons captured by American forces in the military actions against terrorism;

WHEREAS it is imperative not only that the United States set an example for fair and humane treatment, but that our efforts be perceived as fair and just;

WHEREAS the United States cannot be, or be viewed as being, willing to depart from its own laws and principles;

WHEREAS the international view of the United States as being willing to depart from its own laws and principles imperils our country's men and women in uniform across the world;

WHEREAS our dedication to the rule of law drives our positions on the creation of military commissions and the rules that will govern them;

WHEREAS we object to the creation of the particular military commissions reflected in the Presidential Order of November 13, 2001, on the basis that the President was not empowered by law to unilaterally create these commissions;

WHEREAS moreover, that position unchanged, the procedures announced as governing such commissions, as promulgated by the Secretary of Defense on March 21, 2002, are also inadequate as a matter of fundamental fairness;

WHEREAS the Preamble to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), states that such commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial;"

WHEREAS NACDL supports the principle articulated in the Preamble to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), and the procedures promulgated by the Secretary of Defense do not comply with the provisions of the MANUAL FOR COURTS-MARTIAL,

THEREFORE BE IT RESOLVED that NACDL opposes implementation of the procedures promulgated by the Secretary of Defense for these commissions;

IT IS HEREBY FURTHER RESOLVED that NACDL shall urge the President and the Congress of the United States, as well as appropriate judicial tribunals, to find that these procedures promulgated by the Administration to date violate principles of fundamental fairness, and threaten our country's stature and the welfare of its military personnel throughout the world, and thus that such rules

should be revised by the Secretary of Defense through amendment of his Order of March 21, 2002, to make applicable to such commissions the Uniform Code of Military Justice and the Manual for Courts-Martial.

APPROVED this 4th day of May, 2002
Cincinnati, Ohio

We are not alone in questioning the constitutionality and fundamental fairness of these proceedings. Several law review articles by distinguished scholars on constitutional and military law find these military commissions are: an unconstitutional exercise of the War Power reserved to Congress; U.S. Const., Art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-46 (1952); an unconstitutional suspension of the writ of habeas corpus, fundamentally unfair and a denial of due process, and a violation of human rights under international law. We cannot add to them here, so we merely cite and rely on them.[4]

**We share the concern of these scholars and others[5] that the stature of the United States as a world power is denigrated by these closed proceedings that are fundamentally flawed in their obvious potential for denial of a fair trial and the appearance of impropriety for failure to follow our own law and international law and utilize the UCMJ for trials before Military Commissions. While the government publicly seeks to assure a fair trial, and we know that defense counsel will zealously defend, as is their sworn duty, the limits on defense counsel, the secrecy of the proceedings, the due process flaws, including the denial of applicability of the UCMJ and protections of double jeopardy[6] and all other rights we hold as U.S. citizens,[7] all will lead the rest of the world to believe that the persons tried before these commissions were not treated in accord with our national beliefs**

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[4] George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002); Neal K. Katyal, Essay, *Waging War, Deciding Guilt: Trying Military Tribunals*, 111 YALE L.J. 1259 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002).

[5] In addition, newspaper and magazine articles and columns too numerous to cite have raised the same concerns.

[6] Art. 86 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.S.T.S. 135, 6 U.S.T. 3316, T.I.A.S. 3364, guarantees double jeopardy protection.

[7] For a comprehensive discussion of lost rights, see Donald G. Rehkopf, Jr., *Military Commissions: A Primer for Defense Counsel* (2003) (CLE paper, first delivered in Detroit, May 2003). *See also* Jack B. Zimmermann, *Liberty at risk, Part 5: Handling legal aspects of captured al Qeada detainees*, THE CHAMPION 53, 54-55 (July 2002).

**in the "Rule of Law,"[8] due process of law,[9] or international law.[10] In a World War II war crimes trial, two dissenting Justices of the U.S. Supreme Court were taken aback by our disregard for "elementary due process" and international law. *See Application of Yamashita*, 327 U.S. 1, 27-28, 49 (1946) (Justices MURPHY and RUTLEDGE dissenting, respectively).**

**Therefore, our own service members and citizens captured by an "enemy" abroad are even more likely to be subjected to similar denials of due process or atrocities in foreign lands.[11] We are not "leading by example" as a free nation should. Our government is**

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[8] One cannot help but note that the "Rule of Law" was politically invoked to impeach the last President for lying about a private sexual matter, but now is being ignored for political convenience by many of the same persons who relied on it before in the name of "national security." The President takes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." All federal officials take a similar oath. These military commissions do not "preserve, protect and defend the Constitution of the United States"—they make a mockery of it.

[9] The application of the UCMJ to military commissions would provide due process. The current regime does not.

[10] For example, Art. 84 of the Geneva Convention requires that a prisoner of war be tried in a military or civilian court. Manuel Noriega was prosecuted in a civilian court for drug crimes and RICO offenses after he was captured during the Panama invasion. *United States v. Noreiga*, 746 F.Supp. 1506, 1525-26 (S.D. Fla. 1990), *later opinion*, 808 F.Supp. 741, 796 (S.D. Fla. 1992) (Noriega was a "prisoner of war" under the Geneva Convention; he was allowed to wear his military uniform during the trial), *aff'd*, 117 F.3d 1206 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

[11] *See Noriega*, 808 F.Supp. at 803:

> [T]hose charged with that determination [Noriega's confinement location and status] must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views this Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.
>
> In the turbulent course of international events . . . the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented. (bracketed material added)

This happened in both the Vietman conflict and the 1991 Gulf War. In Vietnam, our captured service members were treated as an invading force and denied the benefits of the Geneva Convention. In the 1991 Gulf War, a female pilot and her crew were shot down, and she

**demonstrating a disregard for the protections of our own legal system and moral principles by circumventing established domestic and international law. *See Yamashita*, 327 U.S. at 81 (Justice RUTLEDGE dissenting), quoted *infra*. One cannot help but feel that secret trials with secret evidence, evidence sometimes even presented in secret from the accused and defense counsel, with little restrictions on the admissibility of evidence and ignoring the requirement that the protections and procedures of the UCMJ are applicable to military commissions[12] and Geneva Convention will lead to unjust[13] and unreliable results that will lead to these proceedings being viewed as a mere way station on the way to an inevitable conviction and probable execution.**

**A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is**

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was repeatedly raped, tortured, and otherwise degraded. Zimmermann, note 7, *supra*, at 54. Many other of our shot down POWs were tortured, including men threatened with rape and sexual abuse, and their suffering is recounted at length in *Acree v. Republic of Iraq*, 2003 WL 21537919 (D. D.C. 2003), *later opinion*, 2003 WL 21754983 (D. D.C. 2003).

[12] MANUAL FOR COURTS-MARTIAL, Preamble ¶ 2(b)(2) (2000) requires that military commissions ". . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial."

UCMJ, Art. 36, 10 U.S.C. § 836, provides:

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.

The question then is: May the DoD determine that special rules are required for military commissions that are actually "contrary to or inconsistent with the" UCMJ? We believe not. Congress mandated that application of the procedures of the UCMJ to commissions and tribunals be consistent with it, and the President cannot simply ignore Congress, in his capacity as Commander-in-Chief.

[13] At the request of the British Prime Minister, our government recently decided to waive the death penalty for two British citizens in the initial six to be tried by the Military Commission and to permit them to have British counsel. Our government is now treating citizens of favored nations differently and granting them more rights than the others accused. A denial of equal protection is a denial of due process under American law and international law.

**prosecuting, and it garners no respect from the international community, and even its own citizens.**

## II. WHAT ETHICAL LAW GOVERNS LAWYERS BEFORE COMMISSIONS?

When a military or civilian lawyer appears before a military commission or tribunal, what ethical law governs? It is clear that lawyers before a military commission must adhere to the Rules of Professional Conduct and are mandated to provide independent and zealous representation.

The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of limits on counsel imposed by the government.

### A. RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000)

The RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000) provides that defense counsel in a military proceeding shall provide zealous representation the same as required of civilian lawyers:

> *General duties of defense counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See* R.C.M. 901(d)(4)(D).

All prior versions of the MANUAL FOR COURTS MARTIAL or the RULES FOR COURTS MARTIAL required defense counsel to provide zealous, independent representation.

### B. 28 U.S.C. § 530B

The "McDade Amendment," 28 U.S.C. § 530B(a), provides as follows:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties to the same extent and in the same manner as other attorneys in that State.[14]

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[14] The Department of Justice must defend the constitutionality of the McDade Amendment. *See* The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op.

**28 C.F.R. § 77.3 is in accord:**

> **In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in Sec. 77.2 of this part.**[15]

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Off. Legal Counsel DOJ 25 (1981).

[15] *See also* 28 C.F.R. § 77.4 on "guidance":

(a) Rules of the court before which a case is pending. A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) Inconsistent rules where there is a pending case.

(1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) Choice of rules where there is no pending case.

(1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) Rules that impose an irreconcilable conflict. If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable

**Pre-McDade Amendment, it was held that there is no preemption of state ethics law when states seek to regulate the licenses of and discipline federal prosecutors, for example. *United States v. Ferrara*, 847 F.Supp. 964, 968-70 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C.Cir. 1995) (D.C. federal prosecutor licensed in New Mexico; no federal jurisdiction in D.C. to question state disciplinary action in New Mexico; state regulation of federal prosecutors was expressly authorized by Congress since 1980 starting in an appropriations act. (Pub.L. 96-132, 93 Stat. 1040, 1044 (1979)); *Matter of Doe*, 801 F.Supp. 478, 485-88 (D.N.M. 1992). Post-McDade cases are in accord. *Stern v. U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000); *Mendoza Toro v. Gil*, 110 F.Supp.2d 28 (D.P.R. 2000).**

**C. Military Regulations**

Regulations of the branches of the military provide that military lawyers are governed by the Model Rules of Professional Conduct. Army Reg. 27-26 (1992); AF Rules of Professional Conduct (1989); Navy JAG Inst. 5803.1 (1987).

**D. State Bar Influences and Control Under Military Law**

Military case law and regulation recognize that military lawyers are still governed by their state bars and rules,[16] **as was reaffirmed by § 530B. *See, e.g., United States v. Baker*, 58 M.J. 380, 386 (2003) (applying free narrative approach to client perjury; also applying RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000)); *United States v. Wheeler*, 56 M.J. 919, 922 (A.Ct. Crim. App. 2002); *United States v. Beckley*, 55 M.J. 15, 23 (A.F.Ct.Crim.App. 2001); *United States v. Smith*, 35 M.J. 138, 140 (C.M.A. 1992) (state bar**

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obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) Supervisory attorneys. Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

[16] Army Reg. 27-26, *supra*, Rule 8.5, cited in John Jay Douglas, *Military Lawyer Ethics*, 129 MIL. L. REV. 11, 14-15 & n. 6 (1990).

*Contra:* Col. E. Albertson, *Rules of Professional Conduct for the Navy Judge Advocate*, 35 FED. B.J. 334, 336 (1988) ("when conflict exists between the state rule and the JAG rule, the latter prevails") (but, this article pre-dates the McDade Amendment and 28 C.F.R. § 77.3, so the Supremacy Clause is no longer an argument).

**duties argued as controlling; declining to decide whether the Supremacy Clause overrides state bar rules); *Rhea v. Starr*, 26 M.J. 683, 684 (A.F.C.M.R. 1988). *See also United States v. Dorman*, 58 M.J. 295, 299 n. 3 (2003) (relying on opinions of state bars for guidance).**

**The appearance of impropriety standard applies in the military. *United States v. Golston*, 53 M.J. 61, 66 n. 5 (2000); *United States v. Lewis*, 38 M.J. 501, 517 (A.C.M.R. 1993).**

**E. Duty of Zealous Advocacy under Military Law**

Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. RULES FOR COURTS MARTIAL 502(b)(6)(B), quoted *supra*;[17] ***United States v. Nicholson*, 15 M.J. 436, 438 (C.M.A. 1983); *United States v. Rodriguez*, 44 M.J. 766, 776 (N.M.Ct.Crim.App. 1996); *United States v. Thomas*, 33 M.J. 768, 777 (N.M.Ct.Crim.App. 1991), *aff'd in part and rev'd in part on other grounds*, 46 M.J. 31 (1997); *United States v. Whidbee*, 28 M.J. 823, 826 n. 5 (C.G.C.M.R. 1989); *Martindale v. Campbell*, 25 M.J. 755, 757 (N.M.C.M.R. 1987). "[T]he personal honor of the individual" is vitally important in the military. *Officer's Guide* 2 (37th ed. 1973), quoted in Douglas, note 16, *supra*. Zealous criminal defense is a military tradition and duty.**

## III. DUTIES BEFORE MILITARY COMMISSIONS

**Because of the foreign nature[18] of these military commissions established under the March 21, 2002 Department of Defense Military Commission Order No. 1 (MCO-1), criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions. The government on one hand states that zealous representation is required of detailed military counsel or civilian counsel, and then puts severe limits on counsel's ability to provide a complete defense.[19]**

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[17] In addition, RULES FOR COURTS MARTIAL 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation "because of the zeal with which such counsel represented any accused."

[18] Secretary of Defense Rumsfeld admitted in a press release with the adoption of the directive that these rules were new "to a certain extent." "DoD Presents Procedural Guidelines For Military Commissions," http://www.defenselink.mil/news/Mar2002/n03212002_200203213.html. This is an understatement.

[19] "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.*, 410 U.S. at 302.

**There are thus far seven Military Commission Instructions (MCIs) issued April 30, 2003 under MCO-1. The first appears at http://www.defenselink.mil/news/May2003/d20030430 milcominstno1.pdf, and they are consecutively numbered; *e.g.*, ~ no2.pdf, ~no3.pdf, etc. We are primarily concerned with MCI-4 & -5.**

**A. MCO-1, the MCIs, Assigned Military or Civilian Defense Counsel, and Their Duties**

**1. Defense counsel in general**

MCO-1 provides as to defense counsel in ¶ 4(C):

(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

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The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967). Accordingly, it is held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Our national view of due process does not apply to these military commissions, even though law; MANUAL FOR COURTS MARTIAL, Preamble ¶ 2(b)(2); and the Geneva Convention and other human rights treaties require it.

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). . . .

(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 prequalified 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). (emphasis added)

The second italicized portion refers to MCI-5, Annex B, *infra*. What the government gives in ¶ 4(C)(2) as to Detailed Defense Counsel it takes away as to civilian defense counsel under ¶ 4(C)(3)(b)(v).

**2. Office of Chief Defense Counsel for the Military Commissions**

MCI-4 ¶ 3 establishes the Office of Chief Defense Counsel and it delineates its duties in assigning Detailed Defense Counsel. Chief Defense Counsel must insure that the accused is always represented by Detailed Defense Counsel even if civilian counsel also represents an accused. *Id.* ¶ 3(B)(11). Chief Defense Counsel will also monitor counsel to seek to ensure zealous representation but also to ensure that defense counsel do not enter into joint defense agreements that create confidentiality obligations beyond the accused.[20] *Id.* ¶ 3(B)(10). **Moreover, ¶ 3(C)(2) provides:**

[20] This is ironic because of a lack of confidentiality, discussed *infra*.

2) **Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) [MCO-1] and (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)]. 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 . . . . (emphasis and bracketed material added)**

**Detailed Defense Counsel, however, are in the same position as civilian defense counsel except that they may not be barred from the courtroom, but they cannot discuss with their civilian co-counsel what happened in a "closed session."**

**3. Civilian Defense Counsel**

Civilian Defense Counsel are governed by MCI-5. The burdens on a civilian becoming eligible to serve as defense counsel before a military commission are onerous. To become a defense counsel, civilian lawyers are required to execute an Affidavit and Agreement by Civilian Defense Counsel, MCI-5, Annex B. It provides in pertinent part in ¶ II under "Agreements":

B. I will be well-prepared and will conduct the defense zealously, representing the accused through the military commission process, from inception of my representation through the completion of any post trial proceedings . . . .

. . .

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 my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications 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).[21]

**It should be apparent to all that the purpose of forcing defense counsel to sign this agreement is so violations of the agreement may be prosecuted under 18 U.S.C. § 1001, as happened in the Stewart case. *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002),[22] *later opinion United States v. Sattar*, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of § 1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand). Her co-defendant's case is *United States v. Sattar*, 2002 WL 1836755 (S.D.N.Y. 2002), *later opinion*, 2003 WL 21698266 (S.D.N.Y. July 22, 2003).**

**B. The Duty of Zealous Representation**

The DoD repeatedly tells us that it expects all defense counsel to zealously defend. We have no doubt that defense counsel will do so, in the highest traditions of duty of American criminal defense lawyers and military lawyers. The problem with MCI-4 & -5 is that it makes it impossible for defense counsel to provide a zealous and ethical defense before these military commissions.

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[21] MCI-5 also provides that civilian defense counsel, *inter alia*:

- will not be paid by the U.S. government (*id.* ¶ 3(A)(1))
- must have a SECRET or higher security clearance which they have to pay for (*id.* ¶ 3(A)(2)(d))
- ensure the commission proceedings are counsel's primary duty and no matter in counsel's private practice or personal life can interfere with the commission's proceedings (*id.*)
- once proceedings have begun, counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer (*id.* ¶ II(E)(2))
- will make no public or private statements regarding closed sessions or about classified material (*id.* ¶ II(F))
- agree to abide by all rules and regulations concerning classified material (*id.* ¶ II (G).

[22] Indictment: http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf. The government's theory is that the lawyer made a false affirmation under SAMs to the government that she would not disclose certain things learned from the client. Indictment ¶s 7 (attorney signed affirmations) & 10 (attorney violated SAMs).

We give three examples, two involving military tribunals, of lawyers taking highly unpopular cases:

**1. The Boston Massacre Criminal Trial (1770)**

The British garrisoned troops in Boston starting in 1768. On March 5, 1770, a lone guard was attacked by a mob (estimated to be between 30-60 men and young men). First came shouting and insults. Then they threw objects. One British soldier standing alone was hit first by snowballs, and then by chunks of ice, coal, rocks, paving stones, and sticks. He called for reenforcements, and other troops came to his aid. Only the troops were armed. When a soldier was hit with a stick, he fired into the crowd, and others did, too. Five died and several were injured. Of course, a furor erupted in Boston. The popular sentiment was immediately obvious: this was murder, and the officer in charge, British Capt. Thomas Preston, had ordered the shooting. Eight soldiers and Capt. Preston were turned over to the Sheriff of Suffolk County, Massachusetts.

On March 6th, a friend of Preston's came to lawyer John Adams's office and asked him to undertake their defense because Preston did not order the shooting. Adams, a busy lawyer at the time, took the case. Before he could get involved, however, an inquest was held, and Preston gave a lengthy deposition. 3 LEGAL PAPERS OF JOHN ADAMS 4 (Butterworth, ed., 1965, Atheneum).

An indictment soon followed in the name of the British government, but the case was pursued in the Superior Court of Suffolk County, Massachusetts, *Rex v. Preston* and *Rex v. Wemms*. *Id.* at 46-47. Adams and Robert Auchmuty, Jr. and Josiah Quicy, lawyers for the soldiers, stalled the trials as long as they could so tempers would cool and a fair trial would be more likely. Seven months later, the case came to trial before a Boston and Suffolk County jury. *Id.* at 48. After a week's testimony (*id.* at 50-86), Adams persuaded the jury that the witnesses that put Preston outside ordering his troops to fire were mistaken or lying—Preston only ordered the troops to stop shooting (*id.* at 86-88), and Preston was acquitted.

The soldiers were tried separately less than three weeks later. At the end of the second trial, six of the soldiers were acquitted, and two were convicted of manslaughter.[23]

**Adams's career was not harmed by his taking the case, although he admitted that his practice dropped off for over a year. He went on to become the second President of the United States. Adams's diary account of why he took the case is pertinent to us today:**

> **The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death**

[23] Their trial comprises the balance of *id.* vol. 3.

**against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.**[24]

**2. The Nazi Saboteurs Military Tribunal (1942)**

In late June 1942, eight "Nazi Saboteurs" entered the United States in civilian clothing allegedly to engage in, what would be called today, domestic terrorism. One of them turned himself in to the FBI and he gave the locations of the rest. The arrests were all made by June 23d. The one who turned himself in apparently was fleeing Nazi Germany and was using this surreptitious entry as a method of gaining asylum. J. Edgar Hoover of the FBI, however, gave the impression that they made the case and captured the saboteurs by their own investigation and actions for the benefit of Germany so they would think that further such invasions would fail. The government gave the impression to the one who came in that it would give him leniency, but it reneged. All eight were charged with being saboteurs subject to trial before a military commission since they entered the country as spies. On July 2d, President Roosevelt issued his proclamation for a military tribunal, and the rules of procedure for the trial were issued on July 7th. The secret trial began on July 11th.

During the trial, defense counsel sought habeas review in the U.S. District Court for the District of Columbia and certiorari in the U.S. Supreme Court, and the trial had a hiatus while the Supreme Court considered the case on an expedited basis, hearing argument starting the day the briefs were filed and carrying over to a following half day, and it promptly denied relief on July 29th with an opinion following months later. *Ex Parte Quirin*, 317 U.S. 1 (1942). The trial resumed immediately and ended on August 1st with convictions and death sentences for six and life for two. The President reviewed the findings and refused to stop the executions. The six were electrocuted in the D.C. Jail on August 8th: Forty-six days from arrest to execution, including a three week trial. The other were granted clemency to a 10 year sentence in the 1950's.

Military defense counsel assigned to the case were Col. Cassius M. Dowell and Col. Kenneth Royall. Col. Carl L. Ristine was shortly appointed to represent the one who came in first because of an apparent conflict of interest, so Dowell and Royall had the other seven (two were arguably U.S. citizens, but that was found irrelevant). By all accounts of the proceedings, many believe that defense counsel provided zealous representation in the face of a trial that was a foregone conclusion, designed to result in conviction, challenging the constitutionality of the proceedings, futilely seeking a writ of habeas corpus challenging the jurisdiction of a military tribunal, and putting on a full (to the extent allowed by the rules) and zealous defense in a completely secret trial held in Washington in the Department of Justice building. The quality of their representation was not known until years later when the papers of the proceeding were released to the public. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW ch. 3 (Univ. Press of Kansas, 2003).

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[24] Douglas Linder, "The Boston Massacre Trials: An Account," http://www.law.umkc.edu/ faculty/projects/ftrials/bostonmassacre/bostonmassacre.html (2001).

The outcome of the trial was foreordained by Hoover himself, believing that swift trial and execution of the saboteurs would lead the Nazis to believe in the invincibility of the FBI in the saboteurs' capture, but the defense lawyers apparently did all they could for their clients. They did what was expected of American military criminal lawyers and criminal defense lawyers in general: they defended their clients with zeal, creativity, and utmost vigor under undisputably bad circumstances, and they sought civilian review of what they believed was an unconstitutional process. Their reputations as lawyers were not harmed by their zeal, either. After retirement, Col. Royall was appointed Secretary of War by President Truman.

### 3. The Military Tribunal of General Yamashita (1946)

After the surrender of Japan at the end of World War II, Japanese General Tomoyuki Yamashita was brought before an American military tribunal sitting in the Philippines. He was charged barely three weeks after surrender. He was assigned six American military lawyers to defend him, and only one had extensive trial experience, Capt. Frank Reel. The others proved their mettle [25]

**The tribunal was obviously organized to convict General Yamashita because of the gross denials of due process of law visited upon him. Nevertheless, the defense lawyers served heroically, if nothing else, fighting the government every step of the way, seeking to show that General Yamashita could not be held accountable for what was happening all over the Philippines, in light of how the American invasion fragmented his forces and he could not communicate with them. Essentially, he was being held responsible for the actions of troops under his command, even though he was unable to command them at the time of many of the acts they were accused of.**

**From the Philippines, Capt. Reel dispatched a handwritten[26] petition for writ of habeas corpus to the U.S. Supreme Court, and it was actually heard, but, of course, rejected. *Application of Yamashita*, 327 U.S. 1 (1946). The Supreme Court found the tribunal to be constitutional, but one cannot appreciate what defense counsel and the accused had to endure without reading the dissenting opinions of Justices MURPHY, 327 U.S. at 26-41, and RUTLEDGE, 327 U.S. at 41-81.**

**Justice MURPHY found that the tribunal violated virtually every tenet of law argued on behalf of the accused Japanese general:**

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[25] *See generally* FRANK REEL, THE CASE OF GENERAL YAMASHITA (U. Chi. Press 1949). *Compare* the differing proceedings before the International Tribunal for the Far East (ITFE) where due process actually was accorded, and the results for the individual persons accused were better in T. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIAL (U. Ky. Press 2001).

[26] They had no typewriters or other basic things to conduct such a trial.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish * * * Offenses against the Law of Nations * * *." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . .

*Yamashita*, 327 U.S. at 26-27 (Justice MURPHY dissenting). There were no evidentiary or constitutional protections available to the accused (similar to these commissions).

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those future [implications]. Indeed, the fate of some future President

> of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

*Id.* at 28-29 (bracketed material added).

Justice RUTLEDGE was less kind to the government. *Id.* at 41-42 (Justice RUTLEDGE dissenting):

> More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.
>
> . . .
>
> With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

Justice RUTLEDGE found the military commission to be unconstitutional, (1) in significant part because of the deficiencies in the rules of evidence that allowed ex parte evidence without authentication (*id.* at 48-49 & n. 9; *id.* at 52-53), something shared by today's military commissions, (2) the lack of an opportunity to prepare a defense to defend against 64 specifications, including the government adding 59 more specifications on the day the trial started (*id.* at 56-61); and a denial of a continuance to prepare a defense (*id.* at 60-61); (3) ignoring of the Articles of War (now the UCMJ) for the trial as required by statute (*id.*

**at 61-69); (4) ignoring the Geneva Convention of 1929 (*id.* at 72-78); (5) denying application of the due process clause of the Fifth Amendment to Yamashita (*id.* at 78-81).**

**Justice RUTLEDGE closed as follows:**

> **I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.**
>
> **It was a great patriot who said:**
>
> > **"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."[42]**
>
> **42. 2 THE COMPLETE WRITINGS OF THOMAS PAINE (edited by Foner, 1945) 588.**

***Id.* at 81.**

**Justice RUTLEDGE thus states our concern today: American soldiers and civilians are at risk of being similarly denied due process as happened in Iraq in 1991; *Acree, supra;* if they are captured because of our example of a trial without minimal due process in violation of our own law and international law.**

**C. Comparison to Today's Criminal Defense Bar**

The kind of defense afforded one accused of crime is an integral part of the American legal tradition, and it is NACDL's mission:

> Ensure justice and due process for persons accused of crime . . .
>
> Foster the integrity, independence and experience of the criminal defense profession . . .
>
> Promote the proper and fair administration of criminal justice.

NACDL Bylaws, Art. II, § 1.

The public and the courts expect criminal defense lawyers to provide a zealous defense to every client, no matter how unpopular that client may be. Representing the unpopular is the job of the criminal defense lawyer, and it is necessary to insure that the rights of all of us are protected and maintained. This has been recognized for hundreds of years. *See* Lord

Brougham's closing argument in 2 TRIAL OF QUEEN CAROLINE 7-8 (1821), quoted in DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973); GEORGE SHARSWOOD, PROFESSIONAL ETHICS 84-84 (1884); *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988); *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (Justice WHITE, concurring and dissenting). It is imbedded in the ethical rules by RPC Rule 1.1 (duty to be competent), Rule 1.3 (duty to be diligent), Rules 1.7-1.10 (duty to be independent), and Rule 2.1 (candid advice). *See also* RPC Rule 1.16(b) (duty to withdraw if counsel cannot zealously defend).

If representation of a particular person is or becomes morally repugnant to the lawyer, or simply impossible under the circumstances; RPC Rule 1.7(a)(2); the lawyer should not take the case or may withdraw in a proper case. RPC Rule 1.16(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32, and Comment (2000); Tenn. Op. 96-F-140. Indeed, a lawyer that cannot give the client his or her all should not be in the case because that creates a personal conflict of interest under Rule 1.7(a)(2). A lawyer's personal conscience or moral code is a valid consideration in determining whether or how to proceed. RPC Preamble ¶ 6. *See also id.* ¶ 14:

> The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Any criminal defense lawyer needs to keep in mind that the government will contend that no law but the MCO and MCIs will apply and that the accused has only the rights the government chooses to give.[27] **Defense counsel may feel it necessary to seek civilian court review, as happened in *Ex Parte Quirin* and *Application of Yamashita* even if counsel believes that the courts will unlikely intervene. The scholars uniformly believe that the President has exceeded his authority as Commander-in-Chief when the War Powers Clause of the Constitution resides that power in the Congress. U.S. Const., Art. I, § 8, cl. 11; *see Youngstown Sheet & Tube, supra*. An independent judiciary may, and should, agree.**[28]

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[27] *See, e.g.*, Mark Hamblett, "Government Argues Jose Padilla Has Few Rights," *New York Law Journal* (July 29, 2003) (http://www.law.com/jsp/article.jsp?id=1058416437338) involving *Padilla v. Rumsfeld* pending in the Second Circuit ("'The laws and customs of war recognize no right of enemy combatants to have access to counsel to challenge their wartime detention,' attorneys for the government said in their brief.").

[28] There is a difficult jurisdictional issue here, too: NACDL believes that Guantanamo Bay, Cuba, was picked for the forum for these military commissions to enable the government to defeat any effort at an accused person obtaining civilian court jurisdiction over him. These

**D. ABA's Proposed Recommendation**

NACDL also endorses[29] **the American Bar Association's proposed Recommendation from its Task Force on Treatment of Enemy Combatants from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities.**[30] **That recommendation states:**

> **FURTHER RESOLVED,** that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:
>
> 1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client;
>
> 2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;
>
> 3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;
>
> 4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;

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"enemy combatants" are not being tried in the place of their alleged crimes as required by the Law of War.

Guantanamo Bay has a unique status as leased land which the government claims foils any civilian court's efforts to assert jurisdiction over the detainees. *See Odah v. United States*, 355 U.S.App.D.C. 189, 321 F.3d 1134 (2003).

[29] This provision was separately unanimously adopted on August 6, 2003, by the NACDL Executive Committee which acts for NACDL between meetings of the Board of Directors.

[30] It is also endorsed by the Association of the Bar of the City of New York and the Beverly Hills Bar Association.

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

**FURTHER RESOLVED,** that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003).

The U.S. Supreme Court virtually adopted these ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases on June 26, 2003 in *Wiggins v. Smith,* 123 S.Ct. 2527, 2537 (2003).

**E. Duties of Defense Counsel in a Military Commission**

It appears from the rules under which these commissions will operate that defense counsel will be severely disadvantaged. Defense counsel has no ability to share information with co-defendant's counsel or witnesses to attempt to put on a common defense, defense counsel likely will be limited in counsel's ability to even meet with the client, and attorney-client communications will be monitored.[31]

**A military lawyer detailed to take the case likely has no choice to get involved, but the military lawyer should refuse to sign the military version of Annex B,[32] but civilian**

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[31] Defense counsel most certainly will need an interpreter to communicate with the client, and the interpreter will likely be provided by the CIA, DIA, or other governmental entity, and the communications *will* be monitored and likely will be recorded. The government insists that the information so obtained will not be used against the accused in that proceeding, and the future crime exception applies. (MCI-5, Annex B, ¶ II(I) & (J) (defense counsel must reveal future crimes likely to result in death or seriously bodily harm or impair national security; *compare* RPC Rule 1.6(b)(2))

Since there is no double jeopardy protection in these military commissions, admissions of the accused to counsel could be used in another trial over the same facts or a related trial.

[32] We take no position on a military lawyer's obligation to refuse to execute what he or

**counsel does have a choice to not apply to be counsel.**[33]

**We also believe that no military or civilian defense lawyer should apply to handle such cases unless qualified to handle death penalty cases in their local jurisdictions or in federal or military courts. These military commission cases must presumptively be considered death penalty cases, but, under the rules of the military commission, counsel and the accused may not learn that the case is being pursued as a death penalty case until the opening statement since there is no fundamental fairness requirement, as in the civilian system, of notice and the pleading of an aggravating circumstance so the accused can prepare for a penalty phase.**

**It is NACDL's position, by unanimous vote of the Board of Directors having viewed MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B.**

**NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the extraordinarily serious and unconscionable risks involved in violating Annex B just by doing what we do everyday,**[34] **raising every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the UCMJ, treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.**[35]

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she believes is an unlawful order. *See generally* 10 U.S.C. § 892. We leave it to the individual military defense counsel involved, although NACDL through its Military Law and Ethics Advisory Committees will address specific cases on the request of NACDL members.

[33] Civilian counsel has to be a U.S. citizen under the MCO and MCIs (except for British counsel given special status). If a U.S. lawyer is sought to be retained, the lawyer is cautioned that the Office of Foreign Assets Control operating under the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, will determine that the defense lawyer cannot be paid under the Taliban Sanctions, 31 C.F.R. § 545, and the Global Terrorism Sanctions, 31 C.F.R. § 594. *Compare United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va. 2002) (Lindh's lawyers, however, were not paid with foreign funds).

[34] **We strongly caution, however, that counsel must keep in mind that signing Annex B and then refusing to abide by its terms likely will be treated by the government as a crime under 18 U.S.C. § 1001.** The government has done so as to Special Administrative Measures agreements in the Bureau of Prisons.

[35] By signing Annex B, defense counsel waives the ability to test the constitutionality of

**If counsel appearing before a military commission has an ethical quandary that they cannot resolve, they need to consult with their state bars. Military case law has already settled that issue (as noted above), and 28 U.S.C. § 530B and 28 C.F.R. § 77.3 makes all government lawyers subject to regulation by their state bars.[36]**

**NACDL members can also consult with the Ethics Advisory Committee. NACDL will stand behind its members to insure than they can give their clients the best defense possible.**

**One final note, if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret—it could lead to counsel being indicted. One can assume that defense counsel's calls to outside counsel from Guantanamo Bay will be monitored, too.[37]**

**Notice**

This is an opinion only of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers, as approved by the NACDL Board of Directors. NACDL is a voluntary association of nearly 11,000 criminal defense attorneys with more than 80 state and local affiliates. This opinion is intended to be the Committee's best interpretation of the Model Rules of Professional Conduct and the rules, statutes, and constitutional provisions involved as they apply to the written facts presented to the Committee, and it is not binding on anyone other than to show the lawyer's good faith in reliance on it.

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the proceedings in a civilian court. Defense counsel cannot waive such a fundamental client right.

[36] While it varies from state-to-state, state bar ethics opinions may be binding on the lawyer seeking the opinion, or they may be merely advisory.

[37] The government then will seek to impose secrecy requirements on counsel that defense counsel consults.

# REVIEW EXHIBIT 129

**Review Exhibit (RE) 129 is a memorandum signed by the Chief, Army Standards of Conduct Office (SOCO), Office of The Judge Advocate General, located in Arlington, Virginia. It is addressed to the Presiding Officer, *United States v. al Bahlul*.**

**RE 129 responds to the Presiding Officer's question concerning whether an Army Judge Advocate can be lawfully ordered to represent an Accused who is being tried by military commission when that same Accused declines that representation.**

**RE 129 is discussed briefly in *United States v. al Bahlul* at R. 87-88.**

**RE 129 consists of 6 pages.**

**SOCO has requested that RE 129 not be released on the Department of Defense Public Affairs web site, and that any requests for RE 129 be referred to SOCO.**

**RE 129 was released to the parties in *United States v. al Bahlul*, and will be included as part of the record of trial for consideration of reviewing authorities.**

**I certify that this is an accurate summary of RE 129.**

**//signed//**

**M. Harvey**
**Chief Clerk of Commissions**

**NOTE by APO: The email immediately below this note states,** "The exhibits are all identical to the earlier (Iowa request) exhibits." The "Iowa request" and all attachments (103 pages) can be found at PO 102 H and have not been included here for reasons of efficiency.

KH Hodges
Assistant to the Presiding Officers

**From:** Fleener, Tom, MAJ DoD GC [redacted]
**Sent:** Friday, January 06, 2006 12:32 PM
**To:** 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** RE: Presiding Officer's Directions - RE: Ethics Opinion - al Bahul

**Attachments:** SOCO Ethics Opine Request.pdf
all,

Here is my request from the Army Standards of Conduct Office. The exhibits are all identical to the earlier (Iowa request) exhibits.

Major Tom Fleener
-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Wednesday, January 04, 2006 15:17
**To:** Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
**Subject:** Presiding Officer's Directions - RE: Ethics Opinion - al Bahul

1. The PO does not redact information from any item made a Review Exhibit or placed on the filings inventory. According to the Appointing Authority Memo of 30 Jun 05 entitled Duties and Responsibilities of Chief Clerk of Military Commissions, before a filing or a Review Exhibit is made public by the Chief Clerk for Military Commissions, he may elect to redact certain information. (http://www.defenselink.mil/news/Sep2005/d20050921trial.pdf). If you wish anything to be redacted in that manner, you should make a request to the Chief Clerk for Military Commissions.

2. If you believe information should be the subject of a Protective Order, your attention is directed to POM 9-1.

3. The Presiding Officer directs that all the attachments to the attached request to the Iowa Bar be placed onto CDs that can be read on any computer (i.e., Read Only), and provide such CD to opposing counsel. In addition, the Presiding Officer directs that a copy of the same CD be delivered to the APO when you arrive at Guantanamo. The APO

has spoken to Mr. Harvey who offers his assistance in fulfilling this requirement. He is CC on this email.

4. If and when you receive a reply, provide it to the APO, the Presiding Officer, and opposing counsel in electronic form as soon as it is received.

5. If you have requested any ethics opinions or advisory opinions from any other Bar or entity that could or may impact the determination of the pro se issue, immediately provide them, and any replies thereto, to opposing counsel, the APO and the PO.

6. This email and the below emails will be placed on the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Fleener, Tom, MAJ DoD GC[redacted]
**Sent:** Wednesday, January 04, 2006 1:48 PM
**To:** 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
**Subject:** Ethics Opinion - al Bahul

Colonel Brownback,

I am forwarding to you my request for an ethics opinion that I made to the Iowa Bar Association. I am not sending all the exhibits as they are too large and in most cases, repetitive Please note, while I believe I handled all privacy concerns with my exhibits I did not redact any information from my request. Accordingly, before posting and making part of the record the name of the individual to whom I sent the request and my contact information on the last page should be redacted.

Major Tom Fleener
-----Original Message-----
**From:** Hodges, Keith [redacted]
**Sent:** Tuesday, November 22, 2005 18:13
[redacted]

Hodges, Keith
**Subject:** Representation and Docketing Concerns - US v. Al BahlulHodges, Keith
[redacted]

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

---

**From:** Pete Brownback[redacted]
**Sent:** Tuesday, November 22, 2005 4:54 PM
**To:** keith - 1 - work
**Subject:** Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

**MAJ Fleener,**

**In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.**

**1. What bars are you a member of?**

**2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005,**

**notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.**

**3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.**

**4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:**

**a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.**
**b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.**
**c. Determining whether your client wishes to have you represent him.**
**d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.**
**e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.**
**f. Any and all other duties of a detailed defense counsel.**

**5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.**

**6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.**

**7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s),**

**The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?**

**8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.**

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

Office of Military Commissions
Office of the Chief Defense Counsel
1600 Defense Pentagon
Room 3B688
Washington, D.C. 20301

Dept of the Army - JAGC
Standards of Conduct Office

January 4, 2006

Dear Colonel

My name is Major Tom Fleener. I am an Army Reserve JAG Officer who has been ordered to active duty to represent one of the Guantanamo Bay detainees before a military commission. I am an Iowa lawyer, license # 14805, and a Wyoming lawyer, license # 6-3747. In the formal request that follows, I respectfully seek answers to three questions: the first involves a military lawyer's order to represent a client who declines such representation; the second involves a military lawyer's participation in proceedings before a military tribunal, where that tribunal's procedures depart substantially from customary, domestic and international standards of due process; and the third asks whether the convergence of conditions under the first two questions affects the answers to either of those questions. Accordingly:

> 1. May a military lawyer obey the order of a military tribunal to represent a person charged with criminal offenses before the tribunal, when (1) that person has declined representation by counsel, (2) the tribunal has made no particularized finding that the person has been or will be disruptive to the tribunal or is mentally or physically incapable of representing himself, (3) the tribunal has made no finding that appointing standby counsel would be inadequate to protect against disruption of the proceedings, and (4) the tribunal's decision to deny the person's claim to represent himself, or to choose his own counsel is based on a categorical assertion that national security and logistical concerns prohibit both courses, without regard to whether reasonable, less-restrictive means may be available?
>
> 2. May a military lawyer obey the order of a military tribunal to represent a person before a military commission,

when the rules of the tribunal depart significantly from customary, domestic and international standards for due process? More specifically, the rules of the tribunal permit (1) non-disruptive defendants to be excluded from their own commission proceedings and testimonial hearsay admitted, in contrast to the Confrontation clause, (2) statements obtained through torture or other coercive means to be admitted into evidence, (3) the admission of all evidence that is "probative to a reasonable person," regardless of the prejudicial effect such evidence may have, (4) the death penalty to be imposed with as few as seven panel members and no requirement that aggravating factors be charged or proven, and (5) the accused's trial to be delayed indefinitely?

3. Does either your answer to question 1 or 2 change if the conditions outlined in both questions are applicable to the proceeding?

## Background

On September 18, 2001, Congress authorized the President to use all necessary and appropriate force against those nations, organizations or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 .... (Encl. 1). Pursuant to that apparent authorization, the President issued a Military Order (Encl. 2). That Military Order has served as the basis for the military commissions at Guantanamo Bay.

On July 23, 2003, President Bush determined that Sulayman al Bahul was subject to the military commission process. (Encl. 3).

In early 2004, Army Major Mark Bridges and Navy Lieutenant Commander Phil Sundel were detailed to represent Mr. al Bahul. This detailing was made pursuant to DoD Military Commission Order No. 1. Paragraph 4C. (Encl 4. - please note, the MCO #1 was revised on August 1, 2005, but the applicable provisions have not changed).

Later in 2004, during the initial session of Mr. al Bahul's proceeding before the military commission, he announced that he wished to represent himself and explicitly refused to accept Major Bridges and Lieutenant Commander Sundel as his counsel. Consequently, both attorneys sought to withdraw. Chief Defense Counsel, Colonel Will Gunn denied this request as the MCO required detailed military defense counsel at all times. The attorneys then sought amendments to the commission's rules governing the accused's rights to select counsel. (Encl. 5).

The issue of the right of self-representation was briefed several times. On September 2, 2004, the defense wrote a memorandum of law on the topic (Encl. 6). Their memorandum concluded that Mr. al Bahul had a right to represent himself and that this right was universally accepted. On October 1, 2004, the prosecution wrote a response to the defense memorandum of law (Encl. 7). In their response, the prosecution concurred with the defense position that Mr. al Bahul had a right of self-representation and joined the defense in their initial request to have the rules amended to comport with both domestic and international law. The defense submitted three additional documents in support of the position – shared by defense and prosecution – that the commission's procedure needed to be changed to allow for self-representation (Encls. 8-10).

On July 14, 2005, despite both the prosecution and the defense joining in the request to amend the rules to allow for self-representation, the Appointing Authority denied the request (Encl. 11). Shortly thereafter, as they had not established an attorney/client relationship with Mr. al Bahul, both Major Bridges and Lieutenant Commander Sundel departed the Office of the Chief Defense Counsel for other assignments.

On September 14, 2005, Colonel Dwight Sullivan, Chief Defense Counsel, Office of Military Commissions, met with Mr. al Bahul in Guantanamo Bay. During that meeting, Colonel Sullivan told Mr. al Bahul that he would be assigning me to Mr. al Bahul's case. Mr. al Bahul told Colonel Sullivan that he would not accept me as his lawyer (Encl. 14).

On November 1, 2005, I was ordered to active duty from my civilian job as an Assistant Federal Public Defender in Cheyenne, Wyoming (Encl. 12). On November 3, 2005, Colonel Sullivan detailed me to represent Mr. al Bahul (Encl 13).

On November 22, 2005, the Presiding Officer in charge of Mr. al Bahul's commission sent an email to Colonel Sullivan questioning the ethical propriety of my actions – or lack of action – on behalf of Mr. al Bahul. (Encl. 15).

On November 28, 2005, the Presiding Officer issued a lengthy directive to me regarding my duties to Mr. al Bahul (Encl. 16). Page 4, paragraph 7 of his email specifically instructed me to seek advice on the potential ethical dilemma from the state bar associations of which I am a member, The Judge Advocate General of the US Army, and the DoD General Counsel. Accordingly, I am making this request.

As I mentioned above, I am licensed to practice law in Iowa and Wyoming. I am also admitted to practice in the U.S. District Court for the District of Wyoming and the Court of Appeals for the 10th Circuit.

In addition to this request of you, I am requesting opinions from the States of Wyoming and Iowa; the American Bar Association; and, the National Association of Criminal Defense Lawyers (NACDL). For your review, I am enclosing a prior opinion offered by the NACDL for you to review (Encl. 17) as it outlines some of the other

considerations a defense attorney faces, outside but related to the question I am asking you.

If you have any additional questions for me or need anymore information, please call my cell at [redacted] or email me at [redacted] as I will be away from my office often. My fax number is [redacted] I would appreciate receiving your opinion by fax. Again, I thank you for your assistance in this matter and await your opinion.

Sincerely,

Tom Fleener
Major, Judge Advocate
General's Corps
U.S. Army Reserves

# REVIEW EXHIBIT 131

**Review Exhibit (RE) 131 is curriculum vitae of Translator No. 1.**

**RE 131 is discussed briefly in *United States v. al Bahlul* at R. 21, 31 and 36.**

**RE 131 consists of 7 pages.**

**Translator No. 1 has requested, and the Presiding Officer has determined that RE 131 not be released on the Department of Defense Public Affairs web site. In this instance Translator No. 1's right to personal privacy outweighs the public interest in this information.**

**RE 131 was released to the parties in *United States v. al Bahlul*, and will be included as part of the record of trial for consideration of reviewing authorities.**

**I certify that this is an accurate summary of RE 131.**

**//signed//**

**M. Harvey**
**Chief Clerk of Commissions**

# REVIEW EXHIBIT 132

**Review Exhibit (RE) 132 is curriculum vitae of Translator No. 2.**

**RE 132 is discussed briefly in *United States v. al Bahlul* at R. 21, 31 and 36.**

**RE 132 consists of 2 pages.**

**Translator No. 2 has requested, and the Presiding Officer has determined that RE 132 not be released on the Department of Defense Public Affairs web site. In this instance Translator No. 2's right to personal privacy outweighs the public interest in this information.**

**RE 132 was released to the parties in *United States v. al Bahlul*, and will be included as part of the record of trial for consideration of reviewing authorities.**

**I certify that this is an accurate summary of RE 132.**

**//signed//**

**M. Harvey**
**Chief Clerk of Commissions**

# Filings Inventory - US v. al Bahlul

## PUBLISHED: 10 Jan 05

**Issued in accordance with POM #12-1.**
**See POM 12-1 as to counsel responsibilities.**

## This Filings Inventory includes only those matters filed since 4 Nov 2005.

# Prosecution (P designations)

| Name | Motion Filed | Response | Reply | Status /Disposition/Notes<br>0R = First filing in series<br>Letter indicates filings submitted after initial filing in the series.<br>R=Reference | RE |
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# Defense (D Designations)
# Dates in red indicate due dates

| Designation Name | Motion Filed / Attachs | Response Filed / Attachs | Reply Filed / Attachs | Status /Disposition/Notes<br>0R = First filing in series<br>Letter indicates filings submitted after initial filing in the series.<br>Ref=Reference | RE |
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# PO Designations

| Designation<br>Name<br>(PO) | Status /Disposition/Notes<br>0R = First filing in series<br>Letter indicates filings submitted after initial filing in the series.<br>Ref =Reference | RE |
|---|---|---|
| **PO 101** – Resumption of Proceedings Memo | • Sent to counsel 16 Nov by email; DC personally served at GTMO.<br>• A. Prosecution calendar (para 7b, PO 101)<br>• B. Defense reply and PO response (para 7c, PO 101), 16 Dec<br>• C. Prosecution reply to para 7c, PO 101, 12 Dec<br>• D. Defense response to PO directions (PO 101 B) and to PO 101, 19 Dec<br>• E. DC email and PO Response, 20 Dec 05 | OR - 102<br>A – 112<br>B – 123<br>C – 124<br>D -125<br>E - 126 |
| **PO 102** – Collection of Pro Se materials | • Sent to counsel 16 Nov by email; DC personally served at GTMO.<br>• A. PO Email to MAJ Fleener and ALCON on case concerning duties of detail counsel and representation, 22 Nov 05<br>• B. PO email to CDC and DDC on DDC duties, 22 Nov 05.<br>• C. DDC reply to PO 101 A, 28 Nov<br>• D. CDC email about al Bahlul's desires as to counsel 1 Dec.<br>• E. Draft request for opinion to SOCO for comment - 1 Dec 05.<br>• F. Defense request for delay to submit comments and PO decision, 1 Dec 05.<br>• G. PO request to SOCO for opinion, 6 DEC 05.<br>• H. DC request for Opinion to Iowa Bar and enclosures.<br>• I. SOCO opinion in response to PO 1 G.<br>• J. DC request for SOCO opinion less enclosures (See APO note on page 1) | OR - 101<br>A - 113<br>B - 114<br>C - 115<br>D - 116<br>E - 117<br>F - 118<br>G – 119<br>H – 128<br>I – 129<br>J - 130 |

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| **PO 103 - Docketing and Scheduling** | • Announcement Jan 06 session, defense request for delay, PO decision - 1 Dec 05<br>• A. Announcement of Jan 06 session Specific times, 9 Dec 05.<br>• B. Presence of LT[redacted] Jan session. | OR - 120<br>A - 121<br>B - 122 |
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# PROTECTIVE ORDERS

| Pro Ord # | Designation when signed | Signed Pages | Date | Topic | RE |
|---|---|---|---|---|---|
| **Pro Ord D is the first filing for ProOrds** | | | | | |
| | | 2 | 9 Jul 04 | Legal Advisor Protective Order - Classified Information | **108** |
| | | 2 | 30 Jun 04 | Legal Advisor Protective Order – Unclassified Sensitive Information | **109** |
| | | 2 | 17 Mar 04 | Legal Advisor Protective Order - Unclassified Sensitive Information | **110** |
| | | 1 | | PO Order on name of Translators | |
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Inactive Section

# Prosecution (P designations)

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Inactive Section

# Defense (D Designations)

| Designation Name | Motion Filed / Attachs | Response Filed / Attachs | Reply Filed / Attachs | Status /Disposition/Notes<br>0R = First filing in series<br>Letter indicates filings submitted after initial filing in the series.<br>Ref=Reference | RE |
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Inactive Section

# PO Designations

| Designation Name (PO) | Status /Disposition/Notes<br>0R = First filing in series<br>Letter indicates filings submitted after initial filing in the series.<br>Ref =Reference | RE |
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**OFFICE OF THE SECRETARY OF DEFENSE**
**OFFICE OF MILITARY COMMISSIONS**
**1600 DEFENSE PENTAGON**
**WASHINGTON, DC 20301-1600**

OFFICE OF THE
CHIEF PROSECUTOR

November 21, 2005

MEMORANDUM FOR LIEUTENANT COLONEL [redacted] USAFR
LIEUTENANT COMMANDER [redacted] USN
MAJOR [redacted] USA
LIEUTENANT [redacted] USNR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated August 31, 2005, and Section 3B(9) of Military Commission Instruction No. 3, dated July 15, 2005, all previous detailing orders related to U.S. v. Al-Bahlul are rescinded and the above named counsel are detailed and designated as follows:

United States v. Al-Bahlul
Detailed Prosecutor:
Lieutenant Colonel [redacted]
Detailed Assistant Prosecutors:
Lieutenant Commander [redacted]
Major [redacted]
Lieutenant [redacted]

MORRIS D. DAVIS
Colonel, U.S. Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor



Printed on Recycled Paper

# Translation of RE 135 (al Bahlul)

BOYCOTT

This boycott is the result of an objection and it is followed by a renunciation – until the time of the final punishment sentencing.

11/12/1426 Hegira (the Moslem year.)
11/1/2006

Translated by a Commission Translator

# Boycott

# مقاطعة

هذه المقاطعة نتيجة اعتراض ويعقبها إعراض -

إلى وقت الحكم الجزائي النهائي .

1426/12/11
2006/1/11

Review Exhibit 135

Page 1 Of 1

FILED WITH THE
COURT SECURITY OFFICER
CSO: [illegible]
DATE: 12/13/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| ISSAM HAMID ALI BIN ALI AL JAYFI,<br>Detainee,<br>Guantánamo Bay Naval Station,<br>Guantánamo Bay, Cuba,<br><br>HAMID ALI AL JAYFI,<br>As Next Friend of ISSAM HAMID ALI BIN ALI AL JAYFI,<br><br>OTHMAN ALI MOHAMMED AL SHAMRANY, Detainee,<br>Guantánamo Bay Naval Station,<br>Guantánamo Bay, Cuba<br><br>ALI MOHAMED OMAR AL SHOMRANY,<br>As Next Friend of OTHMAN ALI MOHAMMED AL SHAMRANY,<br><br>KHALID MOHAMMED AL THABBI,<br>Detainee,<br>Guantánamo Bay Naval Station,<br>Guantánamo Bay, Cuba,<br><br>MUHAMMED AHMED MUHAMMED AL GHURBANY, As Next Friend of KHALID MOHAMMED AL THABBI,<br><br>ALI HAMZA AHMED SULIMAN BAHLOOL, Detainee,<br>Guantánamo Bay Naval Station,<br>Guantánamo Bay, Cuba,<br><br>ABDOUL MOHAMMED AHMED BAHLOOL,<br>As Next Friend of ALI HAMZA AHMED SULIMAN BAHLOOL<br><br>SALEH MOHAMMED SELEH AL THABBII, a/k/a SALEH MOHAMMED AL DHABI,<br>Detainee,<br>Guantánamo Bay Naval Station,<br>Guantánamo Bay, Cuba, | Civ. Act. No. 1:05-cv-02104-RBW |

RE 136 (al Bahlul)
Page 1 of 38

FATMAH QHASIM AL AHMADI )
As Next Friend of SALEH MOHAMMED )
SELEH AL THABBII )
)
ABDUL AL QADER AHMED HUSSAIN, )
Detainee, )
Guantánamo Bay Naval Station )
Guantánamo Bay, Cuba, )
)
ABDULGADER AHMED HASIN )
ABOBAKER )
As Next Friend of ABDUL AL QADER )
AHMED HUSSAIN )
)
Petitioners/Plaintiffs, )
)
v. )
)
GEORGE W. BUSH, )
President of the United States )
The White House )
1600 Pennsylvania Ave., N.W. )
Washington, D.C. 20500 )
)
DONALD RUMSFELD, )
Secretary, United States )
Department of Defense )
1000 Defense Pentagon )
Washington, D.C. 20301-1000 )
)
ARMY BRIG. GEN. JAY HOOD, )
Commander, Joint Task Force )
JTF-GTMO )
APO AE 09360; and )
)
ARMY COL. MIKE BUMGARNER, )
Commander, Joint Detention )
Operations Group – JTF-GTMO )
JTF-GTMO )
APO AE 09360, and )
)
Mr. JOHN D. ALTENBURG, JR., )
Appointing Authority for Military )
Commissions )
1851 South Bell Street )
Arlington, VA 22202 )
)
Respondents/Defendants. )

**SUPPLEMENTAL PETITION OF ALI HAMZA AHMAD SULIMAN BAHLOOL FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE, DECLARATORY AND OTHER RELIEF**

One of the above named Petitioners, Ali Hamza Ahmad Suliman Bahlool ("Bahlool") through his undersigned attorneys, files this supplemental petition against Respondents for habeas and other relief. Respondents have held Bahlool for more than three years without ever demonstrating a basis for his detention. They have now charged Bahlool with "crimes" that they have made up after the fact. Respondents intend to try Bahlool for those "crimes" before a military panel that they have appointed and over which they exercise reviewing authority. The prospect of this lawless proceeding provides no basis for the continued detention of Bahlool.

In support of his Petition, Bahlool alleges as follows:

## INTRODUCTION

1. Petitioner Ali Hamza Ahmad Suliman Bahlool is currently incarcerated at United States Naval Station, Guantanamo Bay, Cuba (hereinafter "Guantanamo Bay"). Upon information and belief, Bahlool was seized in or about December 2001, in Afghanistan, and was subsequently transferred to the custody of U.S. military and intelligence personnel. Bahlool was not engaged in combat against U.S. or other forces at the time of his seizure.

2. Bahlool has been unlawfully detained at the direction of the Respondents for over three years. During the period of his initial seizure and subsequent confinement Respondents have authorized, directed and/or permitted illegal, abusive and coercive conditions of confinement and interrogation to be directed against Bahlool.[1]

3. There is no basis for Bahlool's detention. At no time did Bahlool engage in any criminal or terrorist conduct. Nor did he kill, injure, fire upon, or direct fire upon, any U.S. or Coalition Forces. Nor did he attempt any such conduct. He did not at any time commit any criminal violations, or any violations of the law of war. Nor did he ever enter into any agreement with anyone to do so. Accordingly, Bahlool brings this action seeking a writ of habeas corpus to secure his release from Respondents' unlawful detention.

4. Lacking any lawful basis for Bahlool's continued detention, Respondents now seek to justify Bahlool's detention by subjecting him to "trial" by military commission (the "Commission") on a purported war crimes charge of Respondents' own creation and definition, never before recognized under international law, and using a procedure that also has been made

[1] The information provided in this Complaint has been compiled from several sources, including counsel's personal knowledge, the Charge Sheet lodged against Bahlool by the U.S. Department of Defense (attached hereto as Exhibit 1), other information made public by the government, media reports, and counsel's independent investigation. It does not include any privileged information from Bahlool, or any confidential discovery or CLASSIFIED information that the government has provided to counsel.

up out of whole cloth. Because Respondents' war crimes charge is indisputably invalid and the Commission's process and procedures unlawful, Bahlool seeks habeas relief with respect to his unlawful detention and trial by the Commission.

5. As set forth more fully below, Bahlool also challenges numerous other unlawful aspects of his continued detention by Respondents, including, without limitation (i) Respondents' failure to afford Bahlool the protections of the Geneva Conventions and other applicable law to which he is presumptively and actually entitled, (ii) Respondents' denial of Bahlool's rights to due process and equal protection of the laws, (iii) Bahlool's continued detention in derogation of his right to speedy trial under applicable law, (iv) Respondents' reliance, in charging and detaining Bahlool for trial, on statements garnered through the use of illegal, improper, abusive and coercive means and methods of interrogation and treatment directed at Bahlool and other detainees, and (v) various other deficiencies in the Commission and/or combatant status review tribunal process and procedures.

6. Last year, the Supreme Court explained that "[c]onsistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul v. Bush*, 542 U.S. at 474, 124 S. Ct. 2686, 2692-93 (2004).

7. This is one such application. Bahlool invokes the protection of this Court and seeks the Great Writ in order to secure his release and to vindicate the fundamental rights recognized by the Supreme Court. *See Hamdi v. Rumsfeld*, 542 U.S. at 545, 124 S. Ct. 2633 n. 15 (2004); *id.* at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) "Petitioner's allegations -- that. . .they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the

United States, without access to counsel and without being charged with any wrongdoing unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" 28 U.S.C. § 2241(c)(3); *Rasul*, 542 U.S. at 488, 124 S. Ct. at 2700 (Kennedy, J., concurring) ("[a] necessary corollary of [*Johnson v.*] *Eisentrager* [, 339 U.S. 763 (1950)] is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated"), citing *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866).

**PARTIES**

8. Petitioner Bahlool, born in 1968 in Yemen, is a citizen of Yemen. The United States military assumed custody of Bahlool in or about December 2001, and he has remained in the custody of the United States continuously since that date.

9. Respondent George W. Bush is President of the United States, and executed the Military Order that created the military commissions and under which Bahlool is being detained. Respondent President Bush also designated Bahlool a person eligible for trial by the Commission, which is why Bahlool is scheduled for an unlawful trial before the Commission.

10. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States, and commands all aspects of the United States Military, including the Office of Military Commissions established by the applicable Presidential Military Order. Respondent Secretary Rumsfeld has custodial authority over Bahlool and is ultimately in charge of the prosecution of Bahlool by the Commission.

11. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force Guantanamo and, in that capacity, is responsible for Bahlool's continued and indefinite detention at Camp Echo.

12. Colonel Mike Bumgarner is the Commander of Joint Detention Operations Group... and in that capacity, is responsible for the U.S. facility where Bahlool is presently detained. He exercises immediate custody over Bahlool pursuant to orders issued by Respondent President Bush, Respondent Secretary Rumsfeld and Respondent General Hood.

13. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military Commissions, and in that capacity exercises authority over the entire Commission process.[2]

## JURISDICTION

14. This action arises under the Constitution, laws and treaties of the United States, including Articles I, II, III, and VI and the 5th and 6th Amendments, 28 U.S.C. §§1331, 1350, 1361, 1391, 2241, and 2242, 5 U.S.C. §702, the All Writs Act (28 U.S.C. §1651), 42 U.S.C. §1981, the *Bivens* doctrine [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)], and Geneva Convention (III), as well as international law more generally.

15. This Court possesses subject matter jurisdiction under 28 U.S.C. §§ 1350, 1361 and 1391,5 U.S.C. § 702, as well as the habeas corpus statute, 28 U.S.C. §2241, and the All Writs Act, 28 U.S.C. §1651. In addition, the Court may grant the relief requested under Art. 2(a)(12) of the UCMJ, 10 U.S.C. §802(a)(12), which grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantanamo. As explained above, the Supreme Court expressly held that this Court has subject matter jurisdiction to consider a habeas petition by a Guantanomo detainee in *Rasul*.

---

[2] This Supplemental Petition adds Respondent Altenburg, since his responsibility for Bahlool's detention and proceedings before the Commission was unknown to counsel prior to the filing of the initial Petition in this matter.

16. This Court has personal jurisdiction over the parties. Respondents have substantial contacts in this District.

17. Venue is proper in this Court under 28 U.S.C. §§1391(b) and (e) since a substantial part of the events, acts, and omissions giving rise to the claim occurred in this District and a Respondent may be found in the District. *See Rasul*, 542 U.S. at 484, 124 S. Ct. at 2698; *Padilla*, 542 U.S. at 426, 124 S. Ct. 2711. *See also Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004) (amended opinion) (transferring Guantanamo Bay detainee's action to the District of the District of Columbia in light of *Padilla*).

## ALLEGATIONS COMMON TO ALL COUNTS

18. Following the September 11, 2001 attack upon targets in the United States, the United States commenced military operations in Afghanistan on or about October 7, 2001 against Taliban and *al Qaeda* targets within Afghanistan. That activity was augmented twelve days later on October 19, 2001, with ground operations by U.S. forces. Through December 2001, the U.S. military action initially involved a small number of Special Forces operating on the ground in Afghanistan, and working with forces of the Northern Alliance, a consortium of armed and organized Afghan foes of the Taliban government. A substantial air campaign supported these units as well as a small number of Special Forces from other nations (hereinafter collectively the "Coalition Forces"). The Northern Alliance and Coalition Forces operated in full cooperation and coordination in their joint campaign against the Taliban and *al Qaeda*.

19. The above military activities were authorized by Congress in a "use of force" resolution passed on September 18, 2001:

> [t]hat 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.

*See* Authorization for Use of Military Force (hereinafter the "AUMF"), Pub.L. 107-40, 115 Stat. 224 (2001). *See also Rasul*, 542 U.S. at 470, 124 S. Ct. at 2690 ("[a]cting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against *al Qaeda* and the Taliban regime that had supported it").

20. Pursuant to the AUMF, the United States, in support of, and in conjunction with, the Northern Alliance, commenced military action against Afghanistan's Taliban government. Within ninety days, the Taliban government was defeated and Coalition Forces and the Northern Alliance had captured and/or apprehended a number of persons allegedly associated with the Taliban and/or *al Qaeda*. Upon information and belief among those persons was Bahlool, who was seized by the Northern Alliance and subsequently transferred to the custody of the U.S.[3] Petitioner Bahlool was not engaged in combat against U.S. or other forces at the time of his seizure.

21. Following his removal from Afghanistan by U.S personnel, Bahlool was confined on U.S. Navy vessels for several weeks. Upon information and belief, Bahlool was then transported by U.S. military aircraft to Guantanamo Bay in February 2002. Upon arrival Bahlool was placed in a special facility reserved for alien detainees denominated "enemy combatants" by

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[3] In *Hamdi* the Court found that the AUMF provided authority to seize Hamdi on the battlefield in Afghanistan. *See* 542 U.S. at 516, 124 S. Ct. at 2639. In *Hamdi*, however, the Court pointed out that "the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant." 524 U.S. at 522, 124 S. Ct. at 2642. *See also id. at* 2637; *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), *vacated by* 542 U.S. at 507, 124 S. Ct. 2633 (it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict"). Here, in contrast, there has not been any such allegation made with respect to the seizure of Bahlool. *See* Charges (attached hereto as Exhibit 1). In any event, the Supreme Court emphasized that regardless whether the seizure was authorized under the AUMF, "[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized." 542 U.S. at 521, 124 S. Ct. at 2641. *See also Padilla*, 542 U.S. at 465, 124 S. Ct. at 2735 & n. 8 (Stevens, J., *dissenting*).

Respondent President Bush and/or the Department of Defense. Initially he was confined at Camp X-Ray, and then subsequently at Camp Delta, before he was moved to his current location in Camp Echo.

22. During Bahlool's lengthy confinement by the U.S. and its proxies, Bahlool has been the subject of continued, intensive, and uncounseled interrogation, which ended only after Bahlool was detailed counsel for his Military Commission. On information and belief, this interrogation has included physical and psychological abuse.

23. A description of some of the abusive interrogation methods employed against Bahlool and other detainees are set forth in the statements from three British detainees who have since been released from Guantanamo Bay. (Their statements released publicly in the United Kingdom August 3, 2004 are attached hereto as Exhibit 2. The entire composite statement is available at http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.)

24. The coercive and illegal techniques used against Bahlool constitute torture under the definition set forth in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* February 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (hereinafter "CAT") ("any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession . . . when such pain is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[.]") *See also Khouzam v. Ashcroft*, 361 F.3d 161, 168-69 (2d Cir. 2004). The United States became a party to the CAT in 1994.

25. After more than a year and a half of confinement and interrogation, on July 3, 2003, Respondent President Bush designated Bahlool as a person eligible for trial before the Commission. The Commission was established by Presidential Military Order, dated November 13, 2001, *see* 66 Fed. Reg. 57,833 (November 13, 2001) (hereinafter "PMO"), and the August 31, 2005, Military Commission Order No. 1 (hereinafter "MCO No. 1"). (A copy of the PMO is attached hereto as Exhibit 3; a copy of MCO No. 1 is attached hereto as Exhibit 4.)[4] On June10, 2004, a charge against him was publicly released. It was approved by Respondent Altenburg on June 28, 2004. Bahlool was charged with Conspiracy. *See United States v. al Bahul*, Charge Sheet (attached hereto as Exhibit 1). Bahlool's charge was referred to the Commission on June 28, 2004. (A copy of that referral is attached hereto as Exhibit 5).

26. Some of the procedures for the military commissions under which Bahlool will be tried were set up in the MCO No. 1 (see Exhibit 4). Many other procedures will be made up as the proceedings go along, precluding the accused from having anywhere close to a full understanding of the procedures under which he will be tried. One such example, evident from the nascent proceedings that have occurred thus far in the Commission process, is that a member of the Commission can be challenged "for good cause" – but what constitutes good cause is not defined under Commission rules. Nor are the standards by which "good cause" is evaluated articulated in the Commission rules. The Presiding Officer acknowledged that gap, and declined to define "good cause" conclusively, instead directing counsel to brief this issue for the Appointing Authority.

27. Even those procedures that have been clearly established are deficient and will not result in a full and fair trial. Under these existing procedures, Respondent Secretary Rumsfeld

[4] The Presidential designation of Bahlool is CLASSIFIED and thus is not included here.

has appointed an Appointing Authority, Respondent John Altenburg, a retired Army officer who is currently employed by the Department of Defense in a civilian capacity. The Appointing Authority will in turn appoint members of the Commission who will decide questions of both law and fact. *Id.* at ¶ 4. Only the presiding officer will be required to have any legal experience. The defendant will have no peremptory challenges with respect to members of the Commissions. Thus, Respondent Secretary Rumsfeld and his appointee, who are investigating and prosecuting Bahlool, will ultimately be responsible for choosing the panel that will judge him. *Id.* at ¶ 6.

28. During the military commission proceedings, there is no bar to admission of evidence that courts normally deem unreliable -- such as statements coerced from Bahlool at a time when he had no counsel, or statements coerced from other detainees. Indeed, witness statements can be used even if the witnesses are not available to testify and their testimony is presented as unsworn hearsay.

29. There will be no direct appeal from a decision of the Commission. *Id.* The proceedings will be reviewed, but not in federal court. The first review will be conducted by the Appointing Authority (who appointed the Commission members, brought the charges and decided any interlocutory legal issues). *Id.*[5] The second review will be by a panel consisting of four members already appointed by the Respondent Secretary of Defense, including two members who were on the very panel that crafted the trial procedures, *id.*, another member who has written an op-ed piece stating that, "[i]t is clear that the September 11 terrorists and

[5] The MCO's clear requirement that case-dispositive motions be certified to the Appointing Authority is in irreconcilable conflict with the PMO's directive that the Commission is the determinant of all issues of "law and fact." Thus, the Commission rules themselves fail to adhere to the PMO, and are invalid. MCO No. 1, § 4(A)(5)(d).

detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War," and a fourth member who is a close friend of Respondent Secretary Rumsfeld.[6] Subsequent review will be by the Secretary of Defense and/or the President. *Id.* Bahlool's accusers will thus be the "appellate court." Thus, not only has Bahlool been held without trial for over three years but there is no future prospect of a trial by an impartial tribunal using only reliable evidence. Moreover, even if the initial factfinder were to overcome its bias and find Bahlool not guilty, this would not guarantee an acquittal. At any stage in the review process, the reviewers can send the case back for further proceedings -- perhaps even after a finding of not guilty.

30. Just as there has not been and will not be an unbiased determination that Bahlool is guilty of any crime, there also has been no determination by a neutral tribunal that Bahlool can justifiably be held as an enemy combatant. On June 28, 2004, the United States Supreme Court decided *Hamdi*, 542 U.S. at 507, 124 S. Ct. 2633 (2004), in which it determined that individuals could not be detained as enemy combatants unless such a determination was made by a neutral tribunal that accorded them due process.

31. Subsequently, the United States created a Combatant Status Review Tribunal ("CSRT") to make determinations as to whether those held were enemy combatants. The CSRT was hastily formed in the wake of the Supreme Court's decisions in *Rasul* and *Hamdi*, and does not qualify as the neutral tribunals that satisfies the requirements of due process. For example,

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[6] Stephen J. Fortunato, Jr., *A Court of Cronies*, In These Times (Jun. 28, 2004) *available at* http://www.inthesetimes.com/site/main/article/a_court_of_cronies.

the CSRT fails even to meet the standards for Article 5 hearings as set forth in U.S. Army regulations.[7]

32. The CSRT varies from both the Army regulations and *Hamdi* (and due process generally) materially and dispositively, including with respect to, *inter alia*: (1) the standard of proof required [Regulation 190-8, §1-6(e)(9)'s preponderance of the evidence standard as opposed to the CSRT's "rebuttable presumption" that the detainee is an enemy combatant][8]; (2) the availability of an appeal by the government of a ruling favorable to the detainee; (3) the categories in which a detainee may be placed (*i.e.*, the CSRT fails to allow for POW status, but instead purport to determine only whether or not a detainee is an "enemy combatant"); (4) the detainee's right to counsel and/or representation by a personal representative of choice before the Tribunal; (5) whether the hearings are open to the public; (6) the government's reserved power to rescind or change the conditions of the Tribunals at its whim; (7) the composition of the Tribunal(s) (in contrast with *Hamdi's* requirement of "neutral decisionmaker[s,]" 542 U.S. at 534, 124 S. Ct. at 2648); and (8) even the definition of "enemy combatant." These deficiencies are individually and collectively fatal to the CSRT.[9]

33. Moreover, while there may have been a CSRT determination for Bahlool, he has now been held for nearly four years without a determination by a neutral tribunal that he is an

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[7] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997).

[8] Indeed, the Order implementing the Combatant Status Review Tribunals informs tribunal members that the detainee's status has already been predetermined by their superiors: "[e]ach detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." *See* Dep't of Defense Order No. 651-04, (July 07, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html (attached hereto as Exhibit 6).

[9] Bahlool has been subjected to a CSRT, although it failed to make a determination regarding his legal status. On July 16, 2004, Bahlool's then-detailed military counsel requested to serve as his personal representative (a copy of which is attached hereto as Exhibit 7). This request was summarily denied and counsel was informed *after the fact* of the result of the hearing (a copy is attached hereto as Exhibit 8).

enemy combatant or a trial to determine whether he has committed war crimes. This delay has greatly prejudiced the likely result of any proceeding that would now occur.

34. On information and belief, the government has relied upon and intends to use at trial, statements by persons who were detainees at Guantanamo Bay, but whom have since been released.

35. Thus, the prejudice Bahlool has suffered as a result of the denial of his rights to a speedy trial have been multifaceted:

(a) he was denied access to counsel for approximately 2 1/2 years, during which time he was interrogated under coercive and illegal conditions;

(b) persons whose statements against Bahlool may be introduced by the government at the Commission trial are no longer at Guantanamo Bay, and therefore, are no longer accessible as witnesses. As a result, not only will the government attempt to admit such statements in evidence without providing Bahlool any opportunity for cross-examination, but those persons will not be available to be called as witnesses. Moreover, with respect to other former detainees whom the government does not intend to call (or to introduce statements from), but whom Bahlool would call as witnesses, the inordinate delay in providing Bahlool an appropriate hearing has rendered them unavailable as well.

36. Consequently, as a result of the denial of Bahlool's speedy trial rights, he will be deprived of the rights to confront the evidence against him, and to present his defense at Commission proceedings. The absence of a speedy trial is another ground for Bahlool's release.

## CLAIMS FOR RELIEF

### COUNT ONE

### RESPONDENTS MAY NOT DETAIN BAHLOOL FOR TRIAL BEFORE AN INVALIDLY CONSTITUTED MILITARY COMMISSION

37. Bahlool re-alleges and incorporates by reference paragraphs 1 through 36 above.

38. The Commission in this case is invalid and improperly constituted, and the grant of subject matter jurisdiction to the Commission is overbroad and unlawful for at least the following reasons:

A. **The Commission lacks jurisdiction because the President lacked congressional authorization to establish the Commission**

39. The Supreme Court has noted that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 872 (1952) (Jackson, J. concurring). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2650 (2004). The Constitution expressly grants Congress the sole power to create military commissions and define offenses to be tried by them. The Constitution vests Congress, not the Executive, with "All legislative powers," with the power "[t]o define and punish offences against the Law of Nations" and "[t]o constitute Tribunals inferior to the Supreme Court." U.S. Const., Art. I § 8, cl. 9, cl. 10.

40. Congress has not authorized the establishment of military commissions to try individuals captured during the Afghanistan war. Accordingly, Respondents' detention of Bahlool for trial by the Commission is improper, unlawful and invalid as an *ultra vires* exercise of authority. It exceeds the President's powers under Article II and thus violates the constitutional principles of separation of powers.

41. Bahlool's status as a Yemeni citizen does not confer unlimited power on Respondents to operate outside of the Constitutional framework. The Supreme Court's assertion of jurisdiction for the federal courts in *Rasul* establishes indisputably that aliens held at the base in Guantanamo Bay, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C. § 2241. *Rasul*, 542 U.S. at 481, 124 S. Ct. at 2696 ("[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is

little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship") (footnote omitted). Thus, both Congress and the judiciary possess constitutional authority to check and balance the power of the Executive to act unilaterally. *Rasul*, 542 U.S. at 487, 124 S. Ct. at 2700 (Kennedy, J., concurring).

**B. The Appointing Authority lacks power to exercise military authority to appoint a military commission.**

42. Because there is no statute expressly stating who can appoint members of a Commission, the power to appoint members of a military commission is based upon the power to convene a general courts-martial. Only the Executive, the Secretary of Defense (or Secretaries of the other branches of the armed forces) or a commanding officer to whom the Secretary has delegated authority may convene a general court-martial.[10]

43. In this case, the Respondent Secretary Rumsfeld purportedly has delegated authority to Respondent Altenburg to appoint the members of military commissions.

44. Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

45. As a result, the Commission by which the Respondents intend to try Bahlool is improperly constituted and invalid, such that Bahlool is entitled to a writ of habeas corpus preventing his unlawful detention and trial before that improper tribunal.

**C. The Commission lacks jurisdiction to try individuals at Guantanamo Bay.**

46. Military commissions have no jurisdiction to try individuals far from the "locality of actual war." *See Milligan*, 71 U.S. at 127.

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[10] *See* 10 U.S.C. §822.

47. The Commission that will try Bahlool is situated far outside any zone of conflict or occupation, and Bahlool's alleged conduct on which the charges are based did not occur at Guantanamo Bay. As such, the Commission lacks authority to try Bahlool, and therefore, the Respondents lack the authority to continue to detain Bahlool for any purported trial at Guantanamo Bay.

## COUNT TWO

## RESPONDENTS MAY NOT DETAIN BAHLOOL FOR AN OFFENSE THAT HAS BEEN CREATED BY THE PRESIDENT AFTER THE FACT

48. Bahlool alleges and incorporates by reference paragraphs 1 through 47 above.

49. Respondent President Bush is attempting to try Bahlool for a crime that he created long after the alleged "offenses" were committed.

50. The offense stated in the charge against Bahlool– conspiracy – did not previously exist as an offense. This "offense" was in effect created by the PMO, MCO No. 1, and Military Commission Instruction No. 2 (attached hereto as Exhibit 9), well after it was allegedly committed by Bahlool. In essence, the government alleges that Bahlool is *criminally* liable for allegedly conspiring to participate in combat against the United States and its allies. That has never been a criminal offense.

### A. The Executive cannot define crimes.

51. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations." Absent Congressional authorization, the Executive lacks the power to define specific offenses. If he attempts to do so, as he has done here, his actions are *ultra vires* and

violate the principles of separation of powers. Accordingly, Bahlool may not be detained for trial on a newly-created offense established and defined solely by the President.

B. Crimes cannot be defined after the fact.

52. In addition, any charges instituted by the Commission must constitute offenses under the law of war as it existed at the time the alleged conduct was committed. Applying laws created after the conduct (such as the definition of offenses set forth in MCO No. 2 and that which has been included in the Charge against Bahlool) would violate the *ex post facto* clause of the Constitution (Art. 1, §9, cl. 3) and the principle that a person must have reasonable notice of the bounds of an offense. (Offenses defined to criminalize the conduct of a single person or group of people – such as those in MCO No. 2 also violate the Constitutional prohibition on bills of attainder.)

53. Since the Charge does not allege an offense against Bahlool under the law of war as it existed at the time he allegedly committed these acts, Bahlool cannot be detained as a result of this Charge. Accordingly, Bahlool is entitled to a writ of habeas corpus, and Bahlool should be released immediately.

## COUNT THREE

## RESPONDENTS MAY NOT DETAIN BAHLOOL FOR TRIAL ON A CHARGE OUTSIDE THE JURISDICTION OF THE MILITARY COMMISSION

54. Bahlool re-alleges and incorporates by reference paragraphs 1 through 53 above.

55. Bahlool's confinement is unlawful because he is being detained to face a charge before a Commission that is not empowered to hear and/or adjudicate the charge instituted against him. Bahlool's continued detention purportedly to face trial on the charge leveled against him is unlawful because the charge is outside the parameters established by the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. §801, *et seq.*, the statutory scheme that controls

military detentions and that limits the offenses triable by military commissions (even in instances where Congress has provided any jurisdiction to the military commissions, which it has not with respect to the conflict in Afghanistan).

56. Under the UCMJ, military commissions may not hear and adjudicate any offenses other than those that are recognized by the traditional law of war or those that Congress has expressly authorized them to hear. Here, the offense charged is not within either of these categories.

57. The purported offense of conspiracy is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Because civil law countries do not recognize a crime of conspiracy, conspiracy has never been part of the laws of war. No international criminal convention has ever recognized conspiracy to violate the laws of war as a crime. This includes the Geneva Conventions, as well as those setting up the international criminal tribunals in Yugoslavia and Rwanda, as well as the international criminal court. Indeed, the government is making up charges that have been specifically rejected as violations of the laws of war -- including at Nuremburg, for example.

58. As a plurality of the Supreme Court held in *Reid v. Covert*:

> [t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

59. Since the charge does not allege any offense against Bahlool under the law of war or express statutory authority, the Commission lacks jurisdiction to try and/or punish Bahlool for

those offenses. Accordingly, Bahlool is entitled to a writ of habeas corpus, and should be released immediately.

## COUNT FOUR

## THE MILITARY COMMISSION PROCEDURES VIOLATE BAHLOOL'S RIGHTS UNDER STATUTORY, CONSTITUTIONAL, AND INTERNATIONAL LAW

60. Bahlool re-alleges and incorporates by reference paragraphs 1 through 59 above.

61. Even if the Commission had jurisdiction, Bahlool's detention to stand trial before the Commission still would be unlawful because the Commission's procedures violate applicable principles of statutory, constitutional, and international law.

62. In a series of "Military Commission Orders" (the "MCOs"), issued on March 21, 2002, Respondent Secretary Rumsfeld prescribed the procedural rules of these special military commissions. If Bahlool is tried according to these proposed procedures, he will receive less protection than he is entitled to under American law, the Constitution, and international law and treaties. The procedures set forth by the MCOs provide Bahlool with far less protection than those set forth in the UCMJ. The MCOs violate Bahlool's rights to certain basic procedural safeguards. The MCOs fail to provide Bahlool an impartial tribunal to adjudicate the charges against *him* or review those charges. Bahlool's accusers effectively appoint the "judge and jury" and then review their decision. And during these proceedings themselves, his accusers can introduce unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

63. The absence of procedural protections makes the Commission inadequate as a matter of law.

### A. The UCMJ

64. Bahlool is entitled to the protections of the basic trial rights set forth by Congress in the UCMJ. By its own terms, the UCMJ applies to all persons, including Bahlool, who are detained within the territory or leased properties of the United States. And the UCMJ prohibits biased tribunals and the use of unreliable evidence of the sort the commissions intend to permit.

### B. The Geneva Convention

65. The Geneva Convention requires that prisoners of war ("POW"s), as defined by the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, be treated with the same procedural protections as the soldiers of the country detaining them.[11] Under Article 5 of the Geneva Convention (III) ("Article 5"), Bahlool is entitled to be treated as a POW until a competent tribunal has determined otherwise.[12] As a result, he is entitled to the procedural protections that would apply in a court martial.

66. Even if Bahlool were not a prisoner of war, any proceeding would still have to meet the requirements of Common Article III of the Geneva Convention and Article 75 of Protocol I to the Geneva Conventions. These provide that conviction can only be pronounced by an impartial court respecting generally recognized principles of judicial procedure. Article 75 of Protocol I to the Geneva Conventions specifically provides that no one can be compelled to confess guilt. Bahlool's multi-year period of interrogation certainly defies the requirements of Article 75. These requirements are not met by the Commission.

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[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War: August 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. The Geneva Convention has also been codified in the UCMJ.

[12] *See id.* at Art. 5.

C. The Due Process Clause

67. The Constitution's guarantee of due process also guarantees Bahlool the basic trial rights he will be denied before the Commission. A trial without these basic procedural safeguards lacks the fundamental fairness required in any judicial proceedings -- especially in criminal proceedings that can result in life imprisonment.

68. Since the Commission procedures violate statutory, constitutional, and international law, and in so doing, fail to provide Bahlool with the basic safeguards necessary to constitute a fundamentally fair criminal proceedings, Bahlool is entitled to a writ of habeas corpus holding these proceedings to be illegitimate, and should be released immediately.

## COUNT FIVE

## TRIAL BEFORE THE COMMISSION VIOLATES BAHLOOL'S RIGHT TO EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES

69. Bahlool re-alleges and incorporates by reference paragraphs 1 through 68 above.

A. Bahlool's detention violates the Equal Protection Clause.

70. Bahlool is being detained by Respondents under the claimed authority of the PMO and MCO No. 1. These Orders violate Bahlool's right to equal protection of the laws of the United States. Under the PMO and MCO No. 1, Bahlool may be held for trial by the Commission only because of his alienage, since the Orders, by their terms, apply *only* to *non*-citizens.[13] Consequently, thus detention runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution.

[13] Military Order of November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (November 13, 2001); Presidential Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (attached as Exhibit 3).

71. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, the government cannot show a compelling governmental reason, advanced through the least restrictive means, for granting *citizens* access to the fundamental protections of civilian justice (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules developed by the legislature and enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority), but affording *non-citizens* a distinctly less protective and inferior brand of adjudication. While the government may have latitude in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

72. Thus, the blatant and purposeful discriminatory nature and impact of MCO No. 1 violates the Equal Protection clause.

**B. Bahlool's detention violates 42 U.S.C. § 1981.**

73. Bahlool's detention for trial by the Commission also violates 42 U.S.C. § 1981.[14] That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Bahlool is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as Bahlool could

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[14] 42 U.S.C. §1981(a) states in its entirety:
[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

not be detained under the PMO and held for trial before the Commission. Accordingly, Bahlool's detention for trial by the Commission on that discriminatory basis is unlawful.

74. Respondents have detained Bahlool for trial before the Commission in violation of equal protection of the laws of the United States.

75. Accordingly, Bahlool is entitled to a writ of habeas corpus, a determination that the Commission proceedings against him are unlawful, and he should be released immediately.

**COUNT SIX**
**RESPONDENTS FAIL TO**
**JUSTIFY HOLDING BAHLOOL AS AN ENEMY COMBATANT**

76. Bahlool re-alleges and incorporates by reference paragraphs 1 through 75 above.

77. Just as the government has no authority to detain Bahlool for his alleged violation under a nonexistent version of the law of war, the government has no authority to detain Bahlool as an enemy combatant. Respondents' actions to date in detaining Bahlool constitute a violation of the process accorded persons seized by the military in times of armed conflict as defined by Geneva Conventions III and IV and customary international law, as well as being inconsistent with the provisions set forth below.

**A. Under *Hamdi*, the Due Process Clause requires a neutral tribunal with significant procedural protections to determine whether Bahlool is an enemy combatant.**

78. No tribunal has determined that Bahlool is an enemy combatant.

79. The CSRT process and procedures that have now been established violate due process at least with respect to: (1) the failure to adhere to an appropriate standard of proof; (2) the granting of an appeal to the government of a determination favorable to the detainee; (3) the failure to make an appropriate status determination by limiting the inquiry to consideration only of "enemy combatant" status; (4) the denial of a detainee's right to counsel or

other appropriate representation; (5) the denial of a public hearing; (6) the government's power to arbitrarily rescind or change the CSRT process and procedures; and (7) the failure to constitute the CSRT in a manner to assure a neutral decision maker.

### B. The Geneva Convention and army regulations require a determination by a fair tribunal.

80. Under Article 5 of the Geneva Convention, Bahlool is entitled to a "competent tribunal" to determine whether he can be held as an enemy combatant.[15] The same procedural deficiencies that render the CSRT proceedings inadequate for purposes of due process also render the CSRT deficient as a competent tribunal. Army Regulations 190-8 and the Administrative Procedures Act also show these procedures are unlawful as, for example, the burden of proof is not consistent with that established in the regulations.

81. Moreover, it is now too late to establish a competent tribunal. Article 5 of Geneva Convention III, provides that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in [Article 4 of the Geneva Convention (III), defining the different categories of belligerents,] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[16]

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[15] *See id.* at Art. 5.

[16] *Id.* at Art. 5. Geneva Convention (III) revised the Geneva Convention relative to the Treatment of Prisoner of War of July 27, 1929, which followed the 18 October 1907 Hague Conventions [Relative to the Opening of Hostilities (III), Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land (IV), and Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (V)] , and was enacted concurrent with the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces In the Field, Geneva, 12 August 1949 ["Geneva Convention (I)"], the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 ["Geneva Convention (II)"], Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ["Geneva Convention (IV)"]. Subsequently, two Protocols Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 8 June 1977, and relating to the Protection of Victims of Non-International. Armed Conflicts (continued...)

82. Respondents have unlawfully detained Bahlool in violation of their obligation to treat Bahlool presumptively as a POW, as required by Article 5, and in violation of the procedural requirements of the Third and Fourth Geneva Conventions and customary international law more generally. Thus, the government's failure to accord Petitioner Bahlool the protections of Article 5 violates the provisions of Geneva Convention (III) as well as the U.S. military regulations promulgated to implement them.[17]

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("Protocol II"), 8 June 1977. The United States is not a signatory to Protocol I, but Australia and many other nations are.

[17] In addition, in *Hamdi*, Justice Souter, in his concurring and dissenting opinion (joined by Judge Ginsburg), pointed out that under Respondents' stated position, "the Geneva Convention applies to the Taliban detainees[.]" Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), www.whitehouse.gov/news/releases/2002/ 02/20020207-13.html (available in Clerk of Court's case file) (hereinafter White House Press Release) (cited in Brief for Respondents 24, n. 9)[.] Hamdi is such a detainee according to the Government's own account, because, under that account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3320, T. I. A. S. No. 3364." 542 U.S. at 548, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*).[17]

While ultimately noting that "[w]hether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point[.]" 542 U.S. at 551, 124 S. Ct. at 2658-59, Justice Souter (and Justice Ginsberg) nevertheless stated that "[f]or now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi." 542 U.S. at 548, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*). Justice Souter also expressed his concern that

> [b]y holding [Mr. Hamdi] incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. See Brief for Respondents 24; White House Press Release. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5, 6 U.S. T., at 3324.

542 U.S. at 548, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*). *See also id.* [noting that government's position is "apparently at odds with the [applicable] military regulation," Army Reg. 190-8, §§ 1-5, 1-6 (1997)].

83. Respondents have deliberately contravened the requirement that Bahlool's status be determined in order to subject Bahlool to improper and illegal interrogation techniques that violate not only Geneva Convention (III), but also the United States Constitution (Fifth and Sixth Amendments), treaties to which the U.S. is a signatory, and international and common law.

### C. The government cannot continue to hold Bahlool as an enemy combatant because it has not shown that he is one.

84. The government has not come forward with any proof of Bahlool's combatant status. Under the Constitution, the Geneva Conventions, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man, Bahlool cannot be held arbitrarily. Bahlool is entitled to a judicial determination of his status. In order to hold Bahlool as an enemy combatant, the government must demonstrate that he is an enemy combatant. If it does this, it still must accord him prisoner of war status. And absent a showing that Bahlool is an enemy combatant, Bahlool is entitled to release.

### D. The government cannot continue to hold Bahlool under its own regulations

85. Indeed, even under the Army's own Regulations 190-8 at 1-6(g), "Persons who have been determined not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[18]

86. By arbitrarily and capriciously detaining Petitioner in custody for over two and a half years while claiming he is not entitled to prisoner of war status, Respondents have acted and continue to act *ultra vires* and in violation of the Administrative Procedures Act, 5 U.S.C. §

[18] *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §. 1-6(g), (1997).

706(2). Under the Army's own regulations, Petitioner cannot be held unless he has committed specific acts under which he can be punished. But as we have seen in the Counts on the Commission, the government has not charged Petitioner with any acts that could form a basis to hold him.

### E. Under the Alien Tort Claims Act, Respondents Cannot Continue to Detain Petitioner Bahlool.

87. By arbitrarily holding Petitioner without any justification for doing so and subjecting him to cruel, inhuman or degrading treatment, including torture, Respondents have acted in violation of the law of nations under the Alien Tort Claims Act, 28 U.S.C. § 1350 in that the acts violated customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

### F. The government cannot continue to hold Bahlool as an enemy combatant once hostilities have ended.

88. Under Article 118 of Geneva Convention (III), "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *See also Hamdi*, 542 U.S. at 518, 124 S. Ct. at 2640-41. Respondents and their agents have acknowledged that hostilities in Afghanistan have ceased or will soon cease (even if they were ongoing to some extent until shortly before the Supreme Court's decision in *Hamdi*). Indeed, the Chairman of the Joint Chiefs of Staff recently commented with respect to security in Afghanistan, "Security-wise, the *al Qaeda* threat is virtually nonexistent in the country."[19] Similarly, Respondent Secretary Rumsfeld, in a joint May 1, 2003 press conference with Afghan President Hamid Karzai in

[19] *See* Armed Forces Information Service, *Joint Chiefs Chairman Notes Improvement In Afghanistan* (Aug. 16, 2004), *at* www.defenselink.mil/news/Aug2004/n08112004_2004081207.html.

Washington, announced that "we're at a point where we clearly have moved from major combat activity to a period of stability and stabilization and reconstruction activities. The bulk of this country today is permissive, it's secure."[20]

89. Bahlool is presumptively a POW entitled to all protections afforded by Geneva Convention (III), including, under Article 118, release after hostilities have ceased.

90. Bahlool also is entitled to the protection of Common Article 3 of Geneva Convention (III). Article 3(1)(d) prohibits the contracting parties from "passing. . . sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

91. In this case, the prolonged confinement of Bahlool without charge, and without process to contest his guilt or challenge his detention, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people, in violation of Article 3 of the Geneva Convention (III), and in violation of the due process clause of the Fifth Amendment. Further, Respondents' confinement of Bahlool is a form of punishment in violation of the 8th Amendment to the Constitution. Accordingly, Bahlool is entitled to a writ of habeas corpus and should be released immediately.

## COUNT SEVEN

## RESPONDENTS HAVE DENIED BAHLOOL THE RIGHT TO A SPEEDY TRIAL AND THE RIGHT TO BE FREE FROM UNREASONABLE PRE-TRIAL CONFINEMENT

92. Bahlool re-alleges and incorporates by reference paragraphs 1 though 91 above.

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[20] *See CNN Rumsfeld: Major combat over in Afghanistan* (May 1, 2003) *at* http://www.cnn.com/2003/WORLD/asiapcf/central/05/01/afghan.combat; *See also* Armed Forces Information Service, *News Articles*, (May 1, 2003) *at* http://www.defenselink.mil/news/May2003/n05012003_200305016.html.

A. **Bahlool was entitled to a speedy trial under the UCMJ.**

93. The PMO, pursuant to which Bahlool has been detained for trial, purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the PMO, Respondent President Bush relied, in part, on his authority under 10 U.S.C. §836, which allows the Executive to prescribe rules for military commissions so long as they are not inconsistent with the UCMJ.

94. However, the PMO, and its implementation through MCO No. 1, clearly contravene Article 10 of the UCMJ, 10 U.S.C. §810, which provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

> [w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

95. Bahlool is a person subject to the UCMJ by virtue of Respondent President Bush's PMO and MCO No. 1, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. Under the Supreme Court's decision in *Rasul*, 542 U.S. at 480, 124 S. Ct. at 2696-98, Guantanamo Bay qualifies under both prongs.

96. The type of delays to which Bahlool has been subjected are intolerable in the absence of extraordinary or compelling circumstances. Here, the Respondents have not provided any reason whatsoever for their inordinate delays in charging Bahlool. Since Respondents did not take "immediate steps . . . to inform" Bahlool "of the specific wrong of which he is accused,"

they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his confinement.

B. **Bahlool was entitled to a speedy trial under the Geneva Convention.**

97. Bahlool's lengthy pre-trial confinement violates Article 103 of Geneva Convention (III), as well as United States government regulations. Article 103 of Geneva Convention (III) provides that:

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

6 U.S.T. 3316, 3394, 75 U.N.T.S. 135 (emphasis added).

98. In addition, Article 5 of Geneva Convention (III) declares that:

> should any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a P.O.W. under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

99. Likewise, §1-6(a) U.S Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, requires that United States military forces abide by the provisions of Article 5 of Geneva Convention (III). Similarly, the Commander's Handbook on the Law of Naval Operations states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated." Department of the Navy, NWP 1-14M, The Commander's Handbook on the Law of Naval Operations 11.7 (1995).

100. Respondents are under a clear nondiscretionary duty under Geneva Convention (III), and under the U.S. Army's (and Navy's) own regulations to release Bahlool

because he has been detained in segregation for more than three months – indeed, for many, many more months than the permissible period.

101. Even if Bahlool were not a presumptive POW, the Geneva Convention would not sanction such delay. The Geneva Convention requires that all civilians and protected persons must be "promptly informed" of the charges and brought to trial "as rapidly as possible." Geneva Convention IV, art. 7. Similarly the fundamental guarantees of Protocol I require that Bahlool be "informed without delay" of the particulars of charges, and incorporate the International Covenant on Civil and Political Rights.

C. Bahlool was entitled to a speedy trial under the Sixth Amendment.

102. Moreover, the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Respondents' unlawful detention violates Bahlool's right to a speedy trial.

103. Respondents have denied Bahlool his right to a speedy trial as required by American law, the Constitution, and international law and treaty, and Bahlool therefore is entitled to a writ of habeas corpus and immediate release.

## COUNT EIGHT

## THE ABUSE, MISTREATMENT, AND RELATED INTERROGATION OF BAHLOOL CONSTITUTES SHOCKING AND OFFENSIVE GOVERNMENT CONDUCT DENYING HIM DUE PROCESS

104. Bahlool re-alleges and incorporates by reference paragraphs 1 through 103 above.

105. The charge asserted against Bahlool cannot properly justify his detention because it is based on unlawfully obtained statements from Bahlool and other detainees (at Guantanamo Bay and elsewhere). *See* Composite Statement (attached hereto as Exhibit 2). Those statements have been procured via coercive and "aggressive" interrogation techniques and environment that

not only violate Bahlool's Fifth Amendment right to remain silent, his Sixth Amendment right to counsel (with respect to his own statements), and his Eighth Amendment right to be free from cruel and unusual punishment, but also "shock the conscience" and thereby violate Bahlool's Fifth Amendment Due Process rights (with respect to his own statements as well as those of other detainees). Those techniques also violate Bahlool's rights under Geneva Convention (III), the CAT, the UCMJ, the ATCA (which prohibits both torture and cruel, inhuman and degrading treatment), Army Regulation 190-8 and the APA, and customary international law. The illegitimacy of basing Bahlool's prosecution by the Commission upon statements obtained through coercive interrogation arises not only from the volume and degree of abuse, but also from the fact that statements obtained via coercion and a naked reward/punishment system are simply not reliable[21] — and certainly not sufficiently so to find Bahlool guilty beyond a reasonable doubt, and imprison him as a result. Article 99 of the Geneva Convention (III) specifically provides that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."[22] A process

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[21] Dissenting in *Padilla*, Justice Stevens cautioned:

> [Executive detention] may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

542 U.S. at 465, 124 S. Ct. at 2735 (Stevens, J., *dissenting*).

[22] The National Commission on Terrorist Attacks Upon the United States, 108th Cong., The 9/11 Commission Report 380 (Gov't. Printing Office 2004), *at* http://www.9-11 commission.gov/report/911/Report.pdf (hereinafter "the 9/11 Commission"), in its Final Report published last month, recognized the importance of Geneva Convention (III) and international law in the treatment of detainees. In fact, the 9/11 Commission included among its recommendations that:

> [t]he United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was

(continued...)

that permits such unlawful extraction and use of improperly obtained statements to form the basis of charges or at trial cannot stand. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973) (acknowledging that there could exist "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"), *citing [cf.] Rochin v. California*, 342 U.S. 165 (152). As a result, Bahlool also is entitled to habeas relief on that basis.

106. Since the abuse, mistreatment and related interrogations of Bahlool constitutes such shocking and offensive government conduct, Bahlool has been denied his right to due process. Consequently, the only remedy capable of vindicating Bahlool's rights is the grant of a writ of habeas corpus, dismissal of the Commission charges against Bahlool, and an order requiring Bahlool's release.

## PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant him the following relief:

Issue the writ of mandamus or issue an Order directing Respondents to show cause why a writ of habeas corpus should not be granted and why Bahlool should not be immediately released;

1. If an Order to Show Cause is issued, to include as part of the Order a prompt schedule to receive briefing from the parties, including a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of Petitioner Bahlool as appropriate;

2. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner Bahlool;

3. Enter an Order declaring the Combatant Status Review Tribunal unconstitutional and invalid, and enjoin its operation with respect to Petitioner Bahlool; and

4. Issue a writ of mandamus and an Order that orders Respondents not to use the

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specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

*Id.*

PMO and/or the Military Commission Orders and Instructions to detain Bahlool, or adjudicate charges against Petitioner Bahlool, or conduct any proceedings related to such charges, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner Bahlool and are therefore *ultra vires* and illegal;

5. After notice and hearing, determine and declare that Petitioner Bahlool's detention violates the Constitution, laws, treaties, and regulations of the United States; that the PMO is unconstitutional; that Bahlool has been denied a speedy trial; and that Respondents lack any jurisdiction over Petitioner Bahlool;

6. After notice and hearing, issue a writ of mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Petitioner Bahlool immediately;

7. Grant a writ of habeas corpus on behalf of Petitioner Bahlool ordering his immediate release;

8. Enter an Order that the Court shall retain jurisdiction over this matter to permit Petitioner Bahlool to respond to arguments advanced by Respondents on matters related to his continued detention;

9. Grant such other and further relief on behalf of Petitioner Bahlool and against Respondents as this Court deems just and proper.

Respectfully submitted,

Counsel for Petitioners/Plaintiffs:

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December 13, 2005

**CERTIFICATE OF REPRESENTATION WITHOUT COMPENSATION**

Counsel for Petitioner Bahlool, pursuant to L.Cv. R. 83.2(g), certify that they are representing Petitioner without compensation.

Respectfully submitted,

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December 13, 2005

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

3 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Major Thomas A. Fleener, JA, USAR

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4.C and 5.D of Military Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. al Bahlul by a competent authority.

2. In your representation of Mr. al Bahlul, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.

3. You are directed to inform Mr. al Bahlul of his rights before a Military Commission. In the event that Mr. al Bahlul chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel as his own expense, you shall inform me as soon as possible.

4. In the event that you become aware of a conflict of interest arising from the representation of Mr. al Bahlul before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by the Department of Defense General Counsel.

5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. al Bahlul.

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

cc:
Colonel Morris Davis
Brigadier General Thomas L. Hemingway
Mr. [redacted]

**Attachment of a collection of Voir Dire materials concerning the Presiding Officer, Colonel Peter E. Brownback III, consisting of:**

a. Biographical Summary of the Presiding Officer (1 page).
b. Answers to Trial Guide Questions prepared by the Presiding Officer, 27 July 2004 (2 pages).
c. Answers Concerning Certain Personal Relationships prepared by the Presiding Officer, 6 August 2004 (2 pages).
d. Questionnaire #2 prepared by the Presiding Officer, 18 August 2004 (7 pages.)
e. Extract, Hamdan ROT - Voir Dire of the Presiding Officer - 24 August 2004 (22 pages).
f. Extract, Hicks ROT - Voir Dire of Presiding Officer - 25 August 2004 (20 pages).

Biographical Summary

Peter E. Brownback III

[redacted]

Received a Regular Army commission as an infantry officer in June 1969.
After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course – June 1973 - May 1974.

Funded Legal Education Program student at [redacted] Summers at Fort Lee working as assistant trial and assistant defense counsel.

Admitted to Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church, VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare, FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG, 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May 91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Recalled to active duty on 14 July 2004.

AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

PERSONAL: [redacted]

**Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback (Taken from the Draft Trial Guide.)**

1. I do not know any accused whose case has been referred to the Commission.

2. I do not know any person named in any of the charges.

3. Of the names of witness I have seen so far, I do not recognize any of their names.

4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.

5. I do not know, and have no command relationship with, any other member.

6 .I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.

7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.

8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.

9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. [redacted]

10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.

11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.

12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.

13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

**Presiding Officer Voir Dire Addendum - Relationship with Other Personnel**

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for COL Wayne Iskra and me so that we would be properly outfitted for trials in Saudi Arabia.

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

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

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

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

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

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

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

Memorandum for All Counsel 18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.

2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.

3. Professional Background --

a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.

b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.

c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally, I have read numerous articles on various topics while surfing the web.

d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.

e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.

f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

6. Mr. Hodges:

a. I first became aware of Keith Hodges in 1980-81. I was the Senior Defense Counsel at Fort Meade, MD. The post stockade served many posts along the east coast. One of those posts was Fort Eustis, VA, where CPT Hodges was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at Eustis.

b. I next saw LTC Hodges when he was the Regional Defense Counsel in Stuttgart, Germany and I was one of the military judges at Mannheim. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge, 2d Judicial Circuit, Fort Bragg, NC. One of the Circuit Judges who worked for me was LTC (later COL) Hodges. We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for Fort Hood in 1995. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL Hodges and I talked and exchanged emails routinely on various matters. We worked on the Benchbook together and we helped each other with various case-related problems. I saw COL Hodges once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL Hodges and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL Hodges and I had few occasions to exchange email or telephone calls while he was at Fort Hood. However, after he retired in 2000, he visited us on several occasions while going to see [redacted] On one occasion, he [redacted] went deep sea fishing together. When Mr. Hodges would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr. Hodges and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from [redacted] at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr. Hodges' name, because:

1) I was personally familiar with Mr. Hodges' work and work ethic.
2) I was personally familiar with Mr. Hodges' knowledge of criminal law and procedure.

3) I was personally familiar with Mr. Hodges' ability to write, edit, and publish procedural matters.

4) I was aware of Mr. Hodges' performance as a military judge, both the highs and the lows.

[redacted] asked me for Mr. Hodges' contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the Federal Law Enforcement Training Center - whereby Mr. Hodges would be detailed to OMC for a year. While Mr. Hodges is paid by DHS, his employer is OMC. During the period of the detail, Mr. Hodges' primary focus is OMC. Mr. Hodges has distributed a copy of the detailing agreement to all counsel.

h. Once [redacted] and Mr. Hodges talked, I talked to Mr. Hodges and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. Hodges has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. Hodges has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. Hodges has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. Hodges and any members of OGC. All of Mr. Hodges' communications with OMC personnel were in the area of procedural and logistic preparation for commission proceedings. I believe that it is entirely appropriate for Mr. Hodges to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. Hodges and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. Hodges concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL Denise Vowell, Chief Trial Judge.

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC Hall at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. UP the President's Military Orde, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority.

If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication

from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

September 22, 2005

1. I, am M. Harvey, Chief Clerk of Military Commissions and the custodian of the authenticated transcript in *United States v. Salim Ahmed Hamdan,* No. 040004.

2. I certify that R. 9-26 and R. 133-135 (a total of 21 pages of transcript) (attached) are an accurate copy of the authenticated transcript in said case from the session held on Guantanamo Bay, Cuba on August 24, 2004.

3. There was no voir dire of the Presiding Officer at the subsequent hearing on November 8, 2004.

//Signed//

M. Harvey
Chief Clerk
of Military Commissions

P (CDR [redacted]): Prosecution does not.

DC (LCDR Swift): One moment, sir. We waive reading of the charges, sir.

PO: The reading of the charges may be omitted.

Okay. Members of the commission and alternate member, the appointing authority who detailed you to this commission has the ability to remove you from service on this commission for good cause. Is any member, or alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member, which you have not identified previously in the questionnaire you filled out? Before you answer please keep in mind that any statement you might make should be in general terms.

CM (LtCol [redacted]): No, sir.

CM (Col [redacted]): No, sir.

CM (Col [redacted]): No, sir.

CM (Col [redacted]): No, sir.

CM (LtCol [redacted]): No, sir.

PO: Apparently not. Okay.

I have previously filled out a commission member questionnaire. I previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document concerning my knowledge of the appointing authority and other persons. I also provided all counsel with answers to other questions suggested by defense counsel. These documents will now be marked as the next RE in order. The documents are true to the best of my knowledge and belief. That document will be RE 8.

Does either side wish to voir dire me outside the presence of other members?

P (CDR [redacted]): No, sir.

DC (LCDR Swift): Yes, sir.

PO: The other members will retire to the deliberation room.

*The panel members exited the hearing room.*

PO: Please be seated. Let the record reflect the other members have left the deliberation room.

I intend to keep a copy of RE 8 with me during voir dire so counsel may direct me to a specific question. Objection?

P (CDR[redacted]: No, sir.

DC (LCDR Swift): No, sir.

PO: Prosecution, voir dire?

P (CDR [redacted]: Sir, I believe Commander Swift requested to question you, so --

PO: No, he requested voir dire outside the presence of other members.

P (CDR [redacted]: Aye, sir.

PO: They are gone.

Do you want to voir dire me?

P (CDR [redacted]: Not at this time, sir.

PO: Commander Swift?

DC (LCDR Swift): We don't have a podium, sir. Permission to move to the court table.

PO: (Indicating)

DC (LCDR Swift): Sir, I would like to start by clarifying your membership in the Virginia bar. You indicated that you had been admitted to practice in the Virginia bar, I believe since the 1970s; is that correct?

PO: Yes.

P (CDR [redacted]: What? I didn't understand.

DC (LCDR Swift): I will restate the question. I would like

you -- what -- as a member of the Virginia bar what is your current position in the bar?

PO: I am an associate member of the Virginia bar.

DC (LCDR Swift): What does associate member mean?

PO: You would have to ask the Virginia bar. I have never practiced law in the civilian sector.

DC (LCDR Swift): Are you eligible to practice law in Virginia currently?

PO: I am an associate member of the Virginia bar. I am eligible to practice in Virginia if I change my status to active member.

DC (LCDR Swift): What would be required to do that?

PO: I would have to take some -- a CLE.

DC (LCDR Swift): So at this time you are not eligible to practice there?

PO: At this time I am not an active member of the Virginia bar.

DC (LCDR Swift): Are you a member in good standing --

PO: Go on.

DC (LCDR Swift): Are you a member in good standing of any other U.S. court.

PO: We have got a problem, Commander Swift. The audience cannot hear you. We are going to have to do something. I don't know if you could remove the microphone. I don't know if you can move the microphone.

DC (LCDR Swift): I will stay back here, sir.

MJ: I am only a member of the Virginia bar. That's the only bar I am a member of.

DC (LCDR Swift): Sir, would you be eligible to serve as a civilian defense counsel for this commission proceedings?

PO: I don't know. I haven't examined that.

DC (LCDR Swift): It requires you to be in good standing and a member of a court.

PO: I don't know. I haven't examined that. That question has been addressed in a CAAF case I believe.

DC (LCDR Swift): I am aware of the CAAF case, sir.

PO: Okay. Go on.

DC (LCDR Swift): You indicated that you volunteered?

PO: Yes, I did.

DC (LCDR Swift): Why?

PO: I retired in 1999 and I had no desire to do anything particularly. I had ten years of experience as a military judge, and I thought I was good at it. As a matter of fact, I still think I was good at it; and knowing the stresses and strains brought upon our military by the current operational environment and recognizing that retired people could serve, I volunteered.

DC (LCDR Swift): You in that question indicated you had been in a former military judge. Did you view when you were volunteering that you were volunteering to be a judge here?

PO: No. I viewed that I was volunteering to be a presiding officer.

DC (LCDR Swift): What did you think the presiding officer would do?

PO: At the time that I initially volunteered, the only document that had been written was MCO Number 1 -- excuse me, as well as the president's military order. I went to a dictionary and looked up presiding, and I thought that a presiding officer would preside. If you are asking me if I was aware of all of the differences between a military judge and a presiding officer, I couldn't say that I was. However, I knew that I was not volunteering to be a military judge.

DC (LCDR Swift): You mentioned that the military order and the Presidential's order had been written at the time that you volunteered. Did you read both of those documents before you volunteered?

PO: I scanned them.

DC (LCDR Swift): After scanning them, did you believe that the process was lawful?

PO: I choose not answer that question at this time. Thank you.

DC (LCDR Swift): Understand that you won't answer the question. You have an open mind now to the question of the lawfulness of the process?

PO: That's a good question. Yes, I believe that the lawfulness of establishing the commission process by the President, the lawfulness, the delegation to the Secretary and to the general counsel are all matters which may be addressed by motion. And, I believe that it is the duty of counsel to educate all members of the commission on the law.

DC (LCDR Swift): As part of your assignment or as part of being assigned as presiding officer, you have been detailed an assistant to the presiding officer?

PO: Yes.

DC (LCDR Swift): Can you describe how that happened?

PO: I believe I put the dates in my questionnaire, but basically on the 29th of June, I believe, Lieutenant Colonel [redacted] who works in the office of the military commissions, e-mailed me and said words to the effect of we are looking for someone to be an assistant to the presiding officer. Do you have any suggestions? Immediately and without giving the person in question a chance to comment I said, yes, Keith Hodges. And I pointed out that I was aware of Keith and his good sides and his bad sides. After that, Colonel Hall e-mailed me back for his e-mail address and they talked.

DC (LCDR Swift): Was he appointed as your assistant?

PO: There was a detailing agreement. There is a detailing

agreement between Mr. Hodges and -- no, between the FLETC part of the Department of Homeland Security which is where Mr. Hodges is an instructor on the law and DoD, Office of General Counsel. So if that's appointed, that's a detailing -- he is on detail for a year.

DC (LCDR Swift): Can you explain what his duties are?

P (CDR [redacted]): Sir, at this time I am going to object. What we are trying to determine is whether you are qualified to preside over this proceeding. Mr. Hodges is not a voting member and we feel this line of questioning is unwarranted.

PO: Thank you. Go on. Just tell me, ask me your question.

DC (LCDR Swift): I will get quickly to it, sir.

PO: That is fine.

DC (LCDR Swift): You supervise Mr. Hodges; is that correct?

PO: Yes.

DC (LCDR Swift): Mr. Hodges has had contact with the appointing authority; is that correct?

PO: Yes.

DC (LCDR Swift): Did he do so at your direction?

PO: He has done many -- he has had many contacts with the appointing authority at my direction. He has had many contacts with the appointing authority at my consent. He has had many contacts with the appointing authority that I didn't hear about until after he talked to him. His duties are divided into various ranges. For instance, he has been here since the 9th of August arranging to get things done. When the CCTV broke down this morning, he was the one who arranged to get it fixed. When your interpreter couldn't get a head set, he was the one to whom you came to get a head set. That's one set. He also is the best person I have ever known for drafting, writing, coordinating, and publishing procedures; and he works in that area. He also functions to work out the procedural aspects of the cases. For instance, he has provided to all counsel on this case a listing of all the motions and responses and

whatever. Okay, those are three general areas.

DC (LCDR Swift): I want to address, second, the publishing and drawing of scripts, et cetera.

PO: Okay. Go on.

DC (LCDR Swift): Does he work exclusively for you in that capacity or has he worked exclusively for you in that capacity?

PO: On the 19th of August I believe, I could be wrong, the appointing authority published a memorandum stating that Mr. Hodges worked exclusively for me. So there you know -- just a second, we know from the 19th he works for me; right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Before that he provided, and you have got copies of all of this, various suggestions to the office of military commissions on how to write or create procedural changes and the procedures for these commissions. There.

DC (LCDR Swift): Was that after charges had been referred against Mr. Hamdan?

PO: Right.

DC (LCDR Swift): So he was writing how to change the procedures after the charges had been referred?

PO: Right.

DC (LCDR Swift): And you viewed that as appropriate?

PO: Yeah, I did.

DC (LCDR Swift): It didn't concern you that it would be ex pos facto changes after we had established a commission and charges had been referred to it?

PO: I didn't consider that the changes would come into effect in any time to affect anyone. These were changes to the commission procedures as a whole, not changes necessarily affecting Mr. Hamdan and if you believe that they would then I would have expected you to file some

motion saying that these procedures can't be changed because they would affect Mr. Hamdan adversely.

DC (LCDR Swift): To date, I don't know that any have; but I know communication has occurred.

PO: Thank you.

DC (LCDR Swift): So I would respond that until they actually are changed there is no ex pos facto issue.

PO: Thank you. I agree.

DC (LCDR Swift): What I am concerned about though is that there is conversations about changing and applying them to ex pos facto.

PO: Okay, that's that concern. Go on.

DC (LCDR Swift): Other than the meetings that we put on the record earlier, have you met with military counsel regarding those proceedings in the past?

PO: I had that meeting with all the counsel on or about, all the counsel who were in D.C. on or about the 15th of July. And I had a meeting with all the counsel who showed up yesterday on the 23rd of August.

DC (LCDR Swift): During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC (LCDR Swift): I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC (LCDR Swift): Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC (LCDR Swift): But you didn't expect -- while those things were

mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

DC (LCDR Swift): Now, based on the trial script that we have been provided, you intend to instruct the members on the law; is that correct?

PO: Yes.

DC (LCDR Swift): How are you going to avoid having an inordinate influence in respect to each of their opinions while doing that?

PO: I don't understand your question.

DC (LCDR Swift): Well, historically and certainly barrowing from the judge's bench book, it says that each member should have an equal weight in deciding any opinion. Here they are deciding both fact and law. How, after you have instructed them, will they have the opportunity to have an equal opinion as to what the law is?

PO: You refer to the trial script. Did you read farther what I said there?

DC (LCDR Swift): I did.

PO: What did I say?

DC (LCDR Swift): In that portion, you said that they were free to disagree with you.

PO: And?

DC (LCDR Swift): I also read --

PO: Come on.

DC (LCDR Swift): -- in the trial script where you say to them, "I am the only lawyer; and therefore, I will instruct you on the law." Don't you agree that that gives you positional authority?

PO: Commander Swift, if you are going to read something let's read it all.

DC (LCDR Swift): Yes, sir.

PO: As I am the only lawyer appointed to the commission. Now that is a fact; right?

DC (LCDR Swift): That is true, sir.

PO: I will instruct and advise on the law. However, the President has directed that the commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. So what have I told them, okay -- I am not going to argue the point. The point is that they are all military officers. They have all sworn to do their duty and I will advise them on the law as I have been required to do. And, I don't see how you can get around that.

DC (LCDR Swift): My concern comes in their ability after being instructed that you are a lawyer, and you know the law, that you will have an unequal voice in any deliberations. That is something to be avoided, looked at ranks, looked at procedures, that's not happening, and how would we avoid that with the current instruction that we have? It says you are free to disagree, but I am a lawyer and I am probably right.

PO: Whoa, whoa, it does not say that. But that -- okay, so you object to the instruction?

DC (LCDR Swift): Yes, sir. In determining not only on the instruction also concerned is in your ability to sit as the senior member or as the presiding officer that you will ensure that each member has an equal voice in every decision.

PO: I will.

DC (LCDR Swift): Lastly, influence -- yesterday, during the meeting -- during our meeting yesterday, it was discussed whether we would hold up these proceedings pending the appointment of a security officer. Do you recall that, sir?

PO: Yes.

DC (LCDR Swift): During that, you mentioned that holding it up would have an impact vis-a-vis the media. Do you agree with that?

PO: If you say I did. I believe what you say, but go on.

DC (LCDR Swift): At least by that statement, it sounds like the media is having an impact on how you are making decisions.

PO: No. I think what that statement meant was that having been the poor person who had to orchestrate getting hundreds of people to various places at various times, that I sympathize and that we would do what we could to handle it. For instance, this morning with the CCTV broke down, we delayed -- we have delayed the start of these proceedings --

DC (LCDR Swift): We have a translation issue, sir. When we switched translators, he is no longer understanding anything being said.

PO: Can we switch to another translator? The court is addressing the table of translators -- the commission is addressing -- I am addressing the table of translators. Can we switch to another translator?

*The translators changed positions.*

PO: For instance, this morning when he we had that CCTV break, we delayed the proceeding for 30 minutes to start so that the feed to the off-site viewing location could be established. If you mean am I concerned about what the media says or writes about me, no.

DC (LCDR Swift): Understand, sir. I don't have any further questions.

PO: Challenge?

P (CDR [redacted]): I have some additional questions, sir.

PO: Go on.

P (CDR [redacted]): Sir, Military Commission Order Number 1 states that a presiding officer needs to be a military officer whose a judge advocate of any United States armed force. As you sit here today, do you meet that criteria, sir?

PO: Yes.

P (CDR [redacted]): Sir, you received some questions from Commander

Swift about whether the establishment of commissions was lawful and the executive order was lawful. As you sit here today, have you made any predeterminations with respect to those questions?

PO: All of the counsel in the courtroom are familiar with the Uniform Code of Military Justice. If an order is patently illegal, that is one thing. However, if an order is questionable, which apparently some people thinks it is, then an officer or any member of the service has a duty to comply while determining whether or not it is illegal.

P (CDR [redacted]): Now, sir, the notice of motions for the defense was due on the 19th of August. Have they filed any such notice of motion challenging the legality of those orders?

PO: That -- please sit down, Commander Swift. You look like you are about to jump. Don't jump. Don't worry about that.

P (CDR [redacted]): Sir, will the role of the assistant to the presiding officer in any way impact your ability to fairly decide matters in this case?

PO: In so far as he takes so much off my back, yes, it will because I don't have to worry about all the admin stuff that he has been sucking up. But in terms of his impacting my vote, my voice, no.

P (CDR [redacted]): Now you say that there have been several contacts between Mr. Hodges and, you used the term, appointing authority.

PO: I thought I said OMC, but maybe I didn't. I meant the circle around Mr. Altenburg?

P (CDR [redacted]): So that doesn't necessarily mean he is speaking with Mr. Altenburg directly, but could be speaking to the staff person of Mr. Altenburg?

PO: Right.

P (CDR [redacted]): Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly

decide those motions?

PO: No.

P (CDR [redacted]): As far as your interaction with the other members, do you consider them to have equal votes in this case?

PO: Yes.

P (CDR [redacted]): Do you consider them to be on equal footing with respect to votes as to what the law is?

PO: Yes.

P (CDR [redacted]): If they need or request assistance, not being legally trained as you are, in trying to determine what the law is will you take steps to get them that assistance?

PO: To get them what?

P (CDR [redacted]): Assistance to help them understand the law?

PO: Yes.

P (CDR [redacted]): Sir, are you aware of any actions or are underway to hire court clerks to assist the other commission members?

PO: I received -- and I forget when it was -- in the last month a draft, I believe, of a hiring of someone, a position nomination for someone to work in the office of the presiding officers. Where that is I don't know.

P (CDR [redacted]): Sir, is the media in any way going to impact your ability to fairly decide this case?

PO: No.

P (CDR [redacted]): If it is a question to providing the accused a fair trial and accommodating the media, where will that decision lie?

PO: We have spent a lot of money to get six people here to look at Mr. Hamdan across this table. We are here so that these six people can carry out to President's order to provide a full and fair trial for Mr. Hamdan.

P (CDR [redacted]): I have no further questions, sir.

PO: Thank you.

DC (LCDR Swift): May I have a moment?

PO: Yes.

DC (LCDR Swift): Sir, in your answers to Commander [redacted] you indicate that you take steps to assist the other members understanding the law. What steps would those be?

PO: Well, since I don't know -- I am not being sarcastic -- I don't know what the situation would be. The first step is that counsel will provide motions on the law and the second step is that counsel will be allowed to argue what the law is. If the commission members decide that they need any more instruction on the law, then I will decide that then. I don't know. I don't know what they are going to need. I can't tell you what the steps are right now.

Now, some -- you can't predict something about a situation that hasn't arisen yet, Commander Swift. I'm sorry. If your concern is this -- and I don't know why you have been walking around it -- sir, are you going go back in there and say, okay, y'all, I am a lawyer and you are not and this is the law and you got to listen to me. Is that your concern basically?

DC (LCDR Swift): I do not believe you would be, sir. I am more concerned, not that you would intentionally do such a thing, I don't think you would. My concern is how a lawyer is inevitably viewed by other staff officers. It is the equivalent of my wife, who is a pilot, and I sitting in the cockpit seat and today we are going to fly an airplane and I look over and she says put the throttles forward.

PO: Okay. So is your compliant about me or about any lawyer?

DC (LCDR Swift): My concern is how we can minimize this position and how those steps would be taken to prevent it.

PO: I can't tell you what I will do in an unspecified situation. I can tell you that I am not going to say, I have been a judge for ten years and a JAG for 27 years and you got to tell -- you got to do what I tell you

about the law. That's the first thing I can tell you. The second thing is that if they need more assistance on the law I imagine and I don't know, Commander Swift, because it hasn't arisen, that if they need more instruction on the law, I will call you and Commander [redacted] back into court and say -- I am using his name in vain -- Colonel [redacted], is your question the application say of IN RE Sierra to 42 U.S.C. 1933, and he will say, yes. And I will say, Commander [redacted] would you explain your views on that; and he will say, whatever. And I will say, does that answer your question; and you will say something, I don't know.

DC (LCDR Swift): I understand, sir.

PO: Okay. However if you feel the urge, I always welcome briefs on any matter. That's not an order for a brief. If you want to put it in, feel free. Okay, what else, what other follow up do you have, Commander Swift?

DC (LCDR Swift): No other follow up.

PO: Challenge?

P (CDR [redacted]): Prosecution has no challenge.

DC (LCDR Swift): I would like to recess to consult with my client regarding --

PO: Well, I understand that, but I mean I am asking really what sort of recess do you need? Five minutes in place or fifteen minutes in the office?

DC (LCDR Swift): Fifteen minutes in the office, sir.

PO: Court is in recess.

*The Commission Hearing recessed at 1115, 24 August 2004.*

*The Commission Hearing was called to order at 1142, 24 August 2004.*

PO: The commission will come to order. Let the record reflect that only the Presiding Officer is in the commission room. The other members are not present. Defense?

P (CDR [redacted]): Sir, before we go further, we have a new court reporter, Sergeant [redacted], and she has previously been

sworn.

PO: Thank you.

DC (LCDR Swift): Yes, sir. Before entering challenges, would you permit me one more question, sir?

PO: Yeah.

DC (LCDR Swift): When you said that you are a judge advocate, were you recertified when you came back off of active -- off of retirement, or do you base that on you previously being a judge advocate?

PO: To the best of my knowledge and belief, Major General Tom Rummy -- Thomas Rummy, who is the Judge Advocate General, personally approved my retirement recall, and he is the one who certifies people as judge advocates.

DC (LCDR Swift): And you base that on your belief -- on that belief?

PO: Yeah.

DC (LCDR Swift): Notwithstanding, sir, we do challenge the Presiding Officer for cause. We have three -- excuse me, four areas.

One, we challenge the qualifications of the Presiding Officer as a judge advocate based on being recalled from retired service and not being an active member of any Bar association at the time he was recalled.

Two, despite, we understand that this is almost necessarily by the position you've been placed in, we challenge the Presiding Officer based on that the fact that he will exercise improper influence over the other members.

PO: Okay. I want to make sure you clarify this. Are you challenging the system, or are you challenging me? Because the standard is good cause that I will not perform my duties.

DC (LCDR Swift): We're challenging you, sir.

PO: Okay.

DC (LCDR Swift): We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself with the appointing authority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Additionally, based on -- although I did not attend the meeting of 15 July -- based on consultation with counsel that did, we challenge you based on having formed opinions prior to court regarding the accused's right in this trial -- the accused's right to a speedy trial in this case.

PO: Anything else?

DC (LCDR Swift): No, sir.

PO: What do you say?

P (CDR [redacted]): Sir, defense counsel said they're not challenging the system, they're challenging you personally. But they also said during voir dire, I don't think you would ever do anything intentionally unfair. So if it's a challenge to the individual, the prosecution doesn't believe we can do any better than a person who the defense concedes would never intentionally do anything unfair.

The defense has stated many things about conversations between the appointing authority and Mr. Hodges, and the appointing authority and yourself. Specifically, during those conversations between you and defense counsel on voir dire, he stated there's been no prejudice. So as we sit here today, you are not tainted, there has been no prejudice to the defense, and we have had recent changes with respected to the August 19th memo, which should preclude any appearance of this happening in the future.

Sir, we have no challenge and do not feel that there is any cause to challenge you as the Presiding Officer.

PO: I've considered your challenges for cause, Commander Swift. Under the provisions of MCI 8, I'll forward to the appointing authority for his decision and action, a transcript of the voir dire, which will include your

challenge and the reasons therefore, and the comments made by counsel. I will also forward the Presiding Officer's voir dire packet, which I believe is RE 8.

Are there any other matters that you would wish to be forwarded to him for his decision?

DC (LCDR Swift): I would wish to be able to brief, as it did come up during the course of this, the issue of qualifications.

PO: When do you think you could have that prepared?

DC (LCDR Swift): Certainly no later than next Monday.

PO: Okay. Well?

DC (LCDR Swift): I'm somewhat at a loss while down here to do that type of thing. But I can complete it by next Monday.

PO: If you will forward that to Commander [redacted] and he will provide you with any cross-whatever this is to this matter, and then forward it to me, and I will get it to the appointing authority.

Anything else that should go up with this?

DC (LCDR Swift): The defense has nothing else, sir.

PO: Well, I mean the packet to the appointing authority.

P (CDR [redacted]): Nothing from the prosecution.

PO: Okay. Under the provisions of MCI 8 paragraph 3(a)(3), I will not hold the proceedings in abeyance.

Okay. Please recall the other members.

*The members entered the courtroom.*

Please be seated. The commission will come to order. Let the record reflect that all of the members of the commission are present.

Have all the commission members completed a member questionnaire?

take up with yourself outside, on the record. It has to do with your voir dire of the presiding officer.

PO: All rise.

Members, you are in recess.

*The members departed the courtroom.*

Be seated. The court will come to order and let the record reflect all the members except for myself have left the courtroom. All the other parties are present.

Yes, Commander?

DC (LCDR Swift): Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC (LCDR Swift): To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC (LCDR Swift): Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC (LCDR Swift): Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC (LCDR Swift): Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC (LCDR Swift): My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC (LCDR Swift): Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. So I'm telling you right now that I don't have a predisposition towards speedy trial. However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC (LCDR Swift): Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC (LCDR Swift): Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC (LCDR Swift): No, sir.

PO: How about you?

P (CDR [redacted]): No objection to the tape being sent, sir.

PO: Okay. Before I call -- I put the court in recess, Commander Swift, do you have anything else?

DC (LCDR Swift): No, sir, I don't; I really don't, we really don't, sir.

PO: Trial?

P (CDR [redacted]): We really, really don't, sir.

PO: Court is in recess.

*The Commission Hearing recessed at 1835, 24 August 2004.*

September 22, 2005

1. I, am M. Harvey, Chief Clerk of Military Commissions and the custodian of the authenticated transcript in *United States v. David M. Hicks,* No. 040001.

2. I certify that R. 6-24 (a total of 19 pages of transcript) (attached) are an accurate copy of the authenticated transcript in said case from a portion of the session held on Guantanamo Bay, Cuba on August 25, 2004.

3. There was no voir dire of the Presiding Officer at the subsequent hearings on November 1-3, 2004.

//Signed//

M. Harvey
Chief Clerk
of Military Commissions

that question keep in mind you don't want to bias other members? Any member? Apparently not.

Okay. I previously filled out a commission member questionnaire, provided counsel for both sides with a summarized biography, a list of matters that normally would be asked during voir dire, a document about how I know the appointing authority, and other personnel, and answers to questions suggested by defense counsel. That packet will now be marked as the next RE in line.

*Review Exhibit 9 was marked for the record.*

Those documents are true to the best of my knowledge and belief.

We had basically two pretrial conferences, present which were defense and trial and myself; and during the course of these proceedings I will be referring to them. If something happened during one of those conferences that I don't cover or you want covered, trial, defense, speak up. Okay.

During one of those, Major Mori, you and I had a discussion on the standard for challenge in the commission proceedings, and you wanted me to articulate what I, as the presiding officer, believed the standard for challenge is; is that correct?

ADC (Maj Mori): Yes, sir.

PO: Referring to MCO Number 1, Paragraph 4(A)(3) which states the qualifications for a member, and then referring to MCO 1, Paragraph 6(B)(1) and (2), I believe that the standard is whether there is good cause to believe that the member cannot impartially and expeditiously provide a full and fair trial to Mr. Hicks. Do you wish, not perhaps at this time, to articulate a different standard to the person who will make the decision in this case?

ADC (Maj Mori): Yes, sir.

PO: At a later time if we have challenges, I will tell you when you have to provide that standard. If I fail to tell you at that time, please remind me.

ADC (Maj Mori): Yes, sir.

PO: Okay. I will, however, permit you latitude in your questioning going towards the area that you want. You are looking for what we commonly called 912(N); right?

DC: Yes, sir.

PO: Okay. Thank you. Does either side want to voir dire me outside the presence of the other members?

P (LtCol [redacted]): No, sir.

DC (Mr. Dratell): Yes, sir.

PO: Thank you. Members, please return to the deliberation room.

Be seated. Let the record reflect the members, except for the presiding officer, have left the courtroom.

I noted yesterday that we have a joint problem here. In the Army when a single member walks into the courtroom except for the judge, no one rises. Apparently in the Naval services you all rise. Individual members of the defense and prosecution team may rise or not as they wish when the single member walks in or leaves. It is up to you, but the only requirement is when all the members come in, or I come in, you rise.

I have got a copy of the PE that was just marked -- or RE that was just marked, Number 9 which was my voir dire packet. This morning in that latest conference counsel for both sides were handed a copy of the voir dire up to where we broke for closed session yesterday. Counsel for both sides you both stated you intend to focus the voir dire on the questionnaires, and this is not just for me, it is for the other members too, in what was said in voir dire yesterday and you wish to have appended to the record of trial as RE 10 all portions of the Hamdan record of trial that were -- don't get excited yet -- that were held during the open sessions concerning voir dire. Which includes -- just a second, Major Mori -- which includes all the voir dire, all the challenges, and then at the end of the day there was a further reopening of voir dire of the presiding officer. That will be RE 10. RE 11 will be the closed session voir dire from Hamdan. I am not going to mix closed and none closed if I don't have to.

Is that what you all wanted, trial?

P (LtCol [redacted]): Yes, sir. Except for that it was our understanding that counsel voir dire of the whole panel would also not be --

PO: I said all the voir dire. Everyone's.

P (LtCol [redacted]): Yes, sir.

PO: Everything that had to do with the voir dire. You understood what I meant didn't you, Gunny? Yeah, the Gunny knew. We will look at the RE before it is finalized, okay. Is that what you want, defense?

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, you weren't present yesterday during the voir dire; right?

ACC: Yes, sir.

PO: Okay. Your counsel got a copy of the voir dire, somewhere on their thing. They intend to refer to it in questioning me and the other members today to what happened yesterday. You got any objection to that?

ACC: No, sir.

PO: Okay. Trial, voir dire?

P (LtCol [redacted]): None, sir.

PO: Defense, go on.

DC (Mr. Dratell): Yes, sir. Colonel, I want to focus first on something that was brought up yesterday with respect to your intention to advise the other members on the law, in addition to also then receiving law from either side. And in your experience as a military judge, would you ever let an attorney sitting on a military jury express an opinion as a lawyer on the law to a jury that is supposed to be made up of equal members?

PO: I have never seen an occasion to have an attorney sit on a jury panel, but no I wouldn't.

DC (Mr. Dratell): Is that what we have here, in essence, a jury

of equal members, none of whom should be superior to the other with respect to understanding or expression of the law.

PO: Okay. I will answer your question, but let me say that I believe, and I direct Major Mori to provide a brief on this, Major Mori.

ADC (Maj Mori): Yes, sir.

PO: Because there are two parts to it. The SECDEF has said there is going to be a lawyer on this panel; right?

DC (Mr. Dratell): Yes.

PO: Okay. So you're objecting or Major Mori is writing a motion objecting to the structure of the panel.

DC (Mr. Dratell): That's true.

PO: Okay. That's the structure of the panel. So it doesn't matter in many ways what I think about that because that is a structure that you can bounce me off and I believe that the appointing authority will say, okay, he's bounced and let's put another lawyer on there. Can we just let that portion of this voir dire sit as a motion to the structure, and now you can ask me what I will do.

DC (Mr. Dratell): And it is not -- it's not simply the structure but it is also your intention to advise the panel on the law, that's part of it. So it's not just that there is a lawyer because there are lawyers that sit on civilian juries all the time, they are just not permitted to advise other jurors as to the law. And that is the province of the judge, and in this situation we don't have a judge. But and in the sense that you have instructed the members that they are not required to follow your expression of the law and they are free to adopt either side's expression of the law, or yours, or their own, but do you acknowledge the possibility, and really the distinct possibility that the members, or any member, all of whom are non-lawyers will give your expression of the law more deference than they will to either counsel, or to their own?

PO: When I see Major Mori's motion, if it is made to me I will be glad to answer the structural question. Now, I will, if you want to say, Brownback, will you tell us that you

are not going to provide advice to the panel other than what you do while you are sitting here, that's a different matter. Is that what want, I mean --

DC (Mr. Dratell): No. No, my question is -- and if you consider this a structural question then you do; but my question is really do you acknowledge the possibility that a member or all of the members who are non-lawyers will give your expression of the law more deference than they will to either side's or their own?

PO: If you ask me that, I say yes. I will, however, follow up by saying there is a chance they might give Colonel [redacted] because he is Marine, or Major Mori's, because he is a Marine, or Major Lippert or Major [redacted] because they are Army, more deference. I don't know the answer to that.

DC (Mr. Dratell): Can you put a civilian on that for me?

PO: That's a structure. Major Mori, make a note, that goes into your brief. Okay. I can't go any farther than that.

DC (Mr. Dratell): You have combat experience from Vietnam; correct?

PO: Yes.

DC (Mr. Dratell): And did you have occasion to engage in combat with the North Vietnamese Army?

PO: At the time I was not worried about where they came from.

DC (Mr. Dratell): But were they regulars from the North Vietnamese Army?

PO: The intelligence reports that we gathered had them classified as both NVA and VC. And when they hit us we didn't stop them to try to figure it out; we just fired back.

DC (Mr. Dratell): But when they were taken prisoner, regardless of whether they were NVA or VC were they treated according to the Geneva Convention?

PO: Yeah.

DC (Mr. Dratell): Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC (Mr. Dratell): You have known Mr. Altenburg 1977, 1978?

PO: Yes, sometime in that frame.

DC (Mr. Dratell): And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it.

He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of adlaw. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

DC (Mr. Dratell): And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?

PO: Right, at the JAG school.

DC (Mr. Dratell): And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

DC (Mr. Dratell): And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.

DC (Mr. Dratell): And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

DC (Mr. Dratell): And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?

PO: Right, I did.

DC (Mr. Dratell): And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC (Mr. Dratell): Thirty-three others, in fact?

PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got Mr. Altenburg somehow. I don't know how many other people were nominated.

DC (Mr. Dratell): So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?

PO: Well, I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.

DC (Mr. Dratell): I would like to move on and explore your relationship with Mr. Hodges and his role in the

commission.

PO: Okay.

DC (Mr. Dratell): He is presently an employee of the Department of Homeland Security?

PO: Right.

DC (Mr. Dratell): He is [redacted]

PO: Right.

DC (Mr. Dratell): And his long-term career goals is to remain with the Department of Homeland Security in that position?

PO: I don't know.

DC (Mr. Dratell): Have you seen the detailing memorandum?

PO: Yes -- but I didn't -- I mean it was a detailing memorandum. I don't know if those are his long-term goals. Do you mean does he intend to return there after the detail is over?

DC (Mr. Dratell): Yes.

PO: Yes. He bought a house there about three years ago and he probably hasn't made enough money to leave yet.

DC (Mr. Dratell): But, in fact, arrangements have been made so that he is still an employee and he is essentially on loan here part-time.

PO: He is on a detail. Right, they are offering various positions, you know, for GS-14s and 15s but he didn't want to do that, right.

DC (Mr. Dratell): So how would you answer concerns of reasonable person that the Department of Homeland Security employee is acting as a legal advisor or the assistant to the presiding officer of this commission?

PO: He is an instructor in the legal department to the best of my knowledge. He has never had anything to do with operational activities. He instructs people on the

application -- and you would have to look at whatever he wrote. I believe -- he does a lot of Fourth Amendment law and probably some Fifth Amendment law and maybe procedures. Both of which, or all of which, has nothing to do with operational activities. It is how to keep activities within the bounds of the constitution, none of which has he applied in doing what he is doing for me. So I don't see any harm. I mean you are characterizing him correctly as a Department of Homeland Security; however, I believe when he took the job [redacted], the [redacted] didn't belong to DHS because there wasn't a DHS. I think it was a DoJ, but it may have been something else. I don't believe there is any concern there. He is not knocking down doors or searching people out. He is in [redacted]

DC (Mr. Dratell): But he is still affiliated with a law enforcement and homeland security organization which is essentially tasked with terrorists -- terrorism enforcement activities.

P (LtCol [redacted]): Sir, I am going to object to this line of questioning at this point. This does not go toward any potential bias on your part or anything that might lead to that.

PO: That's okay. Thank you. Go on. I hear what you are saying, Mr. Dratell. I don't believe that a reasonable person who heard that [redacted] person who [redacted] kicking down doors. But that is -- reasonable people can differ. That's my opinion.

DC (Mr. Dratell): With respect to his role in the commissions, in the August 19th memorandum from the appointing authority it says that he is to provide advice in the performance of presiding officer adjudicative functions. Can you tell us what that means, adjudicative functions?

PO: Would you do me a favor. Who signed that? Mr. Altenburg, right?

DC (Mr. Dratell): Yes.

PO: Did I sign it?

DC (Mr. Dratell): No.

PO: Okay. I don't know what that means and I am exploring with you as we go what that means. I tell you, if you want to know what he does for me I will be glad to tell you.

DC (Mr. Dratell): I am just more interested in what the interpretation of this phrase is.

PO: I don't know what it means. If it means does he -- this morning you know, Mr. Hodges, would you go find counsel for both sides and tell them I am ready to see them. Because that -- that is not adjudicative. He has not provide -- I will tell you this, he has not provided me any piece of advice on any item of substantive law. Now there are those who would say that writing up motions, you know, the presiding officer memorandum and stuff like that is substantive; I don't believe they are. The things that he has done have nothing to do with substance and I have not yet gotten to an adjudicative function as far as I can tell.

DC (Mr. Dratell): Well, will he? The question is under this memoranda will he be involved, and particularly in light of what you are saying is his experience in what he teaches and whether that is going to have an impact on the rest of the members, that is the questions now.

PO: Was the question then to make Colonel [redacted] happier? Am I going to take improper advice in my role as a member from someone who is not a member?

DC (Mr. Dratell): Advice.

PO: That's what I say advice.

DC (Mr. Dratell): But you said improper and I say any advice or any advice that any of the members get either from you or directly from Mr. Hodges --

PO: No, they are not.

DC (Mr. Dratell): Now with respect to -- well, if that role changes, or is there -- are we ever going to get a definition of those terms adjudicated function in a matter that we can at least get our hands around, or for you to get your hands around so that we know what it

means?

PO: Probably on Tuesday after I get home, after I finish up this week's session, I will inquire from Mr. Altenburg what he means by that.

DC (Mr. Dratell): And will we be --

PO: I haven't sent anything to Mr. Altenburg, nor has Mr. Hodges, or anyone else that hasn't been furnished in voluminous copies to every counsel; right?

DC (Mr. Dratell): And so in your questionnaire you own a Koran.

PO: Yes, I do.

DC (Mr. Dratell): Have you studied it?

PO: I wrote in there also that I would not call myself a student of the Koran. I have looked at it. It was given to me in Saudi by one of the Saudis with whom I worked, and he referred me to some verses, and I looked at them. If you have ever been in Dhahran at night there is not a lot to do on the air base there.

DC (Mr. Dratell): And I assume it is in English?

PO: It is a --

DC (Mr. Dratell): Combination.

PO: One side is English and one side is Arabic.

DC (Mr. Dratell): And you obviously read the English side and not the Arabic side.

PO: Yes. Obviously, I read the English side, not the Arabic.

DC (Mr. Dratell): Thank you, sir. I have nothing further.

PO: Thank you. Trial?

P (LtCol [redacted]): Yes, sir. First of all on the advising the members on the law, do you -- will you be able to give all the members equal voice regardless of rank or their legal background they may or may not have?

PO: In the military order the President said that the

commission is to be the triers of fact and law. That's what he wants and that is what we are going to give him. Yes.

P (LtCol [redacted]): Regarding the relationship with Mr. Altenburg, first of all if you are looking at your record he would note that you had combat experience as an infantry officer in Vietnam. Is that right, sir?

PO: Yes.

P (LtCol [redacted]): You have five bronze stars; is that right, sir?

PO: Yeah.

P (LtCol [redacted]): He would also note that you had ten years experience as a military judge?

PO: Right.

P (LtCol [redacted]): Sir, as a military judge did you have occasion to know the convening authority?

PO: Yeah, right.

P (LtCol [redacted]): Did you ever have the occasion to be friends with the convening authority?

PO: I say the only friend I was with was a guy who ran a special court once down in Vincenza. We aren't friends really with three star and two star generals when you are a light colonel or colonel, but if you are talking about a personal acquaintance where I knew them, yeah. I wouldn't call myself and General Luck or General Keene, or -- I wouldn't call us friends, you know.

P (LtCol [redacted]): They were acquaintances like that?

PO: Right.

P (LtCol [redacted]): How did you handle that situation? I am sure that you were impartial and fair?

PO: I never worried about it. I just did my job, my duty.

P (LtCol [redacted]): Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?

PO: No. You want to ask what I think Mr. Altenburg wants from me?

P (LtCol [redacted]): Do you know, sir?

PO: No, I asked would you like to ask me what I think he wants?

P (LtCol [redacted]): Yes, sir.

PO: Okay. I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.

P (LtCol [redacted]): Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?

PO: You all went to law school; right?

P (LtCol [redacted]): Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?

P (LtCol [redacted]): Yes, sir.

PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. I don't have a professional career. Mr. Altenburg is not going to hurt me. Okay.

P (LtCol [redacted]): Yes, sir. Nothing further, sir.

DC (Mr. Dratell): Just one thing, sir.

PO: Sure.

DC (Mr. Dratell): With respect to -- I don't know where this was part of the packet --

PO: That's all right.

DC (Mr. Dratell): This is the list of the nominees for presiding officer. I don't know if it is already in the packet, but if not we could just mark this as an RE.

PO: I haven't seen it, but you may mark it as an RE.

DC (Mr. Dratell): Okay, and that would be RE -- is that 13 that we are up to?

AP (Maj [redacted]): Colonel Brownback, I just note that that is an attachment to our defense filed motion that is presently before the court.

PO: We will just do this and we can put it in the next one.

*Review Exhibit 12 was marked for the record.*

ADC (Maj Mori): Defense counsel has provided the court reporter with the two sheets of the list of selection for the presiding officers.

PO: Okay.

DC (Mr. Dratell): I have nothing further, sir, thank you.

PO: Prosecution, challenge?

P (LtCol [redacted]): No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, on the same grounds basically yesterday that we explored again today which is the relationship with the appointing authority and also on the -- also on the advice to the commission members on the law and also --

PO: Okay. Just a second.

DC (Mr. Dratell): And also the lack of definition of Mr. Hodge's role and impact that that would have on both on the presiding officer and the commission as a whole, the other members here individually who are in combination.

PO: Okay.

DC (Mr. Dratell): And also the ground that was raised yesterday with respect to the speedy trial issue and comments either were or were not made I was not at the meeting so it was impossible for me to say --

PO: Predisposition?

DC (Mr. Dratell): Yes, exactly.

PO: Okay, what else?

DC (Mr. Dratell): That's it.

P (LtCol [redacted]): Yes, sir, the government opposes that challenge. First of all, the role of Mr. Hodges we believe is just an objection to Mr. Hodges's role. There's no evidence that affects your impartiality and in fact throughout this it's clear that we have gotten a very independent presiding officer who is not swayed, certainly would not be swayed by Mr. Hodges and he does not and has not provided legal advice, is not providing legal advice. We do not believe that is any real basis for challenge of you, sir.

The relationship with Mr. Altenburg we believe that is not problematic. Again, we have a very independent presiding officer. Mr. Altenburg is looking at various people as candidates and he comes across somebody who happens to know his reputation, sterling reputation as a military judge. He is looking at a military record and has seen combat experience in Vietnam, he has seen five bronze stars, heroism in Vietnam, somebody that can stand and not be afraid to say no to Mr. Altenburg or anybody else.

PO: I appreciate the comment, but I would have the gunny note that I don't agree with heroism in Vietnam, but go on.

P (LtCol [redacted]): Yes, sir. We would also note ten years as a military judge. That makes a presiding officer stand out with somebody who has an exceptional amount of experience as the military judge and that's somebody who knows how to maintain integrity and independence. And we believe that there is no grounds for your challenge, sir.

DC (Mr. Dratell): Thank you, just so I can articulate two subsets of the challenges. One is that with respect to the

relationship with Mr. Altenburg. It is also with respect to the perception of the public, the panel.

PO: Major Mori's 912(N?

DC (Mr. Dratell): Yes, that's correct.

PO: He is writing a motion on that.

DC (Mr. Dratell): And the same with respect with Mr. Hodges as a result of his employment with the department of homeland security and his position there and so those are in conjunction with the substantive.

PO: Okay.

P (LtCol [redacted]): Well, sir, first we don't accept that as the standard and second of all we don't see how that is such a bad appearance. Someone who has been a district attorney becomes a judge. Does that mean that he is biased? So somebody who works at FLETC who is now helping administrative matters now for the commission. How is that a bad appearance. And your appearance with your background and experience as a presiding officer we do not feel that there is any bad appearance on that.

DC (Mr. Dratell): Just that -- we don't have a situation where someone was a district attorney and is now a judge, we have someone who is still a district attorney and is now the assistant to a judge who may have adjudicated functions in a commission process.

PO: Okay. I have considered the challenges made by the defense. I am going to forward a transcript of voir dire which contains a reference to RE 12, so that will go along with it. The transcript -- that will include the transcript of the challenge and the prosecution's response. In addition, Major Mori, that motion on the 912(N) matters and your motion on the adjudicative function advice and your motion on the impropriety of the presiding officer providing legal advice -- you understand what I am saying?

ADC (Maj Mori): Yes, sir.

PO: Can you have those to opposing counsel by the 7th? You notice how much time I am giving you, for me that is a heck of a long time. And that way they can comment --

no, so this will get up to Mr. Altenburg all at the same time so he can consider your request for a different standard -- for a standard so he can consider your motion concerning whether or not I should provide advice and your motion concerning the adjudicative advice all at the same time. You get it on the 7th, trial, and you have it back to, your comments ready by the 10th and I will try to get all of this stuff in to Mr. Altenburg on the 10th because he is the one that makes the decision.

ADC (Maj Mori): Yes, sir.

PO: Okay.

P (LtCol [redacted]: Yes, sir.

PO: Okay. Under the provisions of MCI 8(3)(A)(3), I am not going to hold the proceedings in abeyance. Now, before I call the members in I am going to ask this question; who is lead?

DC (Mr. Dratell): I am lead.

PO: Okay. I am going to tell the members that when they come back in. Okay?

DC (Mr. Dratell): Yes, sir.

PO: I am going to call the members in and then we will go through voir dire with them generally, okay? Ready? Call the members.

Please be seated. The commission will come to order. Let the record reflect that all the parties present when the commissioned recessed are once again present.

The members are present.

Mr. Dratell, you are the lead attorney for Mr. Hicks; correct?

DC (Mr. Dratell): That's correct, sir.

PO: That means, members, generally when I call on the defense, generally he will be speaking for the defense. However, if Major Mori or Major Lippert have been cast they may pop up too.

Have all members completed a member questionnaire? Apparently so.

Both sides have been provided a copy of those questionnaires?

P (LtCol [redacted]): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Apparently so. Trial, please have the a questionnaires marked as the next RE.

P (LtCol [redacted]): These will be marked 13 Alpha through Echo at this time.

PO: Those questionnaires will be sealed.

Members, there has been an objection to my instructing you that I will instruct you and advise you on the law. I have not granted that objection, but I am telling you that a motion will be forthcoming on that objection that you all will be seeing at some later time. Keep it in mind. Right, defense?

DC (Mr. Dratell): That's correct, sir.

PO: Okay, members, several of you indicated in your questionnaires that you had some apprehension for the safety of your families because of your participation in this military commission and the release of your names to the public. I can't go back and unbell that cat. But do all members recognize that it wasn't the trial or defense that released your name? Apparently all members recognize that.

Will the release of the names, of your names, affect in any way your ability to listen to the arguments of trial and defense and serve as a member in according to your duty in this case? Apparently not.

Counsel, you both stated that you intend to refer the voir dire in case of U.S. v. Hamdan and focus question to the members based on that voir dire. This is the same, this is RE 10 and 11. You all still going with that?

P (LtCol [redacted]): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, once again this is the exhibit that counsel have in front of you. You weren't here, but Mr. Dratell -- some member of the defense team was here for all voir dire; right?

DC (Mr. Dratell): That's correct, sir.

PO: Do you object to them basing their questions on this?

ACC: No, sir.

PO: Okay. Okay, Members, I asked you all several general questions yesterday. Any member want to change the answer to any of those general questions I asked about your participation? Apparently not.

Members, right now I do ask you this, probably the most important question of all of the voir dire: Does each member understand that he must disregard anything that he may have been exposed to in any way and decide the case of the United States v. Mr. Hicks solely on the evidence and the law presented to you in this courtroom? Apparently all members understand that.

Members, if counsel ask you a question and it is going to take you into a classified area -- you all know where that is, they don't, so it is on you to say can I hold that for a closed session. They aren't going to keep reminding you of that. Apparently all members understand that.

General voir dire, trial?

P (LtCol [redacted]): Thank you, sir. Gentlemen, I am Lieutenant Colonel [redacted], U.S. Marine Corps. At the table with me is my co-counsel, Major [redacted] and my paralegal, Staff Sergeant [redacted] Together we represent the United States of America in this case.

Just a couple questions. First of all, since arriving here at Guantanamo Bay and up to the present has any member been contacted by the media, any contact with any media?

PO: Apparently not.

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* - Also a joint document issued with the Chief Clerk 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<br><br>v.<br><br>[Name of Accused]<br><br>[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.*<br><br>**Defense Motion**<br>to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones<br><br>[Date motion filed]<br>*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 | **D 104 [Name of Accused]** |
| v. | **Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones |
| [Name of Accused] | |
| [aka if any; not required] | [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<br><br>v.<br><br>[Name of Accused]<br><br>[aka if any; not required] | **D 104 [Name of Accused]**<br><br>**Defense Reply**<br>to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones<br><br>[Date motion filed]<br>*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.

I. 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 |
|---|---|---|---|---|
| | | | | |
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| | | | | |

**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.**<br>Use Arabic numerals | Prosecution Exhibit 1 for Identification *OR*<br>PE 1 for identification *OR*<br>PE 1 for ID | *First page*: PE 1 for ID Page, 1 of 24<br>*Subsequent pages*: 2 of 24, 3 of 24 etc. |
| **Defense Exhibits for Identification.**<br>Use letters. After the letter Z is used, the next exhibit shall be AA. | Defense Exhibit A for Identification *OR*<br>DE A for identification *OR*<br>DE A for ID | *First page*: DE A for ID, Page 1 of 24<br>*Subsequent pages*: 2 of 24, 3 of 24 etc. |
| **Prosecution Exhibits and Defense Exhibits** | Presiding Officer or Reporter will mark through<br>~~for Identification~~ *OR*<br>~~for ID~~. | *First page*: Mark through on first page.<br>*Subsequent pages*: No markings necessary if properly marked as above. |
| **Review Exhibits**<br>Use Arabic numbers | Review Exhibit 1 *OR*<br>RE 1 | *First page*: RE 1, Page 1 of 24<br>*Subsequent pages*: 2 of 24, 3 of 24 etc. |
| **Attachments**<br>Letters or numbers depending on how indexed in the Review Exhibits | Attachment 1 to RE 3 *OR*<br>Attachment A to RE 3 | *First page*: Attachment 1 to RE 3, page 1 of 3<br>*Subsequent pages*: 2 of 3, 3 of 3. |
| **II. Classified Exhibits**<br>Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets. | | |
| **III. Unclassified, Protected Exhibits**<br>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 *curriculum 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<br>COL, JA, USA<br>Presiding Officer | M. Harvey<br>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** |
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**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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| **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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| **Relief requested other than to change the translation as shown above.** | | | | | |
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| **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.** | | | | | |

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

| UNITED STATES OF AMERICA | **DEFENSE** |
| --- | --- |
| v. | Motion for an Order Preserving Potential Evidence |
| ALI HAMZA AHMAD SULAYMAN AL BAHLUL | **11 January 2006** |

1. This Motion is filed by the defense in the case of *United States v. Ali al Bahlul.*

2. **Relief Requested.** The defense requests that an order be issued preserving potential evidence.

3. **Synopsis.** Detailed defense counsel in the above-styled case, has reason to believe that there may have been the appearance of an attempt to orchestrate the proceedings in a manner as to avoid potential legal issues to the detriment of the accused. Because the evidence supporting this potential allegation exists in primarily electronic form, an order preventing the destruction of this potential evidence is necessary.

4. **Burden of Proof and Persuasion.** The burden of proof is on the moving party to show, by a preponderance of the evidence, that a continuance is necessary in the interests of justice. However, when the moving party is the accused, "the judge should err on the side of liberalism in taking action on a delay request when good cause for a delay exists." *United States v. Andrews*, 36 M.J. 922, 925-26 (A.F.C.M.R. 1993).

5. **Facts.** The defense submits the following facts with respect to this issue:

A. On 9 January 2006, Mr. Keith Hodges, the Assisting Providing Officer simultaneously performing duties as a senior instructor at the Federal Law Enforcement Training Center, provided defense counsel with a cd containing all the relevant filings in all the commission cases. Inadvertently, one of the documents provided was titled, "Goals of the Jan 2006 Term at Gitmo." The document was located in the Khadr folder.

B. Later in the evening of the 9th or early in the morning of the 10th, Mr. Hodges provided a hard copy of all the review exhibits. Noticeably absent, was the document mentioned above.

C. The above mentioned document may reflect a deliberate attempt to force counsel into private "conferences" – such conferences have been objected to by defense counsel.

D. There was a change in the "script" provided to defense counsel in the undersigned case between the August 2004 proceeding and the proceeding on 11 January. This "script" change focused primarily on having the accused speak about his counsel wishes, before his detailed military counsel spoke.

6. **Argument.**

A. Defense counsel believes that communications between the Presiding Officers in all the cases, the Assistant Providing Officer and Appointing Authorities Office may be relevant.

B. Defense requests an order preventing the destruction of all emails, notes, and word processing documents in all the commission cases, authored by any of the authorities above be preserved so as to be examined at a later date.

By: _____
Tom Fleener
Major, JA
Detailed Defense Counsel

Attach:
1 page "Goals of the Jan 2006 Term at Gitmo" document

Attachment

## US v Khadr - Goals of the Jan 2006 Term at GTMO

| Goal | APO Comments | PO Comments |
|---|---|---|
| **Conduct Initial session**<br>• ID, qualifications, and swearing of counsel.<br>• Accused's desires with respect to counsel.<br>• Arraignment. | • I have Pete's script, and looking at it, and will send on 8 Dec.<br>• Think about what we might do if Khadr's counsel want to wait until the other detailed counsel come on board in Feb. | |
| **Voir dire of Presiding Officer** and your ruling of any challenge against you. | • [redacted] I need to send to counsel so they can prepare for voir dire. While I don't think they need much time, they will say they do.<br>• When you assemble these materials, I will send to counsel. You will see a draft of the email. | |
| In an **8-5 Conference** (like RCM 802), discuss upcoming schedule of motions and sessions.<br>• Counsel discuss their calendars.<br>• All will discuss a proposed schedule of dates.<br>• If there is agreement on dates, I will type up a document and it will become a FI (filings Inventory) and RE. | • As soon as the initial session is completed - and without saying on the record you will have an 8-5, get counsel into chambers.<br>• I will prepare an outline of the dates we need to set.<br>• The matters we need to set a schedule for are:<br>o Global motions - the big, overriding issues that Pete and I did "directed briefs" on.<br>o Law motions.<br>o Evidentiary motions (should wait until discovery underway or complete.)<br>o Witness requests - separate for law motions, evidentiary motions, and the case (merits and sentencing.)<br>• We need to give counsel a heads up to be prepared to discuss. I will draft email. | |
| **Potentially, go back and announce the above decision on the record.** | • | |