RECORD OF TRIAL

(and accompanying papers)

of

DAVID MATTHEW HICKS
also known as DAVID MICHAEL
HICKS, ABU MUSLIM AUSTRALIA, ABU
MUSLIM AUSTRAILI, ABU MUSLIM
PHILIPPINE, and MUHAMMAD DAWOOD

Name and any aliases charged

ISN: 0002

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 26 & 30 March 2007
(place or Places of Trial) *(Date or Dates of Trial)*

Companion cases:
None.

CHRONOLOGY SHEET [1]

In the case of DAVID MATTHEW HICKS
also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD (ISN: 0002)
(Name of Accused)

Date of alleged commission of earliest offense tried: _____ , _____
(Enter Date)

Date record forwarded to Court of Military Commission Review: _____ , _____
(Enter Date)

_____
(Signature and Rank of Legal Advisor)

1 The Trial counsel is responsible for completion of the Chronology Sheet. Trail counsel should report any authorized deductions and reasons for unusual delay in the trial of the case.

2 In computing days between two dates, disregard the first day and count day. The actual number of days in each month will be counted.

3 Only this item may be deducted.

4 If no further action is required, items 1 to 8 will be completed and chronology signed by such convening authority or his/her representative.

ACTION		DATE ———	CUMULATIVE ELAPSED DAYS [2]
1. Charges sworn *(date of affidavit)*			
2. Charges received by convening authority			
3. Charges referred to trial			
4. Sentence or acquittal			
Less days:			
Delay at request of defense			
Total authorized deduction [3]			
5. Net elapsed days to sentence or acquittal			
6. Record received by convening authority			
Action [4]			

REMARKS

CORRECTED COPY

There were no Military Commission Orders issued in 2006.

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MILITARY COMMISSION ORDER NUMBER 1 — 1 May 2007

David Matthew Hicks, a/k/a "David Michael Hicks", a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood," (ISN 0002), was arraigned and tried before a military commission convened at United States Naval Station, Guantanamo Bay, Cuba, pursuant to Military Commission Convening Order Number 07-01, dated 1 March 2007, as amended by Convening Order Number 07-03, dated 29 March 2007.

The accused was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

CHARGE: Violation of 10 U.S.C. Section 950v Part 25--Providing Material Support for Terrorism, to wit al Qaeda

Plea: Guilty; Finding: Guilty.

SPECIFICATION 1: From in or about December 2000 through in or about December 2001 intentionally providing material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda.

Plea: Guilty, except paragraphs 23 & 24 of the specification, substituting paragraphs 1-35 of Appellate Exhibit 28. Finding: Of the excepted words: Not Guilty; of the substituted words: Guilty.

SPECIFICATION 2: From in or about December 2000 through in or about December 2001 providing material support or resources to be used in preparation for, or in carrying out, an act of terrorism.

Plea: Not Guilty. Finding: Dismissed.

SENTENCE

The following sentence was adjudged by the members on 30 March 2007: confinement for 7 years.

ACTION

In the case of David Matthew Hicks, also known as David Michael Hicks, Abu Muslim Australia, Abu Muslim Austraili, Abu Muslim Philippine, and Muhammad Dawood, ISN 0002, the sentence is approved and will be executed, but the execution of that part of the sentence extending to confinement in excess of nine months is suspended for seven years at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The Government of the Commonwealth of Australia may designate an appropriate place of confinement.

The conditions set forth in the pretrial agreement established the conditions of the suspension of the sentence to confinement. The following conditions of suspension apply and if violated, may result in vacation of the suspension:

(1) David Matthew Hicks will not communicate with the media in any way regarding the illegal conduct alleged in the charge and the specification or about the circumstances surrounding his capture and detention as an unlawful enemy combatant for a period of one year.

(2) David Matthew Hicks will cooperate fully, completely and truthfully in post-trial briefings and interviews as directed by competent United States or Australian law enforcement and intelligence authorities. David Matthew Hicks will provide truthful, complete and accurate information and, if necessary, truthful, complete and accurate testimony under oath at any grand juries, trials or other proceedings, including military commission and international tribunals. If David Matthew Hicks testifies untruthfully in any material way, he can be prosecuted for perjury. David Matthew Hicks will provide all information concerning his knowledge of, and participation in al Qaeda, Lashkar-e Tayyiba (LET), or any other similar organization. David Matthew Hicks will not falsely implicate any person or entity, and will not protect any person or entity through false information or omission.

(3) David Matthew Hicks will waive all rights to appeal or collaterally attack his conviction, sentence or any other matter relating to his prosecution whether such right to appeal or collateral attack arises under the Military Commissions Act of 2006 or any other provision of United States or Australian law. David Matthew Hicks will not make, participate in, or support any claim, and not undertake, participate in or support any litigation, in any forum against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to his capture, treatment, detention, or prosecution.

(4) If during the period of suspension, David Matthew Hicks engages in conduct proscribed by Sections 950q through w of Chapter 47A of title 10, United States Code.

Susan J. Crawford
Convening Authority
For Military Commissions

DISTRIBUTION:
Accused
Defense Counsel
Record of Trial
Clerk of Court
Corrections Facility
Commonwealth of Australia

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

Date: 2 May 2007

MEMORANDUM FOR David Matthew Hicks, 0002, Guantanamo Bay, Cuba

SUBJECT: Service of Final Order in the Case of United States v. David Matthew Hicks a/k/a "Abu Muslim Australia, a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood"

You are hereby served with a copy of the Final Order (Military Commission Order Number 1), dated 1 May 2007 on 2 May 2007, pursuant to Regulation for Trial by Military Commissions and the Rules for Military Commission. A copy of the Order will be provided to your detailed defense counsel.

AFFIDAVIT OF SERVICE

I hereby certify that the above paragraph was read to, and a copy of the Final Order was served on, David Matthew Hicks this 2nd day of May, 2007.

USN

Typed/Printed Name/Grade

Signature

Joint Task Force – Guantanamo

Organization

Address of Organization

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

April 25, 2007

MEMORANDUM FOR David Matthew Hicks, 0002, Guantanamo Bay, Cuba

SUBJECT: Service of Record of Trial and Recommendation of the Legal Advisor -- United States v. David Matthew Hicks, a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood," ISN 0002

You are hereby served with a copy of the Record of Trial and Recommendation of the Legal Advisor on 25 April 2007, pursuant to the Rules for Military Commissions, Rule 1104(b) and Rule 1106(e)(1), respectively. A copy of the Recommendation of the Legal Advisor was provided to your detailed defense counsel. A copy of the Record of Trial is also available to your defense counsel to review.

AFFIDAVIT OF SERVICE

I hereby certify that a copy of the Record of Trial and Recommendation of the Legal Advisor were served on David Matthew Hicks this 25th day of April, 2007.

MAJOR, USA
Typed/Printed Name/Grade

Signature

JTF Guantanamo
Organization

Address of Organization

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

LEGAL ADVISOR

19 April 2007

MEMORANDUM FOR Convening Authority, Office of Military Commissions, 1600 Defense Pentagon, Washington, DC 20301-1600

SUBJECT: Recommendation of the Legal Advisor – United States v. David Matthew Hicks, a/k/a "David Michael Hicks", a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood", ISN 0002, United States Naval Station, Guantanamo Bay, Cuba

1. This is my recommendation pursuant to R.M.C 1106 in the military commission trial of David Matthew Hicks. I have completed my review of the record of trial. The purpose of my recommendation is to assist you in your decision as to what action to take on the sentence in the exercise of your command prerogative.

2. PERSONAL DATA

a. HISTORY:
DOB: 7 Aug 1975 Martial Status: Unmarried
Education: 8th grade
Unsworn statement: pages 200-202

b. PRIOR DISCIPLINARY ACTIONS/CONVICTIONS: None

3. CHARGES:

a. The Charge, Section 950v(25), Specification 1:
Providing Material Support For Terrorism, to wit: al Qaeda. *Plea:* Guilty, except paras 23 & 24, substituting para 1-35 of AE 28). *Findings:* Of the excepted words: Not Guilty. Of the substituted words: Guilty.

b. The Charge, Section v(25), Specification 2: *Plea:* Not guilty. *Findings*: Dismissed without prejudice, ripening into dismissal with prejudice at the time sentence was announced.

c. To the Charge: *Plea:* Guilty. *Findings:* Guilty.

4. SENTENCE:

a. Date Adjudged: 30 March 2007.

Printed on Recycled Paper

b. Sentenced adjudged by Members: 7 years confinement

c. Clemency recommended by Military Commissions Judge or Members: None.

d. Pretrial Agreement:

1) The maximum period of confinement that may be adjudged and approved is seven (7) years.
2) The convening authority agrees to suspend any part of the sentence extending to confinement in excess of nine (9) months for a period of seven (7) years.
3) The United States will transfer the custody and control of the accused to the government of Australia not later than sixty days from the date the sentence is announced.
4) The members will be instructed that the maximum sentence is 7 years confinement
5) The prosecution will not present any evidence in aggravation and the defense will not present any evidence in mitigation during the sentencing phase of the trial. The accused may make an unsworn statement.
6) Appellate Review: accused waived (Appellate Exhibit 33).

e. Approved Deferment: none

5. ACCUSED'S DETENTION PRIOR TO TRIAL:

a. Days in pretrial confinement: none

b. Total presentence confinement credit: none

c. Detained in US custody: 5 years and 4 months

6. MATTERS SUBMITTED BY THE ACCUSED: the accused waived his right to submit matters under R.M.C. 1105(a) (Enclosure 2).

7. RECOMMENDATION: I recommend that the sentence be approved and ordered executed. I further recommend that you sign the action at Enclosure 1 approving the sentence and suspending the confinement in excess of nine months.

3 Encls
1. Proposed Action
2. Waiver
3. Record of Trial

Thomas L. Hemingway
Brig Gen, USAir Force
Legal Advisor to the
Convening Authority

ACTION

OFFICE OF MILITARY COMMISSIONS
1600 Defense Pentagon
Washington, DA 20301-1600

MAY 0 1 2007

In the case of David Matthew Hicks, also known as David Michael Hicks, Abu Muslim Australia, Abu Mulsim Austraili, Abu Mulim Philippine, and Muhammad Dawood, ISN 0002, the sentence is approved and will be executed, but the execution of that part of the sentence extending to confinement in excess of nine months is suspended for seven years at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The Government of the Commonwealth of Australia may designate an appropriate place of confinement.

The conditions set forth in the pretrial agreement established the conditions of the suspension of the sentence to confinement. The following conditions of suspension apply and if violated, may result in vacation of the suspension:

(1) David Matthew Hicks will not communicate with the media in any way regarding the illegal conduct alleged in the charge and the specification or about the circumstances surrounding his capture and detention as an unlawful enemy combatant for a period of one year.

(2) David Matthew Hicks will cooperate fully, completely and truthfully in post-trial briefings and interviews as directed by competent United States or Australian law enforcement and intelligence authorities. David Matthew Hicks will provide truthful, complete and accurate information and, if necessary, truthful, complete and accurate testimony under oath at any grand juries, trials or other proceedings, including military commission and international tribunals. If David Matthew Hicks testifies untruthfully in any material way, he can be prosecuted for perjury. David Matthew Hicks will provide all information concerning his knowledge of, and participation in al Qaeda, Lashkar-e Tayyiba (LET), or any other similar organization. David Matthew Hicks will not falsely implicate any person or entity, and will not protect any person or entity through false information or omission.

(3) David Matthew Hicks will waive all rights to appeal or collaterally attack of his conviction, sentence or any other matter relating to his prosecution whether such right to appeal or collateral attack arises under the Military Commissions Act of 2006 or any other provision of United States or Australian law. David Matthew Hicks will not make, participate in, or support any claim, and not undertake, participate in or support any litigation, in any forum against the United States or

any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to my capture, treatment, detention, or prosecution.

(4) If during the period of suspension, David Matthew Hicks engages in conduct proscribed by Sections 950q through w of Chapter 47A of Title 10, United States Code.

1 May 2007
Date

Susan J. Crawford
Susan J. Crawford
Convening Authority
For Military Commissions

UNITED STATES OF AMERICA	))	**Waiver of Rule 1105 Matters**
	))	
v.	))	
	))	**Military Commission**
	))	**Guantanamo Bay, Cuba**
DAVID HICKS	))	
	))	

1. I, David Hicks, pursuant to Rule 1105(d)(3) of the Rules for Military Commissions, waive the right to submit matters under Rule 1105(a).

2. This waiver is submitted voluntarily.

Signed: _____
David Hicks

Date: 30/03/07

Signed: _____
M.D. Mori
Major, U.S. Marine Corps
Detailed Defense Counsel

Date: 30 MAR 07

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

April 23, 2007

MEMORANDUM FOR Detailed Defense Counsel, Major Michael Mori

SUBJECT: Service of Recommendation of the Legal Advisor

You are hereby served with a copy of the Recommendation of the Legal Advisor in the case of David Mathew Hicks, 0002, on 23 APRIL 2007, pursuant to Rule for Military Commission 1106(e)(1).

MSG
Typed/Printed Name & Grade

Signature

OMC- CA
Organization

Address

ACKNOWLEDGEMENT OF RECEIPT OF SERVICE

I received the Recommendation of the Legal Advisor in the case of David Matthew Hicks on this 23 day of APRIL. 2007. 1056 am

For

Michael D. Mori
Major, USMC
Detailed Defense Counsel

UNITED STATES OF AMERICA	))	**Waiver of Rule 1105 Matters**
v.	))	**Military Commission Guantanamo Bay, Cuba**
DAVID HICKS	))	

1. I, David Hicks, pursuant to Rule 1105(d)(3) of the Rules for Military Commissions, waive the right to submit matters under Rule 1105(a).

2. This waiver is submitted voluntarily.

Signed: _____
David Hicks

Date: 30/03/07

Signed: _____
M.D. Mori
Major, U.S. Marine Corps
Detailed Defense Counsel

Date: 30 MAR 07

ALLIED PAPERS

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

March 1, 2007

MEMORANDUM FOR Detainee David M. Hicks 0002, Guantanamo Bay, Cuba

SUBJECT: Service of Referred Charges

You are hereby served with a copy of the charges referred against you on the 1st day of March, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of the referred charges are being provided to you and your detailed defense counsel.

(Pursuant to Rules of Military Commission (RMC) 602, a copy of the referred charges shall be served in English and, if appropriate, in another language that the accused understands. If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.)

AFFIDAVIT OF SERVICE

I hereby certify that a copy of the referred charges were served on the above named detainee this 1st day of March, 2007.

Joint Task Force - GTMO
Organization

Typed or Printed Name and Grade

Address of Organization

FEB 2 1 2007

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS a/k/a "David Michael Hicks" a/k/a "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	)))))))))))))	**LEGAL ADVISOR'S PRETRIAL ADVICE**

Pursuant to the Military Commissions Act of 2006 (M.C.A.) and the Manual for Military Commissions of 2007 (M.M.C.), the Chief Prosecutor has prepared and forwarded the attached charges that were sworn against David Matthew Hicks (hereinafter "Hicks") on February 2, 2007 in accordance with Rule for Military Commissions (R.M.C.) 307.

R.M.C. 401 authorizes a convening authority designated by the Secretary of Defense for the purpose of convening military commissions to dispose of charges. *See also* 10 U.S.C. § 948h. R.M.C. 406 requires that the legal advisor render pretrial advice to the convening authority based on certain conclusions before any charge may be referred for trial by a military commission.

a. Conclusion with respect to whether each specification alleges an offense under the MCA.

I conclude that Specifications 1 and 2 of Charge I, Providing Material Support for Terrorism, each allege an offense under the M.C.A. 10 U.S.C. § 950v(b)(25); Paragraph 6(25), Part IV, M.M.C.

I conclude that the Specification of Charge II, Attempted Murder in Violation of the Law of War, also alleges an offense under the M.C.A. 10 U.S.C. § 950t; 10 U.S.C. § 950v(b)(15); Paragraph 4, Part IV, M.M.C.; Paragraph 6(15), Part IV, M.M.C.

b. Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report).

The Chief Prosecutor has prepared a referral notebook containing TABS 1-30 for your consideration.

In my opinion, Specifications 1 and 2 of Charge I and Charge I, Providing Material Support for Terrorism, are warranted by the evidence.

However, in my opinion, the evidence for the Specification of Charge II and Charge II, Attempted Murder in Violation of the Law of War, is insufficient to establish probable cause. *See* R.M.C. 406, Discussion. In particular, the evidence does not adequately support the Specification's allegation, *inter alia*, that Hicks attempted to commit murder in violation of the law of war "by directing small arms fire, explosives, or other means and methods, with the intent to kill divers persons of the United States, Northern Alliance, or other Coalition forces . . . ."

c. Conclusion with respect to whether a military commission would have jurisdiction over the accused and the offense.

The President is authorized to establish military commissions under chapter 47A of title 10, United States Code. 10 U.S.C. § 948b(b). The President, by executive order on February 14, 2007, established military commissions to try alien unlawful enemy combatants for offenses triable by military commission as provided in chapter 47A of title 10. Military commissions may try any offense under the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. 10 U.S.C. § 948d(a); R.M.C. 203. A Combatant Status Review Tribunal determined on September 30, 2004, that Hicks is an enemy combatant and a member of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants. 10 U.S.C. § 948a(1). Finally, Hicks is a citizen of Australia and not of the United States. Therefore, it is my opinion that a military commission has both *in personam* and subject matter jurisdiction over Hicks.

d. Conclusion with respect to whether trial of the charges would be harmful to national security.

I have concluded, after consultation with the Office of the Director of National Intelligence and appropriate intelligence agencies, that trial of the charges would not be harmful to national security.

e. Recommendation of the action to be taken by the convening authority.

I recommend that you approve and refer Specifications 1 and 2 of Charge I and Charge I, Providing Material Support for Terrorism, to trial by military commission. I recommend that you dismiss and do not refer the Specification of Charge II and Charge II, Attempted Murder in Violation of the Law of War, to trial.

Concur
SAL
3-1-07

Brigadier General, U.S. Air Force
Legal Advisor to the Convening Authority
for Military Commissions

FEB 21 2007

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

2 Feb07
(day) (month) (year)

MEMORANDUM FOR Detainee David M. Hicks 0002, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the 2nd day of Feb, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

PROVIDING MATERIAL SUPPORT FOR TERRORISM

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this 2nd day of Feb, 2007.

Signature

CITF
Organization

Typed or Printed Name and Grade

Address of Organization

RIMINAL INVESTIGATION TASK FORC

REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
02 FEB 07	(See Narrative)	07020508540790

4. REMARKS

Notification of Charges Sworn 20070202 - USXAS-000002DP

Date/Place: 02 Feb 07

(FOUO/LES) Between 1735 and 1810, 2 Feb 07, SA , Criminal Investigation Task Force (CITF) served Notification of Charges Sworn to David M. Hicks, ISN USXAS-00002DP. SA , CITF witnessed the notification, which occurred in an interview room of Camp Six, United States Naval Station Guantanamo Bay, Cuba.

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

FOUO//LES

RECORD OF PROCEEDINGS

ERRATA SHEET

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 3 April 2007
Reporter: MSG , US Army	Date(s) of Trial 26 & 30 March 2007	Date Submitted to DDC Via electrons 3 April 2007
		Date Submitted to MJ Via electrons 11 April 2007
Date Record Completed 3 April 2007	Date Completed by PROS: 6 April 2007 / Date Completed by DDC: 10 April 2007	Date Authenticated by MJ:

Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
10	12	with	in			
38	12	in	and			
38	17	in	and			
46	4	haven't	have it			
52	6	whom	who			
67	16	"essential"	"essentially"			
71	1	I	it			
74	24	"a Maj Mori"	"by Maj Mori"			
80	11	"clenased"	"cleansed"			
91	14	as	has			
125	12	"Hick"	"Hicks"			
176	1	[Delete entire line]	[Delete entire line]			
217	21	"and tell"	"until"			
220	14	in tact	intact			
231	5	"The may"	You may"			
239	11	[Delete entire line]	[Delete entire line]			

Typed Name & Grade [Military Judge] , Colonel, USMC	Signature	Date 19 April 2007
Typed Name & Grade [Prosecutor] LtCol, USMC	Signature	Date
Typed Name & Grade [Detailed Defense Counsel] MICHEAL D. MORI, Maj, USMC	Signature	Date

ERRATA SHEET

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 3 April 2007
Reporter: MSG , US Army	Date(s) of Trial 26 & 30 March 2007	Date Submitted to DDC Via electrons 3 April 2007
	Date Submitted to MJ Via electrons 3 April 2007	Date Completed by MJ
Date Record Completed 3 April 2007	Date Completed by PROS: / Date Completed by DDC:	Date Authenticated

Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
2	9-10	"The prosecution caused a copy of The Charge in English which is the accused's native language to be served on the accused on 1 March 2007."	"The prosecution caused a copy of the Charge in English, which is the accused's native language, to be served on the accused on 1 March 2007."			
7	17	"... that will not be representing ...."	"... but will not be representing ...."			
10	22	"was"	"were"			
12	7	"scheduled"	"schedule"			
12	11	"... I advise them ..."	"... I advised them ..."			
19	12	"... and is seeking ..."	"... and in seeking ..."			
23	12	"filed"	"file"			
28	3	"ultravirus"	"ultra vires"			
32	16	"... if you don't want in there ..."	"... if you don't want him there ..."			
33	3	"... that there is more information ..."	"... that there is important information ..."			
34	15	"... there rule ..."	"... the rule ..."			
53	5	"Bork"	"Borch"			
53	8 & 23	"Altenberg"	"Altenburg"			
56	21	"... except is provided ..."	"... except as provided ..."			
61	13	"Altenberg"	"Altenburg"			
64	1	"... our personnel present ..."	"... all personnel present ..."			
66	5	"... there is been a proffer ...'	"... there has been a proffer ..."			

75	18	"cause"	"caused"			
77	17	"I would request that it impossible the parties ..."	"I would request that if it's possible the parties ..."			
77	21	"... to address this time?"	"... to address at this time?"			
92	3	"... international terrorism organization ..."	"... international terrorist organization ..."			
111	13	"... with no enemy at sight in Kandahar ..."	"... with no enemy in sight at Kandahar ..."			
112	1	Delete "you're"				
115	6	"1"	"one"			
122	13	"were"	"when"			
124	21	"your"	"you're" or "you"			
140	13	"... from a part ..."	"... from a party ..."			
141	4	"... should the Government of the United States that ..."	"... should the Government of the United States determine that ..."			
144	22	"ahs"	"has"			
146	12	"adjudge"	"adjudged"			
157	17	"... 957v(b)(25)."	"... 950v(b)(25)."			
159	1	"... convening quarter ..."	"... convening order ..."			
169	19	"Members, have of your ever been ..."	"Members, have any of you ever been ..."			
173	9	"Are all the folders closed with the notes covered up their?"	"Are all the folders closed with their notes covered up?"			
175	16	"Well it's just a branch that it can within the Army ..."	"Well it's just a branch that I came from within the Army ..."			
183	7	"know"	"now"			
184	3	"USS Baton"	"USS Bataan"			
201	3	"lives"	"life"	4:44:06		
203	3	"I will remind you and bring up ..."	"I will remind you and bring it up ..."	4:48:06		
203	7	"He saw firsthand."	"He saw it firsthand."			
203	15	"... on the battle fronts ..."	"... on two battle fronts ..."			
204	9	"Al Qaeda places zero value own life."	"Al Qaeda places zero value on life."			

204	12	"sits here or if we'll ever ..."	"sits here or if he'll ever ..."			
205	14	"... train on a mock ..."	"... train in a mock ..."	4:52	:28	
205	20	~~Delete~~ "of"		4:52	:56	
205	20-21	"... other student operatives is what they call themselves ..."	"... other student operatives, is what they called themselves, ..."			
206	16	"has embassies in ..."	"has ~~to~~ embassies ~~in~~ of ..."			
206	17	"How do you think ..."	"Now do you think ..."			
207	9	"provide to al Qaeda what's the more equivalent ..."	"provide to al Qaeda what's the moral equivalent ..."			
207	14	"If you wanted ..."	"If he wanted ..."			
207	23	"... from his own friend evidence ..."	"... from his own friend's evidence ..."			
208	6	"anywhere that he freely ..."	"anywhere but he freely ..."			
208	9	"as fuel and missiles to the people around them."	"as fuel and missiles to attack the people in and around them."	4:57	:00	
209	14	"Now the enemy in Muhammad Dawood ..."	"Now the enemy of Muhammed Dawood ..."	4:59	:04	
210	1	"... to stop them ..."	"... to stop him ..."			
210	14	"can do it again ..."	"can't do it again ..."			
211	2	"United States Government, that without any doubt ..."	"United States Government, and without any doubt ..."	5:01	:50	
215	7	"... to prove they weren't international ..."	"... to prove they were an international ..."			
231	21-22	"In the even that we should have such a notice provide ..."	"In the event that we should have such a notice provided ..."			

Typed Name & Grade [Military Judge] , Col, USMC	Signature	Date
Typed Name & Grade [Prosecutor] , LtCol, USMC	Signature	Date 5 Apr 07
Typed Name & Grade [Detailed Defense Counsel] MICHEAL D. MORI, Maj, USMC	Signature	Date

ERRATA SHEET

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 3 April 2007
Reporter: MSG , US Army	Date(s) of Trial 26 & 30 March 2007	Date Submitted to DDC Via electrons 3 April 2007
	Date Submitted to MJ Via electrons 3 April 2007	Date Completed by MJ
Date Record Completed 3 April 2007	Date Completed by PROS: / Date Completed by DDC:	Date Authenticated

Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
3	3	REBECCA R. SNYDER	REBECCA S. Snyder	[sic]		
8	22	Own	ON			
15	5	948(k)(a) 2	948K (a)(2)			
22	17	You	she			
28	3	ultravirus	ultra vires			
34	3	confirm	conferred			
34	15	There rule	The rule			
42	7	1st of March				
50	15	It was what	What			
54	17	Known	Aware			
61	1	Our	all			
77	17	it	if			
79	13	client's	cleansed			

Typed Name & Grade (Military Judge) , COL, USMC	Signature	Date
Typed Name & Grade (Prosecutor) , LtCol, USMC	Signature	Date
Typed Name & Grade (Detailed Defense Counsel) MICHEAL D. MORI, Maj, USMC	Signature	Date 10 Apr 07

ERRATA SHEET

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABO MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MOHAMMAD DAWOOD	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 3 April 2007
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Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
81	18	as	ask			
112	1	andyoiee your	and your			
124	3	Mr. Hick	Mr. Hicks			
144	22	Ahs	has			
146	12	adjudge	adjudged			
164	19	will submittal	will be submitted			
198	18	apologized	apologizes [3 words]			
212	12	Tora BORA	Two hours			
219	13	and to thereby	and thereby			
221	20	judge you will	judge will			
221	20	then	than			
222	5	punishment that	punish for what			
225	18	5years	5 years			

Typed Name & Grade (Military Judge) , COL, USMC	Signature	Date
Typed Name & Grade (Prosecutor) , LtCol, USMC	Signature	Date
Typed Name & Grade (Detailed Defense Counsel) MICHEAL D. MORI, Maj, USMC	Signature	Date 10 Apr 07

ERRATA SHEET

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 3 April 2007
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Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
231	21	even	event			
231	22	provide	provided			
235	19	that	that.			

Typed Name & Grade (Military Judge) , COL, USMC	Signature	Date
Typed Name & Grade (Prosecutor) , LtCol, USMC	Signature	Date
Typed Name & Grade (Detailed Defense Counsel) MICHEAL D. MORI, Maj, USMC	Signature	Date 10 APR 07

RECORD OF TRIAL

of

DAVID MATTHEW HICKS
also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD

(Name and any aliases charged)

ISN: 0002

(Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office of Military Commissions

(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 26 & 30 March 2007

(place or Places of Trial) *(Date or Dates of Trial)*

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TESTIMONY			
NAME OF WITNESS *(Last, First, Middle Initial)*	DIRECT AND INDIRECT	CROSS AND RECROSS	COURT
PROSECUTION			
None			
DEFENSE			
None			
COURT			
None			

EXHIBITS

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		OFFERED	ADMITTED
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COPIES OF RECORD [1]

_____ copy of record furnished the accused or defense counsel as per attached certificate or receipt.

_____ Copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD [2]

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

_____
(Signature of accused)

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

_____
(Signature of accused)

1 *For instructions as to preparation of copies of record, see Military Commission Regulations, Chapter 18.*
2 *If copy of record prepared for accused contains matters requiring security protection, see RMC 1104d, MMC 2007.*

CERTIFICATE IN LIEU OF RECEIPT

_____ _____
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. _____

was transmitted (delivered) to the accused, _____
(Name of accused)

at _____ , by _____
(Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

_____
(Signature of trial counsel)

OR

_____ _____
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. _____

was transmitted (delivered) to the accused's defense counsel, _____
(Rank and Name)

at _____ , by _____
(Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

because (it was impracticable to serve the record of trial on the accused because he/she was transferred to _____

_____) (the accused requested such at trial) (the accused so
(Place)

requested in writing, which is attached) (_____)
(Other reason)

_____
(Signature of trial counsel)

OR

The accused was not served personally because (_____
(Other reason)

_____).

Accused has no defense counsel to receive the record because (defense counsel has been excused under RMC 505(d)(2)(B))
(_____).
(Other reason)

_____ _____
(Date) *(Signature of trial counsel)*

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

February 28, 2007

MEMORANDUM FOR LIEUTENANT COLONEL USMC
LIEUTENANT USN
LIEUTENANT USN

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Rule 501(b), Manual for Military Commissions, dated January 18, 2007, the above named counsel are detailed and designated as follows for the case of United States v. David Matthew Hicks:

Detailed Prosecutor:
Lieutenant Colonel USMC

Detailed Assistant Prosecutor:
Lieutenant USN
Lieutenant USN

Colonel, United States Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

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

February 5, 2007

MEMORANDUM FOR Maj M. D. Mori, USMC

Subject: Detailing as Defense Counsel in the Military Commission Case of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Defense Counsel in the military commission case of *United States v. David Hicks*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

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

February 5, 2007

MEMORANDUM FOR Ms. Rebecca Snyder

Subject: Detailing as Assistant Defense Counsel in the Military Commission Case of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Assistant Defense Counsel in the military commission case of *United States v. David Hicks*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Copy to:
Maj M. D. Mori, USMC

PROCEEDINGS OF A MILITARY COMMISSION

The military judge called the R.M.C. 803 session to order at Guantanamo Bay, Cuba, at 1404 hours, 26 March 2007, pursuant to the following orders:

Military Commissions Convening Order Number 07-01, Office of Military Commissions, Office of the Convening Authority, Washington D.C., dated 1 March 2007; as amended by Military Commissions Convening Order Number 07-03, same headquarters, dated 29 March 2007.

[END OF PAGE]

There were no Convening Orders published in 2006

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MILITARY COMMISSION CONVENING ORDER
NUMBER 07-01 1 March 2007

Pursuant to the authority vested in the Secretary of Defense in accordance with the Military Commissions Act of 2006, 10 U.S.C. § 948h, and my appointment as Convening Authority for Military Commissions on February 6, 2007, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The military commission is convened with the following members:

MEMBERS

RANK	NAME	SVC	ASSIGNMENT
COL		USA	
Col.		USAF	
Col.		USAF	
Capt.		USN	
COL		USA	
Capt.		USN	
Capt.		USN	
Col.		USMC	
Lt.Col.		USAF	
MAJ		USA	

Susan J. Crawford
Susan J. Crawford
Convening Authority
for Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Reference Set (1)

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING ORDER
NUMBER 07-03

29 March 2007

The officers listed below were detailed as members of the military commission convened by the undersigned Convening Authority by Convening Order 07-01, dated 1 March 2007.

Vice COL , US Army, and MAJ , US Army, for the case of United States of America v. David Matthew Hicks only:

Add the following alternate members for the case of United States of America v. David Matthew Hicks only:

MEMBERS

RANK	**NAME**	**SVC**	**ASSIGNMENT**
COL		USA	
COL		USAF	

SUSAN J. CRAWFORD
Convening Authority
For Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Record Set (1)

[The session was called to order at 1404 hours, 26 March 2007.]

MJ: This military commission is called to order.

PROS: This military commission is appointed by Convening Order Number 07-01, dated 1 March 2007, copies of which have been furnished to the military judge, counsel, and the accused and which have been marked as Appellate Exhibit 001 and attached to the record. The Charge has been marked as Appellate Exhibit 002 and has been properly approved by the Convening Authority and referred to this commission for trial. The prosecution caused a copy of The Charge in English which is the accused's native language to be served on the accused on 1 March 2007.

The prosecution is ready to proceed in the arraignment of The UNITED STATES versus DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD. The accused and the following personnel detailed to this commission are present:

[REDACTED], COLONEL,

UNITED STATES MARINE CORPS, MILITARY JUDGE;

[REDACTED], LIEUTENANT COLONEL,

UNITED STATES MARINE CORPS, PROSECUTOR;

[REDACTED], LIEUTENANT,

JUDGE ADVOCATE GENERAL'S CORPS,

UNITED STATES NAVY, ASSISTANT PROSECUTOR;

MICHAEL D. MORI, MAJOR, UNITED STATES MARINE CORPS, DETAILED DEFENSE COUNSEL;

MS. REBECCA R. [sic] SNYDER, ASSISTANT DETAILED DEFENSE COUNSEL;

and MR. JOSHUA L. DRATEL, CIVILIAN DEFENSE COUNSEL.

All other personnel detailed to this commission but absent is [REDACTED], Lieutenant, Judge Advocate General's Corps, United States Navy, Assistant Prosecutor. All other members are absent.

Court reporter, [REDACTED], Master Sergeant, United States Army, has been detailed reporter for this commission and has been previously sworn.

MJ: Thank you. I detailed myself to this case in my capacity as the Chief Judge for the Military Commissions Trial Judiciary and I have previously been sworn in accordance with Rule for Military Commission 807. I am certified and qualified in accordance with Articles 26(b) and (c) and 42(a) of the Uniform Code of Military Justice, as well as Rule for Military Commission 503. I have not acted in any manner which might tend to disqualify me in this proceeding.

Before continuing with other preliminary matters it is necessary for me to inquire into the accused's need for an interpreter/translator.

1 Mr. Hicks, are you able to understand and speak English?

2 ACC: Yes. But if you don't understand some of my speech

3 sometimes, Mr. [sic] Mori will help. Being Australian English, sir,

4 there are some differences.

5 MJ: Very well. Can you understand me now?

6 ACC: Yeah, yeah.

7 MJ: Is it fair to say then that you do not need a translator or

8 interpreter for these proceedings?

9 ACC: No.

10 MJ: Mr. Hicks, pursuant to the Manual for Military Commissions

11 you are represented by Major Mori, your Detailed Defense Counsel.

12 You may also request a different military lawyer to represent you.

13 If that person you request is reasonably available, he or she would

14 be appointed to represent you as your detailed defense counsel. If

15 you are represented by a detailed defense counsel of your own

16 selection, then your Detailed Defense Counsel, Major Mori, would

17 normally be excused. However, you could request that he continue to

18 represent you along with the other military counsel that you selected

19 and if you did that, the detailing authority which is the chief

20 defense counsel would have the discretion to either grant or deny

21 that request.

22 Do you understand that?

23 ACC: Yes.

1 MJ: Detailed defense counsel are provided for you free of
2 charge.
3 Do you understand that?
4 ACC: Yes.
5 MJ: Now in addition to your detailed defense counsel you may
6 also be represented by a qualified civilian lawyer. A civilian
7 lawyer would represent you at no expense to the government. To be
8 qualified he or she must be a United States citizen admitted to the
9 practice of law in a state, district, territory, or possession of the
10 United States, or a federal court, and may not have been the subject
11 of disqualifying action by a bar or other competent authority. They
12 must be eligible for a secret clearance or higher as required, and
13 they must agree in writing to comply with all orders, rules, and
14 regulations of these military commissions.
15 Do you understand that?
16 ACC: Yes.
17 MJ: If a civilian lawyer represents you, your detailed defense
18 counsel will continue to represent you as well unless you
19 specifically waive the right to be represented by that detailed
20 defense counsel.
21 Do you also understand that?
22 ACC: Yes.

1 MJ: Do you have any questions about your rights to counsel
2 before this Commission?
3 ACC: No.
4 MJ: And by whom do you wish to be represented in this matter?
5 ACC: Mr. [sic] Mori, Joshua Dratel, and Rebecca down there on
6 the end. I'm also hoping at a later date to be able to get some more
7 defense counsel and paralegals to give me more equality with the
8 prosecution to give me a better chance with my defense.
9 MJ: Okay. At this time you said you want to be represented by
10 Major Mori, Mr. Dratel, and Ms. Snyder. Is that right?
11 ACC: Yes.
12 MJ: Is there anybody else you want to talk about right now?
13 ACC: No, not at this very moment, no.
14 MJ: Okay. I understand that you said that might change in the
15 future ----
16 ACC: Well, I'm hoping to have some more defense counsel and
17 paralegals to give me in equality with the prosecution.
18 MJ: Okay. I understand that ----
19 ACC: Obviously that will take requests and exceptions and such
20 -- on top of already my defense counsel.
21 MJ: Okay. If there is somebody you want -- and I'm talking
22 about the lawyers right now -- if there is some other lawyer that you

1 want to represent you, you should make that known to the court
2 through your counsel as soon as you can.
3 ACC: Okay.
4 MJ: Prosecution, please state by whom you've been detailed and
5 your qualifications.
6 PROS: Yes, sir. Your Honor, all members of the prosecution
7 have been detailed to this military commission by the chief
8 prosecutor. All members of the prosecution are qualified under Rules
9 for Military Commission 503 and all members of the prosecution
10 present here today have previously been sworn in accordance with the
11 Rules for Military Commissions 807. No member of the prosecution has
12 acted in any manner which may tend to disqualify us in this
13 proceeding. That detailing document has been marked as Appellate
14 Exhibit 011.
15 Prosecution also has sitting at prosecution table
16 [REDACTED], Technical Sergeant, U.S. Air Force, paralegal, who will
17 assist the prosecution but will not be representing the government.
18 MJ: Thank you.
19 Major Mori, please state your detailing information and
20 qualifications, please.
21 DDC: Yes, sir. I've been detailed to this military commission
22 by the chief defense counsel. I'm qualified under R.M.C. 503 and
23 I've been previously sworn in accordance with R.M.C. 807. I've not

1 acted in any manner that might tend to disqualify me from
2 participating in this military commission. The document has
3 previously been provided to the court reporter.
4 MJ: I think that's marked as Appellate Exhibit 14.
5 DDC: Yes, sir.
6 MJ: Thank you. Ms. Snyder, Appellate Exhibit 14 indicates
7 you've also been detailed as a counsel in this case. If you could
8 please announce your detailing information and qualifications.
9 ADDC: Yes, Your Honor. I've been detailed to this military
10 commission by the chief defense counsel and I'm qualified under
11 R.C.M. [sic] 503 and I have previously been sworn in accordance with
12 R.C.M. -- I'm sorry, R.M.C. 807 and I have not acted in any manner
13 that might tend to disqualify me in this proceeding. I believe the
14 document detailing me is marked as Appellate Exhibit 14 as well, Your
15 Honor.
16 MJ: Thank you. Why don't you go ahead and be seated for a
17 moment.
18 [The assistant detailed defense counsel did as directed.]
19 MJ: On 20 March 2007, after receiving a motion concerning
20 prosecutorial misconduct which has been marked as Appellate Exhibit
21 15 on which I saw Ms. Snyder's name there as signing off and
22 submitting that on behalf of the defense, I sent an e-mail to counsel
23 wherein I alerted the prosecution and defense of my concern about Ms.

1 Snyder's status in conjunction with the rules pertaining to civilian
2 counsel. This e-mail is marked as Appellate Exhibit 16.
3 At this time I will note that yesterday I conducted a
4 conference pursuant to R.M.C. 802 which I'll talk about for a moment
5 now. Present at the conference were Major Mori, Ms. Snyder, Ms.
6 Besabrasow, Lieutenant Colonel [REDACTED], Lieutenant [REDACTED],
7 Technical Sergeant [REDACTED], Lieutenant Colonel [REDACTED], Ms.
8 [REDACTED], and myself. In my e-mail of the 20th of March, I advised
9 counsel of the agenda for this 802 conference that I would conduct
10 would contain three items.
11 First, we would review the documents that we had already
12 marked as appellate exhibits in this case and provide counsel an
13 opportunity to advise me about any other documents they intended to
14 present here today. Second, counsel would be provided with an
15 opportunity to provide me with input concerning my development of a
16 litigation schedule for this case. And third, we would discuss Ms.
17 Snyder's status.
18 Despite a defense request that Mr. Hicks be present at that
19 802 conference I determined that his presence was not required. In
20 this regard, conferences conducted pursuant to R.M.C. 802 are not
21 sessions of the Commission and the accused has no right to be present
22 at such a conference. I also note that Major Mori objected to the
23 802 conference in his e-mail of 21 March 2007, which is also captured

1 in Appellate Exhibit 16. The objection was based on the issue of Mr.
2 Hicks' presence at the conference which I have already discussed and
3 based on the defense's proffer that Mr. Dratel could not be present
4 due to his travel plan.
5 Unfortunately, the defense request that the conference be
6 held sometime after 1800 last night did not further my intent with
7 regard to the conference facilitating efficient and professional
8 conduct of this hearing today. At the 802 conference we initially
9 dealt with a note in Major Mori's response to my e-mail announcing
10 the 802 conference wherein he described the defense's intent to
11 record the 802 conference. At the beginning of the 802 conference he
12 withdrew his request in that regard and I also advised him that that
13 would not be permitted anyway.
14 We also went through a review of the filings inventory that
15 we've undertaken in this case and a review of the appellate exhibits
16 that we had marked. I asked the parties whether they had any
17 question regarding the filings inventory or the list of appellate
18 exhibits and there were no questions. I also asked if there was
19 anything present on that filings inventory or appellate exhibit list
20 -- if there was anything not on that list that they thought should be
21 in there and I was advised that there were no such documents. I
22 asked if there was any other documents either side intended to offer
23 at today's hearings such that they could be marked ahead of time and

1 reviewed by all hands prior to us coming in here and the only thing
2 noted was from prosecution a note about the possibility of some
3 documents having to do with protective orders. I received no such
4 input after the conference.
5 I noted specifically that the court had not received the
6 required notice of appearance and agreement from Mr. Dratel as
7 discussed in previous e-mails and in the preliminary procedural
8 instructions provided to counsel and in the statute governing these
9 proceedings. Defense indicated they would get that to us soon after
10 the proceedings and it was ultimately received by the court sometime
11 yesterday afternoon after the 802 conference -- or I should say a
12 letter was received and I'll be discussing the contents of that
13 letter later.
14 Having completed our conference with regard to
15 administrative matters I asked counsel from both sides if they had
16 been able to work together to develop a litigation schedule that
17 served both of their interests. I got a negative response in that
18 regard. I then asked the defense if they had any input they wanted
19 me to consider while I was developing a trial schedule. I was
20 advised that they had none to provide for me at that time, but would
21 get it to me later after consultation with Mr. Dratel. The
22 government offered me a hard copy of their proposed schedule at that
23 time. I advised them to send me an e-mail copy later to keep it in

1 accord with how we have been having information flow up to that
2 point, and I received that sometime after the conference yesterday.
3 I advised the parties at the conference yesterday that I
4 planned to give them a first draft of the litigation schedule either
5 later yesterday or this morning and advised them that they would be
6 provided an opportunity to be heard on that matter today. I
7 ultimately provided that schedule to them this morning.
8 With regard to the Ms. Snyder agenda item I advised counsel
9 that it was not readily apparent to me how a civilian counsel
10 employed by the United States government could serve as a detailed
11 counsel in this case. I advised them that I brought it up at the 802
12 conference because I didn't want to blindside anyone with that issue
13 in court here today and I wanted to provide the defense with notice
14 about my concern and provide them an opportunity to provide me some
15 input at the 802 conference ahead of the schedule. They declined to
16 do so yesterday and I advised them that we would take the matter up
17 on the record here today.
18 The 802 conference was continued this morning at
19 approximately 0930. The same parties were present with the following
20 exceptions; Mr. Dratel was present this morning, Ms. Besabrasow was
21 absent, Sergeant Rioslatelpa was present. At this morning's
22 conference Mr. Dratel noted his disagreement with the requirements
23 set forth in Appellate Exhibit 7 regarding compliance with Title 10

1 United States Code Section 949c(b)(3)(e). The defense also noted
2 their disagreement concerning the designated seating arrangement at
3 counsel table, and at this morning's conference I also provided the
4 parties with my initial draft concerning the litigation schedule in
5 this case. The defense noted their disagreement with that draft.
6 The parties were advised that they would be provided with an
7 opportunity to be heard on these matters on the record here today.
8 Now with all of that being said, Ms. Snyder, you have just
9 stated on the record that you are qualified in accordance with R.M.C.
10 503. Is that based on your having been detailed by the chief defense
11 counsel in Appellate Exhibit 14?
12 ADDC: Yes, Your Honor, it is.
13 MJ: And do I understand correctly that you are employed by the
14 Office of Military Commissions, Office of the Chief Defense Counsel
15 as a civilian employee?
16 ADDC: That's correct, Your Honor.
17 MJ: And do I understand correctly that you are not currently on
18 active duty in the United States Armed Forces?
19 ADDC: That's correct, Your Honor.
20 MJ: Can you speak up just a little bit?
21 ADDC: Yes, sir.
22 MJ: There is a fan behind me.
23 ADDC: Does this amplify?

1 MJ: I don't think so. You don't have to shout -- just a little
2 bit. All right, R.M.C. 506 specifically states that an accused at a
3 military commission has the right to be represented before a military
4 commission by a civilian counsel if provided at no expense to the
5 government and by the detailed defense counsel. R.M.C. 503(d)(1)
6 provides that ordinarily only persons certified under Title 10 United
7 States Code Section 827 as competent to perform duties as counsel in
8 courts-martial by the Judge Advocate General of the armed force of
9 which the person is a member may be detailed as a trial or defense
10 counsel or assistant or associate defense counsel in a military
11 commission. R.M.C. 503(d)(1) provides an exception for detailing of
12 a civilian as a trial counsel and R.M.C. 503(d)(3) provides
13 provisions regarding qualifications of civilian defense counsel. But
14 my initial review of the R.M.C.'s does not reveal any exception or
15 provision for detailing of a civilian defense counsel. These and a
16 number of other R.M.C. provisions appear to restate the language of
17 Title 10 United States Code Section 949c(a) parts II and III which
18 provide that the accused at a military commission shall be
19 represented by military counsel and may be represented by civilian
20 counsel if retained by him.
21 Now although I have made no rulings and I'm not making a
22 ruling now on this matter, my understanding of your employment status
23 and initial reading of the relevant law certainly raises an issue of

1 whether you are authorized to serve as a defense counsel in these
2 proceedings. So that's the issue stated and I'd like to offer you an
3 opportunity to respond to that.
4 ADDC: Yes, Your Honor. If I could back up from the Manual to
5 the M.C.A. Section 948k(a)2 provides that assistant defense counsel
6 may be detailed for a military commission under this chapter. There
7 is no requirement there that the assistant defense counsel as opposed
8 to the defense counsel be on active duty. Then if we go to the
9 Manual, that contemplates that the assistant defense counsel may be a
10 civilian. If you look at R.M.C. 502(d)(1), Your Honor, the title is
11 "Certified Counsel Not Required."
12 I believe you just recited this first sentence, it states:
13 ordinarily only personnel certified under 10 USC 827b as competent to
14 perform duties as counsel in a courts-martial by the Judge Advocate
15 General of the armed forces of which the counsel is a member may be
16 detailed as trial or defense counsel or assistant or associate
17 defense counsel in a military commission. The term "ordinarily"
18 implies that the rule is not an absolute rule and there are at least
19 two factors in this circumstance that justify departure from the
20 general rule.
21 The first is that I have had an attorney-client
22 relationship with Mr. Hicks since June of 2006. The second is that
23 even though the rules as stated in the title do not require Article

1 27(b) certification, I am in fact qualified under Article 27(b).
2 I've been qualified since March 1999 and I'm a drilling reservist
3 with the Navy Marine Corps Court of Criminal Appeals. I do that on a
4 weekly basis.
5 Article 70 of the UCMJ which refers to appellate counsel
6 before the military appellate courts states that the Judge Advocate
7 General shall detail in his office one or more commissioned officers
8 as appellate government counsel and one or more commissioned officers
9 as appellate defense counsel who are qualified under Section 27(b),
10 so that would indicate that there is a present qualification that I
11 have.
12 Additionally, Your Honor, if you look at subparagraph (f)
13 in the discussion section to R.M.C. 502(d)(6), that provision
14 addresses the duties of defense assistant or associate defense
15 counsel and that paragraph (f) if you look at the second to last and
16 the third to last sentence it states "responsibility for trial of a
17 case may not be brought upon an assistant who is not qualified to
18 serve as a defense counsel." So that would imply that the assistant
19 may not be on active duty. The next sentence states "an assistant
20 defense counsel may not act in the absence of the defense counsel at
21 trial unless the assistant has the qualifications required of a
22 defense counsel." So that again, Your Honor, implies that the
23 assistant may not be on active duty. So in short, I think that the

1 Manual contemplates that the assistant could not be on active duty
2 and if there is no express requirement in either the Manual or the
3 Military Commissions Act that the assistant be on active duty, Your
4 Honor, and that is the position of the defense.
5 MJ: How about the express provision in R.M.C. 506 that he can
6 be represented at military commission by civilian counsel provided at
7 no expense and the express provision in the United States Code ----
8 ADDC: Your Honor ----
9 MJ: ---- 10 USC 949c, that you can be represented by civilian
10 counsel if retained by him. So I'm not questioning do I have this
11 qualification or that qualification, the problem I have is express
12 prohibitions that seem to stand in the way there.
13 ADDC: Well for that, Your Honor, I would say that I am employed
14 by DOD and I'm going to be employed by DOD whether I represent Mr.
15 Hicks or not for the purposes of these military commissions. It's
16 not an additional expense to the government for me to represent Mr.
17 Hicks, Your Honor. Additionally, the job description that I was
18 hired under, I believe, provides that I will represent military -- or
19 the accused at military commissions, Your Honor.
20 MJ: And so that job description then may run afoul of the
21 United States Code.
22 ADDC: I would still say, Your Honor, that there is not any
23 expense to the government because I'm still employed by the

1 government regardless of whether or not I'm representing Mr. Hicks in
2 this courtroom or in Washington, DC or working on other matters with
3 respect to the military commissions. And the chief defense counsel
4 who is the detailing authority has determined that I am in fact
5 qualified and so it would be the position of the defense that unless
6 there is good cause, the military judge does not have the authority
7 to undetail detailed counsel, Your Honor.
8 MJ: You say you are still associated with the U.S. Navy Reserve
9 in some capacity?
10 ADDC: That's correct, Your Honor.
11 MJ: Have you pursued the possibility of getting orders so that
12 you'll be on active duty for the purpose of the representation?
13 ADDC: Colonel Sullivan did that in the summer of 2006, Your
14 Honor.
15 MJ: So the question is have you pursued the possibility of
16 getting orders to be on active duty so then this concern would go
17 away?
18 ADDC: Yes, Your Honor.
19 MJ: Okay.
20 ADDC: Not since the Military Commission Act was passed. This
21 was prior to the Military Commission Act being passed, Your Honor.

1 MJ: So you have not at this time pursued the option of getting
2 orders to place you on active duty in the military for the purpose of
3 serving here as counsel?
4 ADDC: Not recently, Your Honor.
5 MJ: Okay. At this time I'm not going to recognize you as
6 meeting the requirements for service as counsel based on the
7 provisions I've noted. There seems to me to be at this time without
8 making a ruling about this, an issue that requires some litigation
9 and briefs by counsel perhaps with regard to your status. I
10 understand the chief defense counsel's role, but I also have a role
11 with regard to a gatekeeper function and keeping an eye on the
12 statute and in seeking to have these proceedings conducted in
13 accordance with applicable statutes and rules. So I'm not going to
14 recognize you as an assistant detailed defense counsel at this time.
15 Instead I'm directing that if the defense wishes to have
16 Ms. Snyder serve as counsel in this case, the defense should submit a
17 brief on this matter providing a basis for the court to recognize Ms.
18 Snyder as an authorized counsel in this case. It obviously should
19 address the concerns that I've raised here today and the filing of
20 that brief should be done in accordance with the standards for motion
21 practice that are set forth in Appellate Exhibit 7. Then the
22 government will have an opportunity to respond and weigh in on that.

1 If you should pursue that line, then I would also recommend pursuing
2 the concept up having orders ----
3 [The detailed defense counsel and the civilian defense counsel
4 conferred.]
5 MJ: ---- Counsel if you could hold your conversation while I'm
6 speaking. If you need a recess to talk about things, please go ahead
7 and ask.
8 You should also pursue the idea perhaps of military orders
9 as that seemingly would moot the issue and pave the way for your
10 participation without any problems. Until such time as this matter
11 is resolved, Ms. Snyder may not serve as a detailed or a civilian
12 counsel in this case. Now even though Ms. Snyder has not been
13 approved as counsel, Rule for Military Commissions 506(d) provides
14 the military judge with the discretion to allow persons other than
15 counsel to remain at counsel table for the purpose of consultation.
16 Mr. Hicks, have you followed what I've been talking about
17 with Ms. Snyder? Right now there is a problem with me recognizing
18 her as far as serving as a counsel at this case. When I say
19 "counsel" I mean a lawyer making representations for you. However,
20 the rules do provide for other people to stay at the counsel table to
21 provide consultation, and I'd like for you to take a moment to
22 discuss this matter with your counsel and I'd like for you to tell me
23 whether you would like Ms. Snyder to remain at counsel table today

1 for the purpose of providing consultation as necessary or desired.
2 If you could just talk about that. Do you all want to step out for a
3 minute?
4 [The detailed defense counsel and the civilian defense counsel
5 conferred.]
6 DDC: Yes, sir.
7 MJ: Is 10 minutes okay?
8 DDC: Yes, sir.
9 MJ: We are in recess for 10 minutes.
10 **[The session recessed at 1434 hours, 26 March 2007.]**
11 **[The session was called to order at 1501 hours, 26 March 2007.]**
12 MJ: The Commission will come back into order. All parties
13 present when the Commission recessed are again present.
14 Mr. Hicks, as I previously stated to you the Rule for
15 Military Commissions 506(d) provides the military judge with the
16 discretion to allow persons other than counsel at counsel table for
17 the purposes of consultation. I'd like for you to tell me whether
18 you would like Ms. Snyder to remain at counsel table today for
19 consultation purposes.
20 ACC: From my understanding I just lost a lawyer. So I don't
21 see the point that she remain at the table if she's not my -- she's
22 not my lawyer.

1 MJ: Okay. So you don't want her at counsel table for
2 consultation purposes?
3 ACC: Yeah, that's correct.
4 MJ: Okay?
5 ACC: If she can't consult me ----
6 MJ: Pardon me?
7 ACC: From my understanding she can't consult me.
8 MJ: No, that's not correct. She could consult with you. What
9 she cannot do is speak on your behalf to the court, or file motions
10 on your behalf or -- we don't have any witnesses today, but she
11 couldn't question them -- but she could most certainly could consult
12 with you or work with the other lawyers in this case. If you want
13 her to remain there for that purpose -- and she may or may not do
14 anything today -- but she certainly could be here hearing everything
15 and participating and she might prove most helpful even just staying
16 there today. Would you like for her to do that?
17 ACC: Can she represent me?
18 MJ: Well, what she cannot do is speak on your behalf in court
19 here today, sign off on motions, but she certainly could participate
20 in the development of those and we may find at a future session that
21 she is going to be recognized by me. What I've identified today is
22 an issue that needs to be resolved and we may resolve it favorably

such that she can act as counsel for you. I just don't know that right now.

ACC: Well I don't see any need for her to be at the table seeing that she's not my lawyer anymore.

MJ: Well what I'm asking you is, do you want her there or not?

ACC: No, I don't.

MJ: You don't want her there?

ACC: No.

MJ: All right, then ----

ACC: But I do want her to represent me as a lawyer.

MJ: I understand that and the defense can -- if you all want to pursue that and file the motion that was discussed. There is not a lot of harm done by her just sitting there here today. If you don't want her there, that's fine.

ACC: No, I don't want her there to answer the question.

MJ: Okay, fair enough.

Ms. Snyder, I'm afraid you'll need to depart counsel table at this time and to take a seat behind the bar.

[Ms. Snyder departed the courtroom.]

MJ: I think the record should reflect then that Ms. Snyder has departed the courtroom.

Major Mori, I note that Mr. Dratel is also seated at counsel table. As noted in my e-mail to the parties on 21 March

1 2007, and in our 802 conferences yesterday and today Mr. Dratel has
2 not submitted a letter of agreement to comply with all applicable
3 regulations or instructions for counsel including any rules of court
4 for conduct during the proceedings as required by the law set forth
5 in Title 10 United States Code Section 949c(b)(3)(e).
6 In our 802 conference I also noted that the letter that Mr.
7 Dratel submitted which has been attached to the record as a part of
8 Appellate Exhibit 19 does not comply with the format set forth in the
9 sample agreement provided to the parties by the court on 9 March
10 2007, and Appellate Exhibit 7. I'll note that the letter in
11 Appellate Exhibit 19 does not comply with the federal statute because
12 Mr. Dratel's offered agreement falls short of the required agreement
13 to comply with all applicable regulations or instructions for counsel
14 including any rules of court for the conduct during the proceedings.
15 Accordingly, Mr. Dratel does not meet the requirements set forth in
16 the United States Code for participation in this Commission as a
17 civilian defense counsel. Now even though Mr. Dratel has not been
18 approved as counsel, Rule for Military Commissions 506(d) provides
19 the military judge with the discretion to allow persons other than
20 counsel at counsel table for the purposes of consultation.
21 Mr. Hicks, I'd like you to take a moment now and discuss
22 this matter with your counsel and then I would like for you to tell

1 me whether you would like Mr. Dratel to remain at counsel table today
2 for consultation purposes.
3 CDC: Your Honor, we do not need a recess for that purpose. If
4 I may be heard to make the record?
5 MJ: Yes.
6 CDC: At the 802 conference this morning -- and I had submitted
7 last week and I understand that the court was not able to pick it up
8 by e-mail -- but I submitted last week a notice of appearance which
9 was precisely the same as that requested by the court with one
10 exception. Instead of saying "all applicable regulations" it said
11 "all existing applicable regulations" for a particular reason.
12 That reason is as the court is aware, the Secretary of
13 Defense is in the process of promulgating -- of developing and then
14 promulgating regulations that will in fact govern the participation
15 of defense counsel. Those regulations do not exist at this point
16 which of course begs the question of why we are proceeding at all
17 when there is a provision for civilian defense counsel when there are
18 no regulations to govern the participation of civilian defense
19 counsel. And as the court's response to voir dire in number 260
20 makes clear the court inquired as to the status of those regulations
21 as to whether they were imminent or not and decided to proceed anyway
22 regardless of whether -- and I don't know whether they are imminent
23 or not -- but the court decided to proceed.

1 Section 502(d)(3)(e) gives the Secretary of Defense the
2 sole authority to create the agreement that the court has created in
3 the absence of any regulation. The court has usurped the authority
4 of the Secretary of Defense. The court has violated Rule 108 that
5 says that the court must obey the rules. That section says that I
6 have to sign the agreement prescribed by the Secretary pursuant to 10
7 USC 949c(b)(3)(e); not the court, but the Secretary of Defense alone.
8 There is no provision for delegation in that section.
9 I cannot sign a document that provides a blank check on my
10 ethical obligations as a lawyer, my ethical obligations to my client,
11 my ethical obligations under the rules of professional responsibility
12 for the State of New York to which I am bound. As I did in the 802
13 conference, I explained to the court that when I first became
14 involved in this process -- in this Commission system, and the prior
15 Commission system -- at the end of 2003 this issue arose with the
16 Annex B, the document that was in essence my agreement to terms with
17 respect to participation in the Commission process. There were
18 unacceptable terms in that agreement.
19 One I will mention is that I had to agree that my attorney-
20 client conversations with Mr. Hicks would be monitored. I had to
21 agree to that and I refused to agree to that. There were other
22 conditions as well that were simply ethically untenable. I objected
23 to those and in the process of negotiation that was worked out so

1 that I could participate consistent with my ethical obligations.
2 Those provisions were either removed or modified to the extent that I
3 could participate.
4 In the 802 conference this morning I specifically said that
5 I wanted to move this process forward so that I could participate and
6 that I was willing to entertain whatever accommodation the court was
7 willing to offer. Instead the court made it an all or nothing
8 proposition, and I cannot again buy a pig-in-a-poke in this process.
9 These are the same problems that plagued the previous
10 commission; that everything is ad hoc, that everything moves in a way
11 where you cannot predict from one day to the next what the rules are.
12 The rules are made by parties who are not entitled to make rules and
13 the statute to make them be clear. This to me is coupled with
14 another issue that has arisen in that 802 conference which is the
15 court's proposed schedule. Because even if -- even if I signed
16 something that would enable me to participate ----
17 MJ: We're not going to talk about the schedule right now.
18 CDC: Well I think it's part of that, Your Honor, because the
19 schedule is designed to deprive me ----
20 MJ: Excuse me -- excuse me, we're not talking about the
21 schedule right now. We are talking about your willingness to comply
22 with the federal regulations which will put you in a position to
23 participate in the proceedings. That's it.

1 CDC: Well I don't look at it that way. I look at it as your
2 regulation not the regulation in the federal code, but your
3 regulation which is *ultra vires* and this is -- there is a way to do
4 these things which is one way to make it work so that something can
5 be done and there is a way to do it so that something can't be done.
6 I choose the former. The court has chose the latter.
7 What you've chosen to do essentially is to deny Mr. Hicks
8 first with Ms. Snyder with to me a tortured interpretation of the
9 rules. And with me, not a tortured interpretation, just a completely
10 invalid one without any authority. It belongs to the Secretary of
11 Defense. You've now denied Mr. Hicks again another lawyer. The
12 third lawyer, Mr. [sic] Mori, has already been attacked by the chief
13 prosecutor in a manner that's designed to intimidate him and deny Mr.
14 Hicks his zealous advocacy.
15 PROS: Objection, Your Honor.
16 MJ: Sustained. Mr. Dratel, stick with the issue about your
17 qualifications.
18 CDC: This is part of the issue. This is what I see as the
19 motivation for denying us the opportunity to represent Mr. Hicks --
20 or denying him the opportunity of counsel of choice who's been here
21 longer than anyone in this case except for Major Mori ----
22 MJ: Mr. Dratel ----
23 CDC: ---- more than anyone in this room ----

1 MJ: Mr. Dratel, right now you do not represent Mr. Hicks
2 because you have not submitted a notice of appearance and agreement
3 as required by the statute. ----
4 CDC: By the court.
5 MJ: ---- If you want to talk about this statute and that
6 requirement, you may be heard. But please confine your comments to
7 what applies right now and that is whether or not you are going to
8 comply with the federal statute such that you can participate in the
9 proceedings.
10 CDC: I am in compliance with the federal statute. I am not in
11 compliance with the court's unilateral rule that is made without
12 authority, and you don't have to ask Mr. Hicks about whether he wants
13 me here or not, I'm not going to pretend that I'm here functioning
14 when I'm not entitled to do my job. A famous lawyer representing a
15 US serviceman said before Congress, "He is not a potted plant and
16 neither am I." Thank you.
17 MJ: Mr. Dratel, you need to be seated right now until I'm
18 finished with this issue.
19 CDC: I will, Your Honor.
20 MJ: The provision which Mr. Dratel has referred to in R.M.C.
21 502 discusses the qualifications of civilian defense counsel and it
22 lists a number of things which I have made some reference to already
23 today in my discussion with Mr. Hicks as to the baseline

1 qualifications for participation by civilian counsel in these
2 military commissions. R.M.C. 502(d)(3)(e) includes a provision that
3 the counsel have signed the agreement prescribed by the Secretary
4 pursuant to 10 USC 949c(b)(3)(e).
5 Mr. Dratel correctly states that no such agreement has been
6 prescribed by the Secretary. That does not change the fact, however,
7 that United States Code created by the United States Congress and
8 upon which all these rules are based provides the same requirement
9 that in order for an accused to be represented by civilian counsel,
10 the civilian counsel must meet a number of qualifications to include
11 having signed a written agreement to comply with all applicable
12 regulations or instructions for counsel including any rules of court
13 for conduct during the proceeding.
14 Now apparently there was some question on how civilian
15 defense counsel might come in compliance with the statute and
16 participate in these proceedings based on the absence of the
17 prescribed agreement by the Secretary of Defense. I resolved that
18 matter through my issuance of the Preliminary Procedural Instructions
19 for counsel in this case which provided a sample agreement which took
20 the exact language out of the federal statute whereby counsel could
21 sign that agreement, be in compliance with the statute, and
22 participate in the proceedings.

1 I find no merit in the claim that that is beyond my
2 authority because that's sometime what judges do is that they provide
3 ways to move forward within the law. It is the court's view that the
4 sample agreement which again simply adopts the language in the
5 statute passed by the United States Congress nothing more,
6 essentially paved the way for participation for counsel who are
7 willing to abide by the laws of the United States and whose presence
8 and services are requested by the accused.
9 In this case Mr. Hicks has requested the participation of
10 Mr. Dratel. The court has no problem with his participation, but the
11 court will require compliance with the United States Code by Mr.
12 Dratel. I will not force that, obviously, and if you do not wish to
13 comply with that such that you have the qualifications there is
14 nothing for me to do about that. You have indicated you do not wish
15 to do so.
16 Now returning to you, Mr. Hicks ----
17 CDC: Your Honor, may I.
18 MJ: ---- I would like for you to tell me ----
19 CDC: Your Honor, may I ----
20 MJ: I would like for you to tell me whether you would like for
21 Mr. Dratel to remain at counsel table today for consultation
22 purposes.

1 ACC: I'm shocked because I just lost another lawyer. And for
2 the same reason, what is the point of him sitting here when he's not
3 representing me at my table? The table is for my lawyers who
4 represent me. One's gone and now another one is going to have to go
5 by your choice. And now I'm left with poor Mr. [sic] Mori.
6 MJ: Okay, well again, he doesn't have to go but he cannot
7 represent you ----
8 ACC: He doesn't have much choice because you asked him to do
9 something ----
10 MJ: Hold on a second. Mr. Hicks, I would ask that you don't
11 cut me off. I certainly will not cut you off. And I will allow you
12 to speak to me.
13 ACC: Sorry.
14 MJ: Okay. As I indicated as was the case with Ms. Snyder there
15 may certainly be value in having him at table for consultation
16 purposes and that's up to you. If you don't want him there, that's
17 fine. If you do want him there, all you have to do is ask.
18 ACC: I want him as my lawyer, but not as a consultant at this
19 table.
20 MJ: Very well.
21 Mr. Dratel, you're excused.
22 CDC: Your Honor, don't let my silence in response to your
23 ruling -- make it clear on the record that I object. Thank you.

1 [Mr. Dratel departed the courtroom.]

2 PROS: Your Honor, under the circumstances the government

3 believes that there is important information and would request an 802

4 with counsel.

5 MJ: Sit down for a minute.

6 [The prosecutor did as directed.]

7 MJ: Does the defense also want that 802?

8 DDC: Not at that this time, sir. I would like to attach some -

9 ---

10 MJ: Okay, hold on a second. The next thing I want to address

11 is with regard to attire by the accused in this case. Although I've

12 not yet had the opportunity to issue a rule of court with regard to

13 this matter, it is my understanding that in most courts with regard

14 to civilian participants a suit and tie or equivalent is encouraged

15 and at a minimum business casual attire is required. Examples of

16 business casual attire for me include long pants and buttoned up

17 collared shirts with sleeves with or without a sport jacket. An

18 accused will typically appear in business casual attire at a minimum,

19 or if the accused desires, a culturally equivalent attire.

20 Arranging for this sort of attire is typically the

21 responsibility of the defense counsel. In the event that defense

22 counsel cannot with due diligence or even financially has any trouble

23 securing sufficient appropriate clothing for an accused, then defense

1 counsel will typically notify the prosecutor sufficiently in advance
2 of trial.
3 [The accused and his detailed defense counsel conferred.]
4 DDC: Sir, if you could finish, and then I'll consult with the
5 client, sir.
6 MJ: Okay. I was saying that if the defense has any trouble
7 securing sufficiently appropriate attire they should notify the
8 prosecutor to provide the prosecutor an opportunity to assist in
9 securing those items for the trial. It is also standard practice
10 that an accused will not appear for a trial session wearing prison
11 garb. That would refer to jumpsuits or scrubs or things of that
12 nature.
13 These rules, as I would expect counsel probably know, are
14 designed to protect the presumption of innocence on the part of the
15 accused. The rule with regard to not appearing in prison attire is
16 for the protection of the accused such that the court or commissioned
17 members or a jury depending on what jurisdiction you are in, the
18 people that are making findings with regard to guilt or innocence,
19 would not be inferring anything adverse on the part of the accused
20 based on them wearing some sort of prison or jail clothing. So
21 again, this rule of court is there to buttress the presumption of
22 innocence that an accused is afforded in these proceedings.

1 I'll note for the record that the accused is wearing what I
2 would describe as some sort of scrubs or attire which certainly could
3 be mistaken or perceived as the type of clothing that is of concern
4 with regard to these rules. Frankly, I don't know what the
5 regulation is and the different sorts of attire are with regard to
6 detention facilities here, but I suspect that this is somewhere along
7 those lines and that's why I raised it.
8 So I wanted to raise with defense counsel my concern so you
9 know about this rule here today and to reiterate the purpose of the
10 rule is for the benefit of the accused. I wanted to see if you had
11 taken that in consideration for your arrangement today, but more
12 importantly to ensure they are taken into consideration at future
13 hearings when you'll actually have finders of fact or sentencing
14 authorities or things like that. It's not that big a concern today,
15 frankly, but I just wanted to make sure we are on the same page.
16 Major Mori?
17 DDC: Yes, sir. It's been noted, and it will be addressed, sir.
18 MJ: Okay. And if there is some reason you think that is
19 helpful to your client, I'm not going to wrestle you to the ground on
20 what he wears here as long as it's not frayed or overly soiled or
21 things like that. But I would reiterate that long-standing protocols
22 for the benefit of the accused are that they wear some sort of more

1 appropriate attire. I certainly recommend that you consider that for
2 future hearings.
3 DDC: Yes, sir.
4 MJ: Okay, what did you have before we covered that?
5 DDC: Sir, I just wanted to ask one question. Was your proposed
6 trial schedule already attached as an appellate exhibit, sir?
7 MJ: We're going to get to that and yours is going to be there
8 too as part of it.
9 DDC: Yes, sir. I just also would like to offer defense's
10 summary of the 802's on 25 March and 26 March, copies have been
11 previously provided to the court reporter and asked that they be
12 marked as the next appellate exhibit.
13 MJ: Now why didn't I receive those yesterday or been placed on
14 notice earlier than right before we started today that you had
15 something like that?
16 DDC: Because normally the defense -- when an 802 is summarized,
17 sir, that the defense is supposed to be given an opportunity to also
18 add additional summarizations of the 802 and I thought that was when
19 it would happen and that's when I would offer it, sir.
20 MJ: In the future ----
21 DDC: I will, sir.
22 MJ: ---- you need to get them to me sooner so we can have them
23 marked. We'll have them marked and appended afterwards.

1 DDC: Yes, sir.

2 MJ: They'll certainly become part of the record. I'm not going

3 to take them now.

4 DDC: Yes, sir.

5 MJ: Okay. You still want an 802 conference, is that right?

6 PROS: Yes, sir.

7 MJ: How long do you think it will take?

8 PROS: Five minutes, sir.

9 MJ: Okay. Do you think it can wait a little while?

10 PROS: Through voir dire, sir.

11 MJ: Okay. The reason I'm hesitating is because every time we

12 take a break there is a lot of things that have to be done so I'm

13 trying to minimize the number of breaks.

14 I have previously provided counsel for both sides a

15 summarized biography. This document has been marked as Appellate

16 Exhibit 6. I also received questionnaires from the prosecution and

17 defense. I provided written responses to all of those questions and

18 provided them to counsel. Those questionnaires along with my

19 responses which were placed on the questionnaire documents have been

20 marked as Appellate Exhibit 13. Since providing responses in

21 Appellate Exhibit 13 I have learned there is one other person

22 associated with the process that I know that I did not disclose.

1 On 24 March 2007, I learned that Colonel [REDACTED], United
2 States Army retired, is employed in some capacity with the OMC
3 Prosecution Office. I first met Colonel [REDACTED] in 1990 when he
4 was the head of the US Army Criminal Law branch in Washington, DC. I
5 was at that time an action officer in the United States Marine Corps
6 Military Law branch.
7 Colonel [REDACTED]and I were both assigned to the Joint
8 Service Committee on Military Justice. A committee which I did note
9 somewhere in my responses that I had that assignment -- that
10 collateral duty essentially, along with my regular assignment.
11 Colonel [REDACTED] was the US Army representative and I was a captain
12 at the time and the United States Marine Corps working group member.
13 We served on this committee together although in very different
14 capacities for approximately 1 year. The committee met approximately
15 once every 6 weeks or so for more or less 2 hours at each time.
16 Since that time I've seen Colonel [REDACTED] from time to time at the
17 US Army JAG School in inter-service judicial conferences where he
18 sometimes comes and puts on programs of instruction.
19 Does counsel for either side have any follow-up questions
20 based on my responses to your previously submitted voir dire
21 questions?
22 Government?
23 PROS: No, Your Honor.

1 MJ: Defense?

2 DDC: Yes, sir. Sir, I would like to ask some follow-up
3 questions specifically regarding question 26 -- I mean 260, sir. The
4 question was, "Did you or through an agent have any communications
5 with anyone in the convening authority regarding the status or
6 content of any draft of the pending implementing regulations from the
7 military commissions?" You indicated that mid-March Lieutenant
8 Colonel [REDACTED] inquired about whether publication of any
9 regulation was imminent such that it might be taken into account with
10 regard to your preliminary instructions to counsel in the case.
11 How did you first find out that there were further
12 regulations going to be published?

13 MJ: As I recall, Lieutenant Colonel [REDACTED] mentioned to me
14 perhaps that he had heard. I have never received any formal notice
15 or seen any draft, was never asked for comment or any participation.
16 He just -- you may know better than me whether there is a rumor of
17 one out there. Since we were going to be publishing preliminary
18 instructions he wanted to check that because obviously if we put
19 something out one day and the next day some reg came out that would
20 make things more complicated. But I have no knowledge about status
21 or anything. Lieutenant Colonel [REDACTED] had heard somehow.

22 DDC: Lieutenant Colonel [REDACTED] is your senior legal
23 adviser, is that correct, sir?

1 MJ: We call it senior attorney adviser to the trial judiciary,
2 that's correct.
3 DDC: To the trial judiciary.
4 MJ: That's correct.
5 DDC: Do you know who he spoke with ----
6 MJ: No.
7 DDC: ---- to even find out that they were implementing
8 regulations coming out?
9 MJ: No. That person is intentionally a bit of a firewall on a
10 lot of things like that so that I don't have problems with outside
11 information, so we try to be rather careful about me not having
12 things in my situational awareness that I don't need to have.
13 DDC: Yes, sir. But you thought it appropriate to find out
14 whether they were imminent or not. Did you request him to find out
15 the status or did he do that on his own, sir?
16 MJ: I don't recall specifically.
17 DDC: And why did you think it was important to know if they
18 were imminent or not in making your preliminary instructions?
19 MJ: As I mentioned, the preliminary instructions there was some
20 work involved in putting that together. I don't remember how many
21 pages it was, but we tried to be careful about it and to do that and
22 then immediately have a regulation the next day which might cause us

1 to have to go back and redo the whole thing is not efficient work, so
2 it was a matter of efficiency essentially.
3 DDC: And one of those issues in regarding the regs that was
4 coming out was how a civilian attorney could represent someone on a
5 military commission. Were you aware of that, sir?
6 MJ: I'm not aware if there is any intention for the reg to
7 address that.
8 DDC: You're not aware at all, sir?
9 MJ: I have no idea what's going to be in the reg.
10 DDC: No one -- did Colonel [REDACTED] at all -- if you had no
11 idea, sir, well then why would you need to know if it was imminent or
12 not, sir?
13 MJ: Because if a reg was going to come out, it might have
14 something in there which might affect, interface, contradict, not
15 line up very well with what we were preparing as our preliminary
16 instructions.
17 DDC: And you needed to make these preliminary instructions
18 because the convening authority had referred a Commission before
19 these implementing regulations were published?
20 MJ: No. The preliminary instructions are to tell counsel how
21 to conduct business.
22 DDC: Yes, sir. And you were aware that the convening authority
23 had referred a case to a military commission before all the

1 regulations were published on how a military commission would run and
2 operate?
3 MJ: I don't understand your question.
4 DDC: You were aware ----
5 MJ: I found out on the 1st of March that there was a case
6 referred.
7 DDC: Yes, sir. And the 1st of March when you were appointed
8 chief judge, is that correct, sir?
9 MJ: That's correct.
10 DDC: And on 6 March is when you ----
11 MJ: And I think on the 9th of March we issued the preliminary
12 instructions because we went to work and somewhere along that line we
13 thought about these things.
14 DDC: And as it’s kind of worked out at least in Mr. Hicks' case
15 those implementing regulations that might cover the agreement for a
16 civilian lawyer to complete was not yet published. That would have
17 interfered with the government moving forward in the Commission but
18 for your coming up with your own form. Is that correct, sir?
19 MJ: What does that have to do about seeking out bias on me?
20 DDC: Well sir, it appears that the government referred a case
21 to a Commission before the system was established, before all the
22 regulations that were known to be published, some of the Manual for
23 Military Commissions actually specifies that the Secretary of Defense

1 publish an additional regulation and I think it's in five areas and
2 then in approximately 20 or so it gives the option to the Secretary.
3 So the government chose to go forward with a case before all the
4 implementing regulations were done. Yet that would probably make it
5 very difficult for them to achieve or meet their speedy trial
6 requirements of having the arraignment in 30 days if the regulations
7 weren't complete. Would you agree with that, sir?
8 MJ: No. I neither agree nor disagree. What does that have to
9 do with the challenge for cause for me which is what we are talking
10 about right now?
11 DDC: It appears in your preliminary instructions you actually
12 created forms which helped the government move forward with a
13 military commission that they had chosen to move forward with that
14 Commission when they did not have those regulations. You were coming
15 to the aid of the government when they had not properly set up the
16 system.
17 MJ: Is that a question?
18 DDC: That you asked what it dealt with on bias and challenge
19 and that's why I'm asking this question.
20 MJ: No, no, you're wrong. I was not coming to the aid of the
21 government. I was establishing procedural instructions to move the
22 case forward.

1 DDC: Yes, sir. Sir, Sergeant First Class [REDACTED], he works
2 in your office as well. Is that correct, sir?
3 MJ: Yes.
4 DDC: Did you assign him a task at either the end of February or
5 beginning of March to speak to the chief defense counsel to find out
6 the schedule or the commitments for the detailed defense counsel in
7 Mr. Hicks' case?
8 MJ: No.
9 DDC: Are you aware that he did that?
10 MJ: Yes.
11 DDC: Do you know why he did that, sir?
12 MJ: What does this have to do with the challenge of me?
13 DDC: Again, sir, it goes to the fact that your office received
14 notice that detailed and assistant detailed defense counsel had case
15 commitments the first week that you scheduled the first hearing. You
16 intentionally chose a week to schedule it when the defense had other
17 commitments.
18 MJ: Is there a question in there, Major Mori?
19 DDC: You just asked me, sir, what does this have to do. I'm
20 explaining why it has to do.
21 MJ: Okay. You've said something that you think that I was
22 doing. Explain how that establishes impartiality or bias on my part.

1 DDC: Well, you set the initial trial schedule for this case in
2 a time period that you knew that detailed and assistant detailed
3 defense counsel had other commitments outside CONUS, part of which
4 involved investigating.
5 MJ: This is a statement now, you're not asking me a question.
6 You're going to be provided an opportunity to challenge me. If you
7 think you're going to have the information to challenge me on that
8 basis ----
9 DDC: I want -- no, sir ----
10 MJ: ---- Don't interrupt me. Don't interrupt me.
11 DDC: Yes, sir.
12 MJ: You're going to be able to make a challenge later. Right
13 now you need to ask the questions to get the information upon which
14 you may try to base a challenge for cause if you wish.
15 DDC: Yes, sir. I will ask factual questions. Sir, did you
16 direct Sergeant [REDACTED] to find out the schedule of detailed
17 defense counsel in Mr. Hicks' case before you scheduled the first
18 hearing?
19 MJ: No.
20 DDC: Did he in fact find out that information and provide it to
21 you?
22 MJ: I believe that's correct.

1 DDC: And did he provide to you that detailed defense counsel
2 currently had orders for overseas from 14 to 23 March?
3 MJ: There was an e-mail talking about something like that. If
4 you're reading from the e-mail ----
5 DDC: Yes, sir, I have a copy if you ----
6 MJ: No, I have it. I just don't remember all the contents.
7 DDC: And also where the chief defense counsel informed the
8 judge that part of the trips purpose was for interviewing witnesses
9 and conducting factual investigation of the case. Do you remember
10 that, sir, being in the e-mail?
11 MJ: No, not specifically, but that e-mail is somewhere in the
12 record there.
13 DDC: If not, I will have a copy to attach. Did your office
14 receive any conflicts with scheduling -- and you set the hearing on
15 March 20, correct, sir, after knowing this information?
16 MJ: Yes.
17 DDC: Did you receive any input from the government that said
18 they had conflicts on March 20, sir?
19 MJ: I don't believe so.
20 DDC: You scheduled the first 802 for yesterday. You were
21 informed that Mr. Dratel, the civilian lawyer, would not be here. Is
22 that correct, sir?
23 MJ: Yes.

1 DDC: The defense asked for that to be moved at a time when the
2 civilian lawyer, Mr. Dratel, could be present. Correct, sir?
3 MJ: Yes.
4 DDC: And you denied that. Correct, sir?
5 MJ: Yes.
6 DDC: When you first scheduled the initial session on 6 March
7 2007, you had not been sworn as the chief trial judge yet had you,
8 sir? Do you recall, sir?
9 MJ: No. I recall. I had not been sworn in accordance with
10 R.M.C. 807. I had been sworn for regular court-martial duties and as
11 a judge advocate.
12 DDC: Yes, sir. Sir, you were a presiding officer under the
13 first military commissions system that was convened under the
14 President's military commission order?
15 MJ: What are we following up on now? I think that's pretty
16 clear in the answers already, right?
17 DDC: Yes, sir.
18 MJ: What I don't want you to do is try to do a cross-
19 examination for members right now.
20 DDC: No I'm not, sir.
21 MJ: What I want you to do is ask follow-up questions and if you
22 want to make a challenge ----

1 DDC: It was my sort of changing topic question for you, sir.
2 You were aware that that military commissions system was found
3 illegal by the Supreme Court?
4 MJ: Well I'm not either going to agree or disagree with your
5 characterization. I know they stopped as a result of the Supreme
6 Court decision.
7 DDC: You mentioned in your questions that you read a summary of
8 the Hamdan case. Have you ever read the full opinion of the Hamdan
9 case, sir?
10 MJ: How does that provide information about a basis for
11 challenge of me in this case?
12 DDC: Because you just said that you didn't -- weren't aware of
13 the illegality whole thing and I'm trying to direct Your Honor to
14 where the Supreme Court said it was illegal.
15 MJ: Okay, and what does that have to do with the basis for
16 challenge of me in this case -- whether I am very familiar with it or
17 not familiar with it?
18 DDC: Whether you participated in a system that might have
19 violated Article III of the Geneva conventions. I know you answered
20 that question, I just had one follow-up question.
21 MJ: Why don't you ask your follow-up question, because I think
22 I have addressed these things.

1 DDC: You answered that -- yes, sir -- you didn't feel -- do you
2 not believe that as a military judge -- or actually as a presiding
3 officer ----
4 MJ: Which question are you following up on now?
5 DDC: We're following up on violating the -- any concern for
6 criminal liability from participating in the first military
7 commissions system.
8 MJ: And I said, "No."
9 DDC: And you said no -- do you believe at that time the Geneva
10 conventions governed your conduct?
11 MJ: I don't find that a relevant question at this time. I have
12 no concerns about any sort of criminal liability based on my
13 participation in the previous military commissions. None. Zero.
14 DDC: In your article that you wrote, sir, "Forum Shoppers
15 Beware," this was an article you wrote back in March of 2002. In it
16 you were somewhat critical of the Military Commission Order and on
17 page 18 -- the copy I have had faxed page numbers on the bottom left,
18 sir.
19 MJ: Which question are you following up on now?
20 DDC: On your article, sir.
21 MJ: Which number?
22 DDC: It's a question in which you disclose your writing, sir.
23 MJ: Which number?

1 DDC: [Looking through binder.]

2 MJ: It seems to me that you'd get there at about number 183.

3 DDC: Yes, sir. And I was going to put in a specific part of

4 the article. In the article you addressed ----

5 MJ: Which question are you following up on now?

6 DDC: On that question, sir. On the whole article. Now I'm

7 moving to follow up on a specific point you raised in the article

8 where you said ----

9 MJ: So you're not following up on any of the questions you

10 asked. You're asking a different question about the article?

11 DDC: I asked in the questions in which you disclosed this

12 article. Now after reading the article I have a follow-up question,

13 sir.

14 MJ: Go ahead.

15 DDC: You mention on page 18 -- it's the fax numbers on the

16 bottom, there is fax numbers on my copy -- it says "for when the

17 executive branch substitutes a panel of military officers in the

18 civilian judge and jury's role as a trier of fact, a number of

19 irrefutable appearance issues are created." It was what irrefutable

20 appearance issues did you mean, sir?

21 MJ: What footnote are you at in the article?

1 DDC: Not a footnote. If you look at the bottom left corner,
2 sir, there is page numbers from a fax that appears. This is fax page
3 18 and it's the second paragraph, just the last sentence, sir.
4 MJ: Did you read the next three paragraphs, because that's kind
5 of a segway sentence to the next three paragraphs where it's
6 explained at length.
7 DDC: In those paragraphs ----
8 MJ: And then it goes on to say that in the military justice
9 system even though we think we have the best military justice system
10 in the world, there are still commentators who don't accept that and
11 even though they are wrong, people still complain about it and that's
12 the point I'm making.
13 DDC: And so would you believe that those irrefutable appearance
14 issues are still created today in this military commission with
15 having a military judge and military members?
16 MJ: I would agree that people will still complain about the
17 Commissions no matter how well they are run and how good a trial is
18 conducted, there are going to be some people who will complain about
19 it anyway. I would agree with that.
20 DDC: Sir, I have no further questions.
21 MJ: Does either side have a challenge for cause?
22 Government?
23 PROS: No, Your Honor.

1 MJ: Defense?

2 DDC: [No response.]

3 MJ: Does the defense have a challenge for cause?

4 DDC: Yes, sir. The defense would challenge the military judge
5 pursuant to R.M.C. 902 on the basis of the Your Honor's impartiality
6 might reasonably be questioned and that Your Honor apparently has an
7 appearance of a personal bias or prejudice concerning Mr. Hicks or
8 his counsel. This is shown that the military judge, at least from
9 the observer and the appearance standard is that the military judge
10 has been pushing Mr. Hicks to go to trial at times that were
11 inconvenient and when the defense was not available.

12 MJ: Times inconvenient to who? Could you clarify that?

13 DDC: The defense, yes -- you're scheduling of the initial
14 session when the military judge knew and had information that the
15 detailed defense counsels were to be scheduled outside of CONUS
16 actually conducting defense case preparation. The military judge
17 created rules to assist the government to move forward with their
18 prosecution when it was the government's failure to properly have the
19 rules published before sending cases to a military commission. Then
20 by scheduling 802's knowing full well that the civilian lawyer could
21 not be there to participate, as well as scheduling the trial schedule
22 knowing full well that the trial schedule you set conflicts with the
23 civilian lawyer's federal US criminal trial.

1 MJ: And you're talking about the draft schedule.

2 DDC: Yes, sir, the draft.

3 MJ: Because I've made no order about the schedule in this case.

4 DDC: Absolutely, the draft.

5 MJ: Got it.

6 DDC: And your participation in the previous system again would
7 create the appearance that your participation in a system that the
8 Supreme Court found illegal and further participating in this new
9 system would give the appearance of unfairness. Your friendship or
10 meeting again with so many people -- Colonel [REDACTED] the first
11 prosecutor, Mr. [REDACTED] a current prosecutor who is also -- worked
12 for the convening authority, and previously your contact with General
13 [REDACTED], as well as your contact with Colonel [REDACTED] -- that
14 it would give the appearance that it would be unfair for you to
15 continue.

16 MJ: Before you go on.

17 DDC: Yes, sir.

18 MJ: You used the word "friendship" there. Who did you say I
19 had a friendship with?

20 DDC: Your acquaintanceship maybe -- possible acquaintance --
21 none of the people I list you actually have a friendship and
22 socialize regularly. I don't want to give that impression, sir.

23 MJ: Okay. ----

1 DDC: They were listed in the questions.

2 MJ: ---- Because there is a difference, right?

3 DDC: Yes, sir.

4 MJ: So my having made the acquaintance of a bunch of people.

5 As far as contact with Major General [REDACTED], you're just talking

6 about the things I revealed in there as far as having met him a few

7 times?

8 DDC: Yes, sir.

9 MJ: Very well.

10 DDC: Also your rulings today dealing with Mr. Hicks' assistant

11 defense counsel -- detailed counsel, and Mr. Dratel, again would give

12 the appearance of a bias against Mr. Hicks. Your article where you

13 are very clear about your opinion about the use of military

14 commissions and that they were not the best choice to be used out of

15 the options to try people accused of violating the laws of war in

16 your opinion.

17 MJ: And why is that a problem for the defense? I would think

18 if anything, that would suggest rather open-mindedness about a lot of

19 these rules. Why do you think that that bodes ill for the defense?

20 DDC: That's true, sir. Except you chose to participate in the

21 first system that was illegal and continued to participate in it even

22 once you were known -- again this creates the appearance.

1 MJ: And what do you base your characterization that I chose to
2 participate? I was assigned my duties and I'm discharging my duties,
3 much as you are I suspect.
4 DDC: Absolutely, sir. Had you felt that what you participating
5 in was not a full and fair -- or unfair trial, you could have raised
6 an objection to that and asked to be removed. So while you had one
7 position respective of military commissions, again I'm talking about
8 from an appearance standard, sir. It appears that you had one
9 position on military commissions when you weren't personally
10 involved, then when you are personally involved your opinion changed
11 and so that could be an appearance that there may be some self
12 interest in participating -- the appearance.
13 MJ: Okay. I'm not offended by your comments. Don't worry
14 about that.
15 DDC: I understand, sir. I just want to make sure I'm clear on
16 the standard I'm applying and it's appearance based.
17 MJ: So no actual bias is claimed, just appearance on all those
18 things?
19 DDC: I think the only actual bias would deal with the
20 scheduling -- the actual scheduling and conflict with the defense.
21 Scheduling favoritism to the government in the sense of fixing the
22 rules to fix their mistakes and going forward without the system
23 being set up, sir.

1 MJ: Okay. This is a good time for us to go ahead and take our
2 break for the 802 conference and then we'll come back and carry on.
3 You say the 802 you anticipate is going to be short?
4 PROS: Yes, sir, I do.
5 MJ: Then we'll just take a small break and let's all work
6 together to see if we can come back on the record with all of the
7 movement and everything by 1630.
8 We are in recess.
9 **[The session recessed at 1554 hours, 26 March 2007.]**
10 **[The session was called to order at 1642 hours, 26 March 2007.]**
11 MJ: The commission will come to order. All parties who were
12 present when court recessed are again present.
13 During the recess an R.M.C. 802 conference was conducted
14 between trial counsel, defense counsel, and the military judge
15 wherein we discussed the status of Appellate Exhibit 15 which is the
16 defense motion regarding prosecutorial misconduct in light of the
17 developments with regard to Ms. Snyder and Mr. Dratel and that they
18 were the ones that signed off on that motion. I advised the parties
19 that I would address that in court a little bit later. Do counsel
20 concur with my summation of the 802 conference?
21 PROS: Yes, sir.
22 DDC: Defense does, Your Honor.

1 MJ: All right, the defense has made a motion to disqualify the
2 military judge pursuant to R.M.C. 902 on two grounds. First is under
3 R.M.C. 902(a) which provides that except as provided in section (e)
4 of this rule which has to do with waiver which we are not going to
5 deal with today, the military judge shall disqualify himself or
6 herself in any proceeding in which that military judge's impartiality
7 might reasonably be questioned. The second ground is under R.M.C.
8 902(b) which deals with specific grounds and it appears to me that
9 defense was seeking under R.M.C. 902(b)(1) which provides that a
10 military judge shall also disqualify himself or herself in the
11 following circumstances. One is where the military judge has a
12 personal bias or prejudice concerning the party or personal knowledge
13 of disputed evidentiary facts concerning the proceedings.
14 I'll address the challenge under part (b) first, the
15 personal bias or prejudice concerning the party. Defense here raises
16 a couple of issues. One, their position that my setting of the
17 initial hearing in this case and the setting of the 802 conference as
18 previously discussed indicated some sort of partiality or desire to
19 help the government or some sort of animus or effort to frustrate the
20 participation by Mr. Dratel or Ms. Snyder in this case. With regard
21 to setting the hearing, the record establishes that the 1st of March
22 was the day that the charges were served on the accused and R.M.C.

1 707 provides that the arraignment in these cases should be within 30
2 days from that time.
3 That same day I was appointed as the chief judge for these
4 military commissions and I decided to detail myself to this first
5 case. At that point I have some responsibility with regard to case
6 management, and the calendar would reflect that the week of the 26th
7 of March is the last week on the calendar such as if one were to
8 schedule an initial hearing during that week and there was any
9 problem with weather or airplanes or things that I couldn't even
10 think of, you'd be in a position where you probably wouldn't get your
11 hearing done within the 30 days.
12 Accordingly, in the court's view to schedule an initial
13 hearing that provides for those sorts of things to happen is not a
14 good decision by the military judge. So instead I set up for the
15 prior week. In setting it for the prior week as reflected in
16 Appellate Exhibit 3 wherein I set the 20th of March for the first
17 session, that same e-mail includes this language, "If either side
18 believes they cannot comply with the schedule set forth above, the
19 lead counsel on behalf of all counsel for either side will
20 immediately request a continuance setting forth a requested date and
21 stating the reasons why such a continuance is necessary. This
22 request shall be contained in the body of an e-mail and must be filed

1 no later than 1700 hours Eastern Standard Time, 9 March." When the
2 defense requested a continuance, it was granted.
3 In that fashion through case management the time of the
4 continuance grant does not count within the 30 days and accordingly
5 the case management responsibilities of the court were met as well.
6 That was not done to help anyone that was just doing the job
7 properly.
8 With regard to Mr. Dratel and the 802 conference, I've
9 already had some discussion of that, but I'll review a few points.
10 The R.M.C. 802 conference was conducted for my benefit such that I
11 could go over matters that I thought needed to be addressed prior to
12 us coming in here today and done in a fashion that they would provide
13 me adequate time to respond and work with the information I received
14 such that this hearing could be conducted in as professional and as
15 efficient a manner as possible.
16 As I stated previously, the travel schedules of the various
17 parties were left to themselves. I also stated that the postponing
18 of the 802 conference until after 1800 yesterday did not serve my
19 intentions with regard to being ready to conduct a professional
20 hearing today. I will also note that I agreed to an additional 802
21 conference this morning to allow Mr. Dratel to provide whatever info
22 he wanted regarding the schedule and to again advise him about the
23 shortfall with regard to his notice of appearance letter.

1 In my view the record is clear that this court has paved
2 the way for Mr. Dratel to participate in every aspect of this
3 proceeding as requested by Mr. Hicks. Unfortunately, Mr. Dratel has
4 declined to take the necessary simple steps to bring himself in
5 compliance with the federal code provisions. Accordingly, I find
6 that the matters raised by the defense with regard to personal bias
7 or prejudice, with regard to my handling of this case thus far do not
8 establish any personal bias or prejudice by me concerning a party or
9 personal knowledge of any disputed evidentiary facts concerning the
10 proceedings.
11 With regard to the second basis under R.M.C. 902(a). This
12 challenge was based on, from what I understand, the combined effect
13 of the matters I just addressed as far as my dealing with counsel in
14 the scheduling of this hearing and the status of Mr. Dratel and Ms.
15 Snyder, the establishment of the 802 conference times and the hearing
16 times, my promulgation of Preliminary Procedural Instructions for
17 counsel, my prior contact with a number of people that are discussed
18 in the voir dire question and answer section. I'll make just a
19 couple of comments about those things.
20 With regard to the scheduling times, I just addressed that
21 with regard to 902(b) and those same comments apply. With regard to
22 the dealing with the defense counsel I would again note there has
23 been no ruling with regard to Ms. Snyder and the defense is free to

1 pursue her participation in a number of ways, either through having
2 her get orders to be military counsel -- and it's hard to understand
3 why that wasn't done prior to now -- or to pursue litigation of the
4 issue I raised today upon which I've made no ruling.
5 With regard to Mr. Dratel, again the court has paved the
6 way for his participation and that is essentially left up to him at
7 this point. So accordingly the court finds that I have done nothing
8 to prohibit those people from participating in these proceedings.
9 With regard to the rules to assist counsel one of my
10 responsibilities in the Manual for Military Commissions is to issue
11 rules of court. The Preliminary Procedural Instructions were issued
12 in lieu of an opportunity for me to issue a full set of rules of
13 court in this case. They are not done to assist counsel, they are
14 done to facilitate professional litigation of this case.
15 With regard to my participation in the prior military
16 commissions system, I don't see that that has any effect one way or
17 the other on my role in this matter. With regard to my contact with
18 various people, several retired colonels talked about in the
19 questions and answers, retired General [REDACTED], and perhaps a few
20 others. I've been in the Marine Corps for almost 27 years, in the
21 armed forces for almost 31. I've been involved in the military
22 justice system basically since summer internship in 1985 and yes I've
23 come across a number of people that are in the military justice

1 system from a variety of the services. There is nothing in my view
2 in any of the questions or answers or things that have been
3 established or things I know about that establish any sort of
4 friendship with any of those people and they are all professional
5 acquaintances essentially on both sides of the aisle in this case,
6 none of which in my estimation would lead a reasonable person to
7 question my impartiality in this matter.
8 So taken individually and collectively I find that the
9 matters raised by the defense and all the matters in the voir dire do
10 not raise matters that might cause a reasonable person to question my
11 impartiality as contemplated in R.M.C. 902(a) and accordingly the
12 challenge for cause is denied. I further find that I am qualified to
13 serve as the military judge of this military commission under the
14 provisions of Rule for Military Commissions 902.
15 Do counsel for both sides understand the provisions of the
16 Manual for Military Commissions concerning safeguarding and securing
17 classified information?
18 PROS: Yes, Your Honor.
19 DDC: [No response.]
20 MJ: Major Mori?
21 DDC: Yes, sir.
22 MJ: I'm going to go in order, so if you say it at the same time
23 as him, I'm not going to be aware of it. So you understand that?

1 DDC: Yes, sir.

2 MJ: Thank you.

3 Do you understand that you must, as soon as practicable,

4 notify me of any intent to offer evidence involving classified

5 information so that I may consider the need to close the proceedings?

6 PROS: Yes, sir.

7 DDC: The defense does, Your Honor.

8 MJ: As I am required by the Manual for Military Commissions to

9 consider the safety of witnesses and others at these proceedings, do

10 counsel for both sides understand that they must notify me of any

11 issues regarding the safety of potential witnesses so that I may

12 determine the appropriate ways in which testimony will be received

13 and witnesses protected?

14 PROS: Yes, sir.

15 DDC: The defense does, Your Honor.

16 MJ: No protective orders have been marked as an appellate

17 exhibit before this commission.

18 Is counsel for either side aware of any protective orders

19 that should be marked at this time?

20 PROS: No, Your Honor.

21 DDC: None from the defense, Your Honor

22 MJ: The current filings inventory as previously discussed has

23 been marked as Appellate Exhibit 18.

1 Do counsel for both sides agree that it is an accurate
2 reflection of all filings, motions, responses, replies and requests
3 for relief to date?
4 PROS: Yes, sir.
5 DDC: Yes, sir.
6 MJ: The accused will now be arraigned. All personnel present
7 appear to have the requisite qualifications and all required to be
8 sworn have been sworn.
9 Major Mori, have you and the accused previously been
10 provided a copy of the charges?
11 DDC: Yes, sir.
12 MJ: The prosecutor will announce the general nature of the
13 charges.
14 PROS: Your Honor, the general nature of The Charge in this case
15 is providing material support for terrorism.
16 MJ: Does the accused desire for the charges to be read?
17 DDC: Defense waives the reading, Your Honor.
18 MJ: Very well, the reading will be omitted.
19 **[THE CHARGE SHEET FOLLOWS AND IS NOT A NUMBERED PAGE.]**
20 **[END OF PAGE]**

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

1 March 2007

MEMORANDUM FOR Office of Military Commissions, Office of the Convening Authority

SUBJECT: David Matthew Hicks Charge Sheet

1. The attached charge sheet pertaining to David Matthew Hicks is a Resigned Duplicate Original Charge Sheet identical in all respects to the document forwarded to the Convening Authority except for the signatures in blocks III and IV of MC Form 458 and the initials at the bottom of pages 3 – 9 of the Attached Charges and Specifications.

2. I am the POC for any questions regarding this certification.

LTC, JA, USAR
Deputy Chief Prosecutor
OFFICE OF MILITARY COMMISSIONS

Attachment:
One 9 page Charge Sheet consisting of a two page MC Form 458 and a seven page Continuation Sheet.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
DAVID MATTHEW HICKS

2. ALIASES OF ACCUSED:
a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood"

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0002

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs, II, Marvin, W.	O-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Kevin M. Chenail
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

O-5
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Signature

MC FORM 458 JAN 2007

Blocks I through IV of this MC Form 458, including the continuation sheets for Block II, are duplicate originals, replacing misplaced originals. 58 SDC 3-1-06

IV. NOTICE TO THE ACCUSED

6 On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Kevin M. Chenail, LtCol, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1000 hours, on 6 Feb. '07, at the Office of the Convening Authority for Military Commissions, Arlington, VA.
Location

For the Convening Authority: Jennifer D. Young
Typed Name of Officer

CW3, USA
Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority Appointed 6 Feb. 2007	Arlington, VA	20070301

Referred for trial to the (non)capital military commission convened by military commission convening order 07-01 dated 1 March 2007.

subject to the following instructions[1]: See Continuation Sheet

~~By~~ X
Command, Order, or Direction

Hon. Susan J. Crawford
Typed Name and Grade of Officer

Convening Authority
Official Capacity of Officer Signing

Susan J. Crawford
Signature

10 U.S.C. Sec. 948h

VII. SERVICE OF CHARGES

9. On March 1, 2007 I (caused to be) served a copy these charges on the above named accused.

Kevin M. Chenail
Typed Name of Trial Counsel

O-5
Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

CONTINUATION SHEET – MC FORM 458 JAN 2007, Block VI Referral

In the case of UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a, "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

The following charge and specifications are referred to trial by military commission:

Specifications 1 and 2 of Charge I, as amended, and Charge I.

Other matters incorporated by reference in Block 4 of MC Form 458 pertaining to the accused, including those sections entitled "INTRODUCTION", "JURISDICTION", and "BACKGROUND" are in the nature of a bill of particulars and are not referred to trial.

The following charge and specification are dismissed and are not referred to trial:

The Specification of Charge II and Charge II.

This case is referred non-capital.

Date 3-1-07

Susan J. Crawford

Hon. Susan J. Crawford
Convening Authority
for Military Commissions

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS a/k/a "David Michael Hicks" a/k/a/ "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	**CHARGES:** Providing Material Support for Terrorism; and, Attempted Murder in Violation of the Law of War

INTRODUCTION

1. The accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this military commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and, the final determination of September 30, 2004 by the Combatant Status Review Tribunal (CSRT) that Hicks is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The charged conduct of the accused is triable by military commission.

BACKGROUND

4. Hicks was born on August 7, 1975 in Adelaide, Australia.

5. In or about May 1999, Hicks traveled to Tirana, Albania and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanian Muslims. Hicks completed basic military training at a KLA camp and engaged in hostile action before returning to Australia.

6. While in Australia, Hicks converted to Islam. In or about November 1999, he traveled to Pakistan where, in early 2000, he joined a terrorist organization known as Lashkar-e Tayyiba (LET), meaning "Army of the Righteous" or "Army of the Pure."

a. The LET is the armed wing of Markaz-ud-Daawa-wal-Irshad (MDI), (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.

b. The LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to occupy Indian-controlled Kashmir and violent opposition of Hindus, Jews, Americans, and other Westerners.

c. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

d. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and India, itself.

e. In 1998, Saeed called for holy war against the United States after LET members were killed by United States missile attacks against terrorist training facilities in Afghanistan.

f. On or about April 23, 2000, in a bulletin posted on the internet, LET claimed that it had recently killed Indian soldiers and destroyed an Indian government building, both located in Indian-controlled Kashmir.

g. On or about December 26, 2001, the United States designated LET a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act.

7. After joining LET, Hicks trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading and land navigation, and troop movement.

8. Following training at Mosqua Aqsa, Hicks, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir, where he engaged in hostile action against Indian forces.

9. In or about January 2001, Hicks, with assistance from LET, traveled to Afghanistan and attended al Qaeda training camps.

GENERAL ALLEGATIONS

10. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

11. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

12. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the

United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

13. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

14. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

15. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

16. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

17. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

18. In or about 2001, al Qaeda's media committee which created As Sahab ("The Clouds") Media Foundation which has orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for its declared war against the United States.

19. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

20. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

21. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

SKC 3-1-07

CHARGE I: VIOLATION OF SECTION AND TITLE OF CRIME IN ~~PART IV OF M.M.C.~~
SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

22. SPECIFICATION 1: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

23. That Paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 1 of Charge I.

24. That the material support or resources provided by the accused, included, but were not limited to, the following:

    a. That in or about January 2001, Hicks traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.

    b. That upon entering Afghanistan, Hicks traveled to Kandahar where he stayed at an al Qaeda guest house and met Richard Reid ("Abdul Jabal"), Feroz Abbasi ("Abu Abbas al-Britani"), and other associates or members of al Qaeda. While attending al Qaeda's training, Hicks would use the *kunya*, or alias, "Abu Muslim Austraili," among others.

    c. That Hicks then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, Hicks trained in weapons familiarization and firing, land mines, tactics, topography, field movements, basic explosives, and other areas.

    d. That in or about April 2001, Hicks returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence to al Qaeda operatives.

    e. That while Hicks was training at al Farouq, Usama bin Laden visited the camp on several occasions. During one visit, Hicks expressed to bin Laden his concern over the lack of english al Qaeda training material.

    f. That after Hicks completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and

individually interviewed certain attendees. Hicks was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel; and his willingness to go on a martyr mission. After this interview, Muhammed Atef recommended Hicks for attendance at al Qaeda's urban tactics training course at Tarnak Farm.

g. That in or about June 2001, Hicks traveled to Tarnak Farm and participated in this course. A mock city was located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

h. That in or about August 2001, Hicks participated in an advanced al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This course included practical application where Hicks and other student operatives conducted surveillance of various targets in Kabul, including the American and British Embassies. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting embassy windows and doors; documenting persons coming and going to the embassy; and, submitting reports to the al Qaeda instructor who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. During this training, Hicks personally collected intelligence on the American Embassy.

i. That during the surveillance course, Richard Reid ("Abdul Jabal") visited on two separate occasions. After the course, Hicks returned to Kandahar airport, where Abdul Jabal taught a class on the meaning of *jihad*. Hicks also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.

j. That on or about September 9, 2001, Hicks traveled to Pakistan to visit a friend. While at this friend's house, Hicks watched television footage of the September 11, 2001 attacks on the United States, and expressed his approval of the attacks.

k. That on or about September 12, 2001, Hicks returned to Afghanistan and, again, joined with al Qaeda. Hicks had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.

l. That upon arriving in Kandahar, Afghanistan, Hicks reported to Saif al Adel, then al Qaeda's deputy military commander and head of the security committee for al Qaeda's shura council, who was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces. Hicks was given a choice of three different locations (city, mountain, or airport), and he chose to join a group of al Qaeda fighters near the Kandahar Airport.

m. That Hicks traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, Hicks armed himself with six (6)

WH

ammunition magazines, 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

n. That on or about October 7, 2001, when the Coalition Forces, Operation Enduring Freedom, bombing campaign began, Hicks had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.

o. That on or about October 10, 2001, after two nights of bombing, Hicks was reassigned and joined an armed group outside the airport where he guarded a tank. For about the next week Hicks guarded the tank, and every day received food, drink, and updates on what was happening from the al Qaeda leader in charge.

p. That Hicks heard fighting was heavy at Mazar-e Sharif, that Kabul would be next, and that western countries, including the United States, had joined with the Northern Alliance.

q. That Hicks implemented the tactics he had learned with al Qaeda and trained some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, Hicks decided to look for another opportunity to fight in Kabul.

r. That on or about October 17, 2001, Hicks told the al Qaeda leader in charge of his plans, and then traveled to Kabul. Hicks also took his weapon and all his ammunition.

s. That Hicks arrived in Kabul and met a friend from LET, who requested Hicks go to the front lines in Konduz with him, and Hicks agreed.

t. That on or about November 9, 2001, Hicks and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after Hicks arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban, or other associated fighters, including John Walker Lindh, engaged in combat against Coalition forces. Hicks spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, Hicks saw bullets flying and Northern Alliance tanks coming over the trenches.

u. That Hicks spent two to three days making his way back to Konduz while being chased and fired upon by the Northern Alliance.

v. That Hicks made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going back into Konduz in order to fight to the death. Hicks, instead, decided to use his Australian passport and flee to Pakistan.

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w. That Hicks then moved secretly within Konduz to a *madafah*, an Arab safe house. Hicks wrote the Arabs a letter that said not to come look for him because he was okay, and left the safe house. At this time Hicks still had his weapon, and moved again, secretly, to another house where he stayed for about three weeks. Later, a man who spoke some english helped Hicks sell his weapon so he could flee to Pakistan.

x. That in or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, Hicks took a taxi and fled towards Pakistan. However, Hicks was captured by the Northern Alliance in Baghlan, Afghanistan.

25. SPECIFICATION 2: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, provide material support or resources to be used in preparation for, or in carrying out, an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

26. That paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 2 of Charge I.

27. That paragraph 24 and its subparagraphs (a) through (x) of Specification 1 are realleged and incorporated by reference for Specification 2 of Charge I.

~~CHARGE II: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.~~
SECTION 950t ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

28. SPECIFICATION: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from on or about September 11, 2001, through in or about December 2001, attempt to commit murder in violation of the law of war, by directing small arms fire, explosives, or other means and methods, with the intent to kill divers persons of the United States, Northern Alliance, or other Coalition forces, while the accused was without combatant immunity as an unlawful enemy combatant who was part of, or supporting, al Qaeda, Taliban, or associated forces engaged in hostilities against the United States or its Coalition partners, and that the conduct of the accused took place in the context of and was associated with an armed conflict.

SJC
3-1-07

WO

1 MJ: Accused and counsel, please rise. Mr. Hicks, you may rise
2 at this time.
3 [The accused and his defense counsel did as directed.]
4 MJ: Mr. David Matthew Hicks, I now ask you how do you plead,
5 but I advise you that any motion addressed under Rule for Military
6 Commission 905(b) must be made prior to the entry of pleas.
7 DDC: Sir, the defense requests to preserve pleas.
8 MJ: Very well. Please be seated.
9 [The accused and his defense counsel did as directed.]
10 MJ: Okay, as we have discussed at various times and as is
11 addressed in the AE's that are a part of the record, I previously
12 submitted input from counsel with regard to the litigation schedule
13 in this case. Although I did not receive any prior to the 802
14 conference from yesterday, I did receive some last night and it was
15 as previously noted discussed a bit more at the 802 conference this
16 morning. At this morning's 802 conference I provided counsel with
17 both sides with a draft schedule which I developed based on the input
18 of counsel and with consideration for the Rules of Military
19 Commissions and that has been compiled together with the counsels
20 input and marked as, I believe, Appellate Exhibit 20. Does either
21 side wish to be heard on this matter?
22 PROS: No, sir.

1 DDC: Sir, the defense would object to the military judge's
2 trial schedule, obviously already marked as appellate exhibit was our
3 proposed dates and the federal trials of Joshua Dratel that he had
4 previously scheduled and as such the military commission's current
5 schedule by the military judge effectively removes his ability to
6 participate in this due to his conflicting federal trials.
7 MJ: Well, two things while you're standing.
8 DDC: Yes, sir.
9 MJ: At the present time he is not a counsel in this case for
10 the reasons we discussed. Additionally, there has been no discussion
11 about any efforts by him with regard to seeking to move those other
12 cases instead of assuming that Mr. Hicks comes third in line after
13 those other clients. So I understand the objection, but if you could
14 speak to that why we assume that he can not participate at those
15 times just because there has been a proffer about some other cases
16 and there has been no discussion about who ordered them, why they
17 couldn't be moved, whether he's the lead counsel, whether they're
18 going to be in session every day or things like that. Perhaps you
19 could speak to that.
20 DDC: Right now, sir, or would you like me to submit it in
21 writing as a request?

1 MJ: While I have not ordered a schedule in this case, so it's
2 problematic speaking about him since he is not a counsel in this case
3 and has never entered a notice of appearance or agreement to comply.
4 DDC: Yes, sir. But as you're aware, obviously, that he is the
5 civilian counsel that Mr. Hicks would like to have. To answer your
6 question about his schedule, the trial coming up in New York starting
7 next month is a previously scheduled federal US criminal trial that
8 was scheduled prior to any charges being brought against Mr. Hicks.
9 It's a multi-defendant case and so you're dealing with -- I believe
10 it's three defendants in a criminal case, so you're dealing with the
11 schedules for three different defense teams and that is again
12 expected to end some time the first part of June. It's a federal
13 trial in New York, sir.
14 MJ: This is a federal trial which is also rather complicated,
15 and I don't see why there is an assumption that it's easier to wait
16 in this case until 2008 essentially instead of moving that trial.
17 DDC: Well, obviously sir, as well as -- I mean, your milestone
18 of having defense motions due the 7th of April -- now it's the 26th
19 of March -- the legal motions -- basically gives the defense 13 days
20 to raise all legal challenges to the Military Commission Act which
21 was created in October of 2006 and to the regulations a 200-plus page
22 document that was written by the government and for us to raise all
23 legal issues that are associated with the very first military

1 commission -- except for the illegal ones a few years ago -- in 60
2 years, this is something that is obviously -- we then, as we've
3 suggested to you on approximately 45 legal motions that we have
4 identified -- we could provide that in writing a full what we
5 anticipate -- we're still learning and investigating and researching
6 the legal issues, sir. So I would expect that even without Mr.
7 Dratel ----
8 MJ: How long have you been working on this case?
9 DDC: I've been working on it for 3 years, sir.
10 MJ: Okay. How many other cases do you have assigned?
11 DDC: None, sir.
12 MJ: Okay. When was the Military Commissions Act passed?
13 DDC: October 2006, sir.
14 MJ: So don't tell me you had 13 days to work on it.
15 DDC: No, sir. We've already previously begun -- we've begun.
16 But we didn't have The Charge. I spent 3 years working on David
17 Hicks' case for charges that don't exist anymore. That work is all
18 thrown out the window. I spent 3 years -- the majority of 3 years
19 working under a system that no longer exists -- a waste of time. I
20 spent 3 years investigating facts to put on a defense to three
21 specific charges that no longer exist, and yet there is an entirely
22 new charge, so while not all of my investigative work is completely
23 worthless, it does take on a different complexity or different angles

1 that you might have pursued in your investigation because you're
2 dealing with a different charge that has different elements.
3 So I appreciate that I have been on this case a long time
4 and I do not want to delay this trial 1 day longer than to adequately
5 provide David Hicks with an adequate defense, because I realize he's
6 in pretrial -- he's in confinement and we want to get him out. But I
7 think the judge should appreciate that there is -- obviously this is
8 an enormous case. We've been on it -- I recognize that. We want to
9 get our legal motions in, but 13 days to challenge the Military
10 Commission Act, the Manual for Military Commissions, and whatever 30
11 chapter regulations that they decide to promulgate later, those
12 eliminate issues or they may raise new issues as well as the -- now
13 that at this point I'm the only counsel I would ask for more time and
14 follow the defense's proposed schedule of having motions due in May,
15 sir, the date proposed in May.
16 MJ: Anything else?
17 [The detailed defense counsel and the accused conferred.]
18 DDC: That's it, sir.
19 MJ: Anything from the government in light of that?
20 PROS: No, Your Honor.
21 MJ: All right, it is my determination that while the defense
22 may ultimately be able to articulate a reasonable basis to support a
23 continuance request in this case, it is appropriate for this court to

1 be mindful of the standards set forth in Rule for Military
2 Commissions 707 with regard to the timing of pretrial matters and to
3 set an initial trial schedule that calls for the assembly of the
4 military commission within 120 days of the service of charges. In
5 this case, the defense proposal would most likely have the effect of
6 delaying the start of this trial well into the year 2008. While it
7 is certainly hard to say how long this trial will take to complete,
8 that is an unacceptable initial plan.
9 Additionally, the defense proposal was largely based, it
10 appears, on an initial position placing Mr. Hicks' trial third in
11 line behind two other cases in which Mr. Dratel is apparently a
12 counsel. Now a couple of things have changed. Mr. Dratel is not a
13 counsel in this case at this point. Even if he was, it would seem to
14 me that it may well be upon further examination that those cases were
15 more amenable to adjustment than the situation in this case. Major
16 Mori has today raised a number of concerns with regard to the volume
17 of work that he anticipates needs to be done on behalf of his client
18 and I intend to be mindful of his requirements such that he is placed
19 in the position to provide a full and vigorous defense on the behalf
20 of his client.
21 However, I am going to order an initial trial schedule that
22 will be set forth and what will be marked as the appellate exhibit
23 next in order and which I will provide to counsel shortly after we

1 conclude here today. I will advise you that it will be in accord
2 with the draft that I provided this morning with some additional
3 instructions, but as far as the dates, you essentially have those
4 dates already in hand.
5 I would advise the defense that after an assessment of the
6 developments in this case which I certainly recognize are
7 significant, but at the same time recognize that I have made no
8 ruling about Ms. Snyder and she could be back and I certainly
9 recognize that there are simple steps for Mr. Dratel to begin
10 participation in this case and that is up to him.
11 After the defense has an opportunity to respond to what has
12 developed here today, should the defense determine that the
13 reasonable course of action is to seek a continuance in the schedule,
14 you should promptly submit a motion for continuance in this case, and
15 we will deal with that in a reasonable fashion.
16 On the 19th of March 2007, the defense filed a motion
17 pertaining to claim prosecutorial misconduct. That has been marked
18 as Appellate Exhibit 15. The government response was filed in
19 accordance with the litigation requirements set forth in Appellate
20 Exhibit 7 today. Pursuant to the standard set forth in Appellate
21 Exhibit 7, the defense reply to the government response is due on the
22 29th of March 2007. A hearing on that motion will be scheduled along

1 with any other motion that may be submitted in accordance with the
2 trial schedule.
3 I will also note that that motion was submitted on behalf
4 of the defense over the signature of Ms. Snyder; Mr. Dratel's name
5 was also on there. Major Mori's name was not on the motion. Given
6 the developments in this case, Major Mori, whether or not you intend
7 to file a reply to the government response I'd like you to submit
8 something in which -- since you are the counsel in this case at this
9 time that you adopt the motion as your own because once again when it
10 was submitted -- Mr. Dratel has never submitted an appearance in this
11 case, and Ms. Snyder's status again is uncertain at this time. So in
12 order to put that thing in the proper queue again let's get your name
13 instead since it's still a defense motion. That's just as a minimum
14 and then whatever other reply you want to do, you go ahead and do.
15 DDC: Yes, sir.
16 MJ: Are there any other matters that we need to take up at this
17 time?
18 PROS: No, Your Honor.
19 DDC: Sir, just the defense's 802 summaries that they be marked
20 as the next appellate exhibit in order.
21 MJ: The court order will be next and then those will probably
22 be combined as one and put as the one after.
23 DDC: Yes, sir.

1 MJ: Anything else?

2 DDC: Nothing further from the defense, sir.

3 MJ: Okay, at this time we're going to recess in accordance with

4 the trial schedule.

5 **[The session recessed at 1718 hours, 26 March 2007.]**

6 **[The session was called to order at 2022 hours, 26 March 2007.]**

7 MJ: The commission will come to order. All parties present

8 when the court recessed are again present.

9 During our recess I was approached by counsel and a

10 conference was conducted in accordance with R.M.C. 802 wherein I was

11 advised that Mr. Hicks desired to enter pleas in this case and we

12 decided to do that now.

13 Do counsel concur with my summation of the 802 conference?

14 PROS: Yes, Your Honor.

15 DDC: Defense does, Your Honor.

16 MJ: Accused and counsel, please rise.

17 [The accused and his detailed defense counsel did as directed.]

18 MJ: David Matthew Hicks, I now ask you how do you plead, but

19 before receiving your pleas I advise you that any motion addressed

20 under R.M.C. 905(b) must be made prior to the entry of pleas.

21 **[END OF PAGE]**

1 DDC: Sir, David Hicks pleads through counsel:

2 **To Specification 1 of The Charge: Guilty.**
3 **To Specification 2 of The Charge: Not guilty.**
4 **To The Charge: Guilty.**
5
6 MJ: Mr. Hicks, are those in fact your pleas?

7 ACC: Yes, sir.

8 MJ: Please be seated.

9 [The accused and his detailed defense counsel did as directed.].

10 MJ: Mr. Hicks, I understand your pleas in this case. Before we
11 proceed any further with regard to that plea, I want to ask you some
12 questions.

13 I previously advised you with regards to your rights to
14 counsel in this commission. Do you recall that explanation from
15 earlier today?

16 ACC: Yes, sir.

17 MJ: Do you wish for me to review those counsel rights with you
18 at this time before I ask you some questions about that?

19 ACC: No, there is no need.

20 MJ: If you have any questions as I go along, I'd be happy to go
21 back and review that all with you again.

22 ACC: Okay.

23 MJ: Now you previously advised me that you wished to be
24 represented in this case by Major Mori, Ms. Snyder, and Mr. Dratel.

1 Is that correct?

2 ACC: Yes, it is.

3 MJ: Although I have not ruled on Ms. Snyder's situation as

4 counsel, that situation has not been resolved and earlier today I

5 withheld recognition of her as an authorized counsel in this case.

6 Do you recall and understand that?

7 ACC: Yes, sir.

8 MJ: Then based on your decision not to keep Ms. Snyder at

9 counsel table as a consultant, Ms. Snyder left the courtroom, right?

10 ACC: Yes.

11 MJ: Has anything that transpired with regard to Ms. Snyder

12 today caused you to enter your plea of guilty in this case?

13 ACC: No, sir.

14 MJ: Additionally, do you recall that after Mr. Dratel ----

15 [The defense counsel and the accused conferred.]

16 MJ: Do you need to talk about anything?

17 ACC: No, sir.

18 MJ: I want you to talk about everything that you need to talk

19 about. At the same time I just want to make sure we have the

20 attention focused when I'm speaking too.

21 Additionally, do you recall that after Mr. Dratel decided

22 not to sign the agreement that I told him he needed to sign in order

23 to be qualified as a counsel in this case, I also determined that he

1 did not meet the qualifications of counsel to participate in this
2 case.
3 Do you recall that?
4 ACC: Yes, sir.
5 MJ: Then based on your decision not to keep Mr. Dratel at the
6 table as a consultant, he also left the courtroom, right?
7 ACC: Yes.
8 MJ: Has anything that transpired with regard to Mr. Dratel
9 today caused you to enter your plea of guilty in this case?
10 ACC: No, sir.
11 MJ: Has a combination of Ms. Snyder and Mr. Dratel not being
12 recognized as qualified to represent you at this time caused you to
13 enter his plea of guilty?
14 ACC: No.
15 MJ: Do you at this time then wish to be represented before this
16 military commission by Major Mori alone?
17 ACC: Yes.
18 MJ: Do you wish to be represented by any other attorney beside
19 Major Mori, either military or civilian?
20 ACC: No.
21 MJ: Do you waive your right to have civilian counsel represent
22 you before this military commission?
23 ACC: Yes.

1 MJ: Do you waive any right to have Ms. Snyder represent you
2 before this commission in any capacity whether as detailed counsel or
3 civilian counsel?
4 ACC: Yes.
5 MJ: And I know these questions a lot of times I'm coming at
6 this same thing from a different angle, but I just want to make sure
7 that we are all on the same page, all right?
8 ACC: Yes.
9 MJ: Do you waive any right to have Mr. Dratel represent you
10 before this military commission as a civilian defense counsel?
11 ACC: Yes.
12 MJ: Have you discussed all these things with Major Mori?
13 ACC: Yes, I have.
14 MJ: Major Mori, have you had sufficient opportunity to discuss
15 these matters with Mr. Hicks?
16 DDC: Yes, sir.
17 MJ: Major Mori, to the best of your knowledge and belief has
18 the issue of representation in any way affected Mr. Hicks' decision
19 to enter a plea of guilty in this case?
20 DDC: No, sir.
21 MJ: All right, we're going to recess shortly. I'm going to now
22 direct the counsel for both sides to provide the court with tailored
23 proposed elements and definitions for the offense to which the

1 accused has entered a plea of guilty not later than 1600 tomorrow, 27
2 March 2007. If you encounter problems in complying with that, as
3 always, please contact me before then ----
4 [The accused and his detailed defense counsel conferred.]
5 MJ: If you encounter problems with complying with that, please
6 contact me before that time has expired. That's my order as far as
7 what you need to do. I would request that if it possible, the
8 parties reach an agreement as to these matters and if that is
9 accomplished, you may submit a consolidated version of this material
10 in lieu of your separate submissions.
11 Is there any other matter we need to address at this time?
12 PROS: No, sir.
13 DDC: None from the defense, Your Honor.
14 MJ: Court is in recess, and we'll meet on my call.
15 **[The session recessed at 2029 hours, 26 March 2007.]**
16 **[END OF PAGE]**

1 **[The session was called to order at 0817 hours, 30 March 2007.]**

2 MJ: The commission will come to order. All parties present

3 when the commission recessed are again present.

4 Since the last session we've had a number of conferences

5 conducted in accordance with Rule for Military Commission 802. These

6 conferences generally covered discussion of the pleas in this case

7 and the anticipated modification of the plea that has been entered;

8 discussion of the sanitized charge sheet or flyer which has been

9 marked as Appellate Exhibit 28; discussion of a pretrial agreement

10 in this case which has been marked as Appellate Exhibit 27;

11 discussion of a number of clarifications of the pretrial agreement

12 which have been captured on a marked up version of the pretrial

13 agreement, and that document has been marked as Appellate Exhibit 30;

14 discussion of a stipulation of fact that has been marked as

15 Prosecution Exhibit 1 for identification.

16 I'll note at this time that present at the 802 conferences

17 were trial counsel, defense counsel, assistant trial counsel,

18 military judge, Lieutenant Colonel [REDACTED], and Ms. [REDACTED].

19 We also discussed voir dire of the members, preliminary instructions

20 and sentencing instruction for the members. We also discussed the

21 current appellate exhibit listing which has been provided to the

22 parties.

1 The court was advised of and we discussed a modification to
2 the convening order. This amending order dated 29 March 2007, has
3 been marked as Appellate Exhibit 29. The prosecution also requested
4 and I signed a protective order with regard to protection of the
5 identities of the commission members. The defense had no objection.
6 The signed protective order has been marked as Appellate Exhibit 32.
7 Do counsel concur with my summation of the several 802
8 conferences?
9 PROS: Yes, sir.
10 DDC: Defense does, sir. What was the appellate exhibit for the
11 cleansed charge sheet?
12 MJ: 28.
13 DDC: Yes, sir.
14 MJ: Major Mori, do you have a current copy of the Appellate
15 Exhibits 1 through 33?
16 DDC: They're printing it off the CD right now, sir. My
17 paralegal will be down in 1 minute.
18 MJ: Okay, we'll make sure you get it at the next break.
19 Anytime you have any questions, go ahead and ask me again and I'll be
20 happy to keep supplying that number. Okay?
21 DDC: Yes, sir.
22 MJ: Very well. Major Mori, does the defense wish to modify its
23 plea at this time?

DDC: Defense does.

MJ: Accused and counsel, please rise.

[The accused and his detailed defense counsel did as directed.]

DDC: David Hicks, through counsel, pleads as follows:

To Specification 1 of The Charge:	**Excepting the words 23 -- paragraphs 23 and 24 and substituting paragraphs 1 through 35 of Appellate Exhibit 28: Guilty.**
To The Charge -- To Specification 2 of The Charge:	**Not guilty.**
And to The Charge:	**Guilty.**

MJ: Okay, with regard to Specification 1, what I understand that to be is to the excepted words, not guilty; to the words substituted therefore, guilty ----

DDC: Yes, sir.

MJ: ---- and it to The Specification with those exceptions and substitutions, guilty?

DDC: Yes, sir.

MJ: Mr. Hicks, are those in fact your pleas?

ACC: Yes, sir.

MJ: Very well. Please be seated.

[The accused and his detailed defense counsel did as directed.]

1 MJ: Good morning, Mr. Hicks.

2 ACC: Good morning.

3 MJ: You have entered a plea of guilty to The Charge and with
4 exceptions and substitutions to Specification 1 of The Charge.

5 Is that correct?

6 ACC: Yes.

7 MJ: Your plea of guilty will not be accepted unless you
8 understand its meaning and effect. I am going to discuss your plea of
9 guilty with you. It's a rather lengthy process. As we go along you
10 may wish to refer to a copy of the charge sheet while we go through
11 the inquiry. Do you have a copy of the charge sheet and Appellate
12 Exhibit 28 which is what I refer to as the sanitized copy of the
13 charge sheet or the flyer? Do you have those two things in front of
14 you?

15 ACC: [Examining documents in front of him.] Yes, I do.

16 MJ: We're going to take as much time as we need, so if you have
17 any questions, go ahead and ask Major Mori. I'm in no rush.

18 Alright?

19 ACC: Yes, sir.

20 MJ: If at any time during this process you become confused or
21 have any questions, please stop me and I'll give you a chance to talk
22 things over with your attorney.

1 Do you understand that?

2 ACC: Yes.

3 MJ: Mr. Hicks, a plea of guilty is the strongest form of proof
4 known to the law. Based on your plea of guilty alone and without
5 receiving any evidence, this commission can find you guilty of the
6 offense to which you are pleading guilty. Your plea of guilty will
7 not be accepted, however, unless you understand that by pleading
8 guilty you admit every act or omission and every element of the
9 offense to which you are pleading guilty.

10 Further, I cannot accept your plea unless after making my
11 inquiry I am satisfied that either there is a factual basis for the
12 plea, or that you voluntarily agree that having viewed the evidence
13 the prosecution intends to introduce against you, you are personally
14 convinced that the prosecution could prove your guilt of the offense
15 to which you are pleading guilty beyond a reasonable doubt.

16 Do you understand that?

17 ACC: Yes, sir.

18 MJ: Even if you believe you are guilty, you still have a legal
19 and moral right to enter a plea of not guilty and to require the
20 government to prove its case against you, if it can, by legal and
21 competent evidence beyond a reasonable doubt. If you were to plead
22 not guilty, then you would be presumed under the law to be innocent,
23 and only by introducing evidence and proving your guilt beyond a

1 reasonable doubt could the government overcome this presumption of
2 innocence.
3 Do you understand this?
4 ACC: Yes, sir.
5 MJ: By your plea of guilty you waive, or in other words, you
6 give up certain important rights. The rights you give up are:
7 First, the right against self-incrimination, that is, the
8 right that you have to say nothing at all about this offense.
9 Second, the right to a trial of the facts by the
10 commission, that is, the right to have this commission decide whether
11 or not you are guilty based on the evidence presented by the
12 prosecution and, if you chose to do so, by the defense.
13 Third, the right to confront the witnesses against you, and
14 to call witnesses on your behalf.
15 Do you understand all of those rights?
16 ACC: Yes, I do.
17 MJ: Now if you plead guilty, there will not be a trial of any
18 kind with regard to the offense to which you are pleading guilty.
19 Because by pleading guilty you give up the three rights that I've
20 just described. You keep them with regard to the offense charged in
21 Specification 2 of The Charge and with regard to the language that
22 was accepted by your plea with exceptions and substitutions.

1 Do you understand that?

2 ACC: Yes, sir.

3 MJ: Have you discussed all these things with Major Mori?

4 ACC: Yes, I have.

5 MJ: Do you agree to give up these three rights then with regard
6 to the offense to which you are pleading guilty and to answer my
7 questions about it?

8 ACC: Yes, I do.

9 MJ: Now in a moment you are going to be placed under oath and I
10 will question you to determine if you are, in fact, guilty based on
11 that standard I described to you.

12 Do you understand this?

13 ACC: Yes.

14 MJ: Major Mori, could you just put that screen down?
15 [The detailed defense counsel turned the monitor screen away to
16 unblock the military judge's view.]

17 MJ: With regard to my questioning you under oath, you should
18 understand that if anything that you tell me is untrue, your
19 statements could be used against you later in a subsequent
20 prosecution for perjury or false statement.

21 Do you understand this?

22 ACC: Yes, sir.

1 MJ: Very well. Please rise, face the trial counsel and raise
2 your right hand.
3 [The accused did as directed and was sworn.]
4 MJ: Please be seated.
5 [The accused did as directed.]
6 MJ: Does the government have an averment of facts pursuant to
7 R.M.C. 910(e)?
8 PROS: Yes, Your Honor. The prosecution offers Appellate
9 Exhibit 28, the sanitized charge sheet as the averment of facts under
10 R.M.C. 910(e).
11 MJ: Is there a stipulation of fact in this case?
12 PROS: Yes, Your Honor.
13 MJ: Has it been marked as a prosecution exhibit?
14 PROS: It has, sir.
15 [The court reporter handed PE 1 for ID to the military judge.]
16 MJ: Mr. Hicks, I am showing you now what has been marked as
17 Prosecution Exhibit 1 for identification.
18 Do you have a copy of that in front of you?
19 ACC: Yes, I do.
20 MJ: It appears to be six pages long and near the bottom of the
21 sixth page there is a signature above your typed name.
22 Is that your signature?
23 ACC: Yes, it is.

1 MJ: Prior to signing this document, did you read it over
2 completely and discuss it with your attorney?
3 ACC: Yes, sir.
4 MJ: Do you understand everything contained in this stipulation
5 of fact?
6 ACC: Yes.
7 MJ: Do counsel for both sides agree to the stipulation and,
8 Major Mori and Lieutenant Colonel [REDACTED], are these your
9 signatures above your typed names on page six?
10 PROS: Yes, sir.
11 DDC: Yes, sir.
12 MJ: Mr. Hicks, at this point we are going to discuss the
13 stipulation of fact to ensure that you understand it and agree to its
14 uses. A stipulation of fact is an agreement between the trial
15 counsel, the defense counsel, and yourself that the contents of the
16 stipulation are uncontradicted facts in this case. You have the
17 right not to enter into this stipulation, and this stipulation will
18 not be accepted without your consent.
19 Do you understand that?
20 ACC: Yes.
21 MJ: Mr. Hicks, this stipulation appears to contain 50 separate
22 paragraphs and statements.

1 Do you understand that?

2 ACC: Yes.

3 MJ: Have you reviewed each of those 50 paragraphs separately

4 with your attorney?

5 ACC: Yes, I have.

6 MJ: Having reviewed each paragraph is there any part or

7 paragraph of that stipulation that you do not want to consent to?

8 ACC: No.

9 MJ: With regard to the stipulation, do you understand and agree

10 that the contents of the stipulation are binding on the commission

11 and may not be contradicted after I have accepted your plea?

12 ACC: Yes, sir.

13 MJ: Has anyone forced or threatened you to enter into this

14 stipulation?

15 ACC: No.

16 MJ: If I admit this stipulation into evidence, it will be used

17 in two ways. First, I will use it to determine if you are, in fact,

18 guilty. Second, it will later be given to the court members -- or

19 the commission members, and they will have it with them when they

20 decide upon the sentence in this case.

21 Do you understand that?

22 ACC: Yes, I do.

1 MJ: Do you agree to those uses?

2 ACC: Yes.

3 MJ: Do counsel for both sides also agree?

4 PROS: Yes, sir.

5 DDC: Yes, sir.

6 MJ: Again, Mr. Hicks, a stipulation of fact ordinarily cannot
7 be contradicted. If the stipulation should be contradicted after I
8 have accepted your guilty pleas, I will have to reopen my inquiry
9 into your pleas. Therefore, you should let me know during this
10 inquiry if there is anything whatsoever that you disagree with or
11 feel is untrue.

12 Do you understand that?

13 ACC: Yes, sir.

14 MJ: Is there anything in here that you disagree with or feel is
15 untrue?

16 ACC: No.

17 MJ: Does defense have any objection to Prosecution Exhibit 1
18 for identification?

19 DDC: No, sir.

20 MJ: Very well, it is admitted as Prosecution Exhibit 1, and
21 there are no words "for identification" written there.

22 Mr. Hicks, I am going to explain the elements of the
23 offense to which you have entered a plea of guilty. By "elements" I

1 mean the facts that the government would have to prove beyond a
2 reasonable doubt before you could be found guilty, if you pleaded not
3 guilty.
4 When I state each element please ask yourself two things.
5 First, are you willing to admit that the element is true, or second,
6 are you willing to admit that having viewed the evidence the
7 government intends to introduce against you, you are personally
8 convinced that the government could prove the facts needed to
9 establish the element beyond a reasonable doubt.
10 By "reasonable doubt" is intended not a fanciful or
11 ingenious doubt or conjecture, but an honest and conscientious doubt
12 suggested by the material evidence or lack of it ----
13 [The accused and his detailed defense counsel conferred.]
14 MJ: I'm just going over now the definition of "reasonable
15 doubt" for you.
16 By "reasonable doubt" is intended not a fanciful or
17 ingenious doubt or conjecture, but an honest and conscientious doubt
18 suggested by the material evidence or lack of it in the case. It is
19 an honest misgiving generated by insufficiency of proof of guilt.
20 Proof beyond a reasonable doubt means proof to an
21 evidentiary certainty, although not necessarily to an absolute or
22 mathematical certainty. The proof must be such as to exclude not
23 every hypothesis or possibility of innocence, but every fair and

1 rational hypothesis except that of guilt. The rule as to reasonable
2 doubt extends to every element of the offense although each
3 particular fact advanced by the prosecution which does not amount to
4 an element, need not be established beyond a reasonable doubt.
5 However, if, on the whole of the evidence, the fact finders are
6 satisfied beyond a reasonable doubt of the truth of each and every
7 element, then they should find the accused guilty.
8 Do you understand the things I just described to you?
9 ACC: Yes, sir.
10 MJ: Now after I list the elements for you, please be prepared
11 to talk with me about the facts regarding the offenses. As I noted,
12 I'll be using Appellate Exhibit 28 which is the sanitized version of
13 the charge sheet to conduct this inquiry because in the course of
14 your pleas the defense has excepted out or taken away the factual
15 allegations that are on the original charge sheet and put in its
16 place the factual allegations that are on Appellate Exhibit 28 which
17 I refer to as the sanitized charged sheet.
18 Do you understand that?
19 ACC: Yes.
20 MJ: So we're working off the large paragraph of The Charge
21 stated on the charge sheet and then after that the numbered factual
22 allegations on the sanitized charge sheet of which there are 35.

1 Do you understand?

2 ACC: Yes.

3 MJ: Please take a look at the language of Specification 1 of

4 The Charge. This alleges a violation of an offense described as

5 providing material support for terrorism. As that pertains to you,

6 they are:

7 That you, David M. Hicks, provided material support or

8 resources to an international terrorist organization engaged in

9 hostilities against the United States;

10 Second, that you intended to provide such material support

11 or resources to such an international terrorist organization;

12 Third, that you knew such organization has engaged or

13 engaged or engages in terrorism;

14 Fourth, that the conduct took place in the context of and

15 was associated with an armed conflict; and

16 Further, that you are an alien unlawful enemy combatant.

17 I am going to explain some of those terms and provide you

18 with some definitions. "Material support or resources" means any

19 property, tangible or intangible, or service including currency or

20 monetary instruments or financial securities, financial services,

21 lodging, training, expert advice or assistance, safehouses, false

22 documentation or identification, communications equipment,

23 facilities, weapons, lethal substances, explosives, personnel (one or

1 more individuals who may be or include oneself), and transportation,
2 except that of medicine or religious materials.
3 The term "international terrorism organization" includes
4 any organization designated as a foreign terrorist organization under
5 section 219 of the Immigration and Nationality Act designated as
6 Title 8 United States Code Section 1189. You are advised that al
7 Qaeda has been designated as a foreign terrorist organization, since
8 October 1999.
9 "Terrorism" means an act by any person who intentionally
10 kills or inflicts great bodily harm on one or more protected persons,
11 or intentionally engages in an act that evinces a wanton disregard
12 for human life in a manner calculated to influence or affect the
13 conduct of government or civilian population by intimidation or
14 coercion, or to retaliate against government conduct.
15 "Protected person" means any person entitled to protection
16 under one or more of the Geneva Conventions, including: (a)
17 civilians not taking part in hostilities; (b) military personnel
18 placed hors de combat by sickness, wounds, or detention; and (c)
19 military medical or religious personnel.
20 The term "alien" as it is used here means a person who is
21 not a citizen of the United States.
22 The term "unlawful enemy combatant" as it is used here
23 means:

1 A person who has engaged in hostilities or who has
2 purposefully and materially supported hostilities against the United
3 States or its co-belligerents who is not a lawful enemy combatant
4 including a person who is part of the Taliban, al Qaeda, or
5 associated forces; or
6 A person who, before, on, or after the date of the
7 enactment of the Military Commissions Act of 2006 has been determined
8 to be an unlawful enemy combatant by a Combatant Status Review
9 Tribunal or other competent tribunal established under the authority
10 of the President of the United States or the Secretary of Defense.
11 The term "co-belligerent" as it is used here means any
12 State or armed force joining and directly engaged with the United
13 States in hostilities or directly supporting hostilities against a
14 common enemy.
15 Do you understand the elements and definitions as I have
16 read them to you?
17 ACC: Yes, sir.
18 MJ: Have you had a prior opportunity to discuss all of this
19 with your counsel?
20 ACC: Yes, I have.
21 MJ: Do you believe and admit that these elements that I've just
22 described for you either accurately describe what you did, or

1 accurately describe what you having viewed the evidence, admit could
2 be proven against you beyond a reasonable doubt?
3 ACC: Yes.
4 MJ: And which of these things do you believe and admit?
5 ACC: Number two.
6 MJ: Okay and that would be that you believe that they
7 accurately describe what you having viewed the evidence admit could
8 be proven against you beyond a reasonable doubt?
9 ACC: Yes, sir.
10 MJ: I'm going to restate it one more time to make sure we're on
11 the same page again. So based on your personal knowledge, and having
12 reviewed the evidence the government intends to introduce against
13 you, do I understand correctly that you are personally convinced that
14 the government could prove its case against you with regard to each
15 of those elements that I have just described beyond a reasonable
16 doubt?
17 ACC: Yes, sir.
18 MJ: Alright, let's take a look at the factual allegations in
19 Appellate Exhibit 28 that have been incorporated into this
20 specification.
21 [The accused and his detailed defense counsel conferred.]
22 MJ: All set?
23 DDC: Yes, sir.

1 MJ: Mr. Hicks, factual allegation number 1 on Appellate Exhibit
2 28 is that: Al Qaeda or "The Base" was founded by Usama bin Laden
3 and others in or about 1989 for the purpose of opposing certain
4 governments and officials with force and violence.
5 Do you understand that?
6 ACC: Yes.
7 MJ: Based on your personal knowledge, and having reviewed the
8 evidence the government intends to introduce against you, are you
9 personally convinced that the government could prove this fact by
10 competent evidence?
11 ACC: Yes.
12 MJ: Factual allegation number 2 is: Usama bin Laden is
13 recognized as the emir or prince or leader of al Qaeda.
14 Do you understand that?
15 ACC: Yes.
16 MJ: Based on your personal knowledge, and having reviewed the
17 evidence the government intends to introduce against you, are you
18 personally convinced that the government could prove this fact by
19 competent evidence?
20 ACC: Yes.
21 MJ: Factual allegation number 3 is: A purpose or goal of al
22 Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to
23 support violent attacks against property and nationals both military

1 and civilian of the United States and other countries for the purpose
2 of "inter alia" which means among other things, forcing the United
3 States to withdraw its forces from the Arabian peninsula and to
4 oppose United States support of Israel.
5 Do you understand that?
6 ACC: Yes.
7 MJ: Based on your personal knowledge, and having reviewed the
8 evidence the government intends to introduce against you, are you
9 personally convinced that the government could prove this fact by
10 competent evidence?
11 ACC: Yes.
12 MJ: Factual allegation number 4 is: Al Qaeda operations and
13 activities have historically been planned and executed with the
14 involvement of a "shura" or consultation council composed of
15 committees, including: political committee; military committee;
16 security committee; finance committee; media committee; and religious
17 or legal committee.
18 Do you understand that?
19 ACC: Yes.
20 MJ: Based on your personal knowledge, and having reviewed the
21 evidence the government intends to introduce against you, are you

1 personally convinced that the government could prove this fact by
2 competent evidence?
3 ACC: Yes.
4 MJ: Factual allegation number 5 is: Between 1989 and 2001, al
5 Qaeda established training camps, guest houses, and business
6 operations in Afghanistan, Pakistan, and other countries for the
7 purpose of training and supporting violent attacks against property
8 and nationals both military and civilian of the United States and
9 other countries.
10 Do you understand that?
11 ACC: Yes, sir.
12 MJ: Based on your personal knowledge, and having reviewed the
13 evidence the government intends to introduce against you, are you
14 personally convinced that the government could prove this fact by
15 competent evidence?
16 ACC: Yes, sir.
17 MJ: Factual allegation number 6 is: In August 1996, Usama bin
18 Laden issued a public "Declaration of Jihad Against the Americans,"
19 in which he called for the murder of U.S. military personnel serving
20 on the Arabian peninsula.
21 Do you understand that?
22 ACC: Yes, sir.

1 MJ: Based on your personal knowledge, and having reviewed the
2 evidence the government intends to introduce against you, are you
3 personally convinced that the government could prove this fact by
4 competent evidence?
5 ACC: Yes, sir.
6 MJ: Factual allegation number 7 is: In February 1998, Usama
7 bin Laden, Ayman al Zawahiri, and others under the banner of
8 "International Islamic Front for Fighting Jews and Crusaders," issued
9 a fatwa, or purported religious ruling, requiring all Muslims able to
10 do so to kill Americans whether civilian or military anywhere they
11 can be found and to "plunder their money."
12 Do you understand that?
13 ACC: Yes, sir.
14 MJ: Based on your personal knowledge, and having reviewed the
15 evidence the government intends to introduce against you, are you
16 personally convinced that the government could prove this fact by
17 competent evidence?
18 ACC: Yes, sir.
19 MJ: Factual allegation number 8 is: On or about May 29, 1998,
20 Usama bin Laden issued a statement entitled "The Nuclear Bomb of
21 Islam," under the banner of the "International Islamic Front for
22 Fighting Jews and Crusaders," in which he stated that it is the duty

1 of the Muslims to prepare as much force as possible to terrorize the
2 enemies of God.
3 Do you understand that?
4 ACC: Yes, sir.
5 MJ: Based on your personal knowledge, and having reviewed the
6 evidence the government intends to introduce against you, are you
7 personally convinced that the government could prove this fact by
8 competent evidence?
9 ACC: Yes, sir.
10 MJ: Factual allegation number 9 is: In or about 2001, al
11 Qaeda's media committee which created As Sahab, or "The Clouds,"
12 Media Foundation which has orchestrated and distributed multi-media
13 propaganda detailing al Qaeda's training efforts and its reasons for
14 its declared war against the United States.
15 Do you understand that?
16 ACC: Yes, sir.
17 MJ: Based on your personal knowledge, and having reviewed the
18 evidence the government intends to introduce against you, are you
19 personally convinced that the government could prove this fact by
20 competent evidence?
21 ACC: Yes, sir.
22 MJ: Factual allegation number 10 is: Since 1989 members and
23 associates of al Qaeda, known and unknown, have carried out numerous

1 terrorist attacks, including, but not limited to: the attacks against
2 the American Embassies in Kenya and Tanzania in August 1998; the
3 attack against the USS COLE in October 2000; and the attacks on the
4 United States on September 11, 2001.
5 Do you understand that?
6 ACC: Yes, sir.
7 MJ: Based on your personal knowledge, and having reviewed the
8 evidence the government intends to introduce against you, are you
9 personally convinced that the government could prove this fact by
10 competent evidence?
11 ACC: Yes, sir.
12 MJ: Factual allegation number 11 is: On or about October 8,
13 1999, the United States designated al Qaeda a Foreign Terrorist
14 Organization pursuant to Section 219 of the Immigration and
15 Nationality Act; and on or about August 21, 1998, the United States
16 designated al Qaeda a "specially designated terrorist" or SDT,
17 pursuant to the International Emergency Economic Powers Act.
18 Do you understand that?
19 ACC: Yes, sir.
20 MJ: Based on your personal knowledge, and having reviewed the
21 evidence the government intends to introduce against you, are you

1 personally convinced that the government could prove this fact by
2 competent evidence?
3 ACC: Yes, sir.
4 MJ: Allegation number 12: In or about January 2001, you
5 traveled to Afghanistan with the assistance of Lashkar-e Tayyiba, or
6 LET, to include LET's recommendation, funding, and transportation, in
7 order to attend al Qaeda terrorist training camps.
8 Do you understand that?
9 ACC: Yes, sir.
10 MJ: Based on your personal knowledge, and having reviewed the
11 evidence the government intends to introduce against you, are you
12 personally convinced that the government could prove this fact by
13 competent evidence?
14 ACC: Yes, sir.
15 MJ: Factual allegation number 13 is: Upon entering Afghanistan
16 you traveled to Kandahar where you stayed at an al Qaeda guest house
17 and met associates or members of al Qaeda. While attending al
18 Qaeda's training courses, you would use the kunya, or alias, "Abu
19 Muslim Australia," "Abu Muslim Austraili," "Abu Muslim Philippine,"
20 or "Muhammad Dawood;" and later was referred to as "David Michael
21 Hicks."
22 Do you understand that?
23 ACC: Yes, sir.

1 MJ: Based on your personal knowledge, and having reviewed the
2 evidence the government intends to introduce against you, are you
3 personally convinced that the government could prove this fact by
4 competent evidence?
5 ACC: Yes, sir.
6 MJ: Allegation number 14 is: That you then traveled to and
7 trained at al Qaeda's al Farouq camp located outside Kandahar,
8 Afghanistan. In al Qaeda's 8-week basic training course, you trained
9 in weapons familiarization and firing, land mines, tactics,
10 topography, small unit fire, maneuver tactics, field movements, and
11 other areas.
12 Do you understand that?
13 ACC: Yes, sir.
14 MJ: Based on your personal knowledge, and having reviewed the
15 evidence the government intends to introduce against you, are you
16 personally convinced that the government could prove this fact by
17 competent evidence?
18 ACC: Yes, sir.
19 MJ: Factual allegation number 15 is that: In or about April
20 2001, you returned to al Farouq and trained in al Qaeda's guerilla
21 warfare and mountain tactics training course. This 7-week course
22 included marksmanship, small team tactics, ambush, camouflage,

1 rendezvous techniques, and techniques to pass intelligence and
2 supplies to al Qaeda operatives.
3 Do you understand that?
4 ACC: Yes, sir.
5 MJ: Based on your personal knowledge, and having reviewed the
6 evidence the government intends to introduce against you, are you
7 personally convinced that the government could prove this fact by
8 competent evidence?
9 ACC: Yes, sir.
10 MJ: Factual allegation number 16 is that: While you trained at
11 al Farouq, Usama bin Laden visited the camp on several occasions.
12 During such visits, any weapons the trainees had were removed from
13 them and they were seated as a group to hear bin Laden speak in
14 Arabic. During one visit, you asked bin Laden why there were no
15 training materials provided in the English language.
16 Do you understand that?
17 ACC: Yes, sir.
18 MJ: Based on your personal knowledge, and having reviewed the
19 evidence the government intends to introduce against you, are you
20 personally convinced that the government could prove this fact by
21 competent evidence?
22 ACC: Yes, sir.

1 MJ: Factual allegation number 17 is that: After you completed
2 your first two al Qaeda training courses, Muhammad Atef a/k/a Abu
3 Hafs al Masri, then the military commander of al Qaeda, summoned and
4 individually interviewed certain attendees. You were interviewed
5 about your background, knowledge of Usama bin Laden, al Qaeda, and
6 your ability to travel around the world, to include Israel. After
7 this interview with Muhammed Atef, you then attended al Qaeda's urban
8 tactics training course at the Tarnak Farm.
9 Do you understand that?
10 ACC: Yes, sir.
11 MJ: Based on your personal knowledge, and having reviewed the
12 evidence the government intends to introduce against you, are you
13 personally convinced that the government could prove this fact by
14 competent evidence?
15 ACC: Yes, sir.
16 MJ: Factual allegation number 18 is that: In or about June
17 2001, you traveled to Tarnak Farm and participated in the training in
18 a mock city located inside the camp where trainees were taught how to
19 fight in an urban environment. This city tactics training included
20 marksmanship, use of assault and sniper rifles, rappelling,
21 kidnapping techniques, and assassination methods.
22 Do you understand that?
23 ACC: Yes, sir.

1 MJ: Based on your personal knowledge, and having reviewed the
2 evidence the government intends to introduce against you, are you
3 personally convinced that the government could prove this fact by
4 competent evidence?
5 ACC: Yes, sir.
6 MJ: Allegation number 19 is that: In or about August 2001, you
7 participated in a 4-week al Qaeda course on information collection
8 and surveillance at an apartment in Kabul, Afghanistan. This
9 surveillance training included weeks of covert photography, use of
10 dead drops, use of disguises, drawing diagrams depicting windows and
11 doors, documenting persons coming and going to and from certain
12 structures, and submitting reports to the al Qaeda instructor who
13 cited the al Qaeda bombing of the USS Cole as a positive example of
14 the uses for their training. The course also included practical
15 application where the accused and other student operatives conducted
16 surveillance of various locations in Kabul, including the former
17 American and British Embassy buildings. During this training, you
18 personally conducted intelligence on the former American Embassy
19 building.
20 Major Mori, what's your understanding of the last sentence
21 there? "During this training the accused personally conducted
22 intelligence." That doesn't make sense to me.

1 DDC: The last sentence is just to identify the support that Mr.
2 Hicks was the one who did the practical application on the American
3 Embassy only, not the former British Embassy.
4 MJ: So you would understand that to be "During this training
5 the accused personally conducted a practical applications
6 intelligence exercise on the former American Embassy building"?
7 DDC: Yes, sir.
8 MJ: Does the government concur on that?
9 PROS: Yes, sir.
10 MJ: Okay.
11 Mr. Hicks, do you understand that?
12 ACC: Yes, sir.
13 MJ: And to include that last sentence, is that also your
14 understanding of that last sentence there?
15 ACC: Yes, sir.
16 MJ: Based on your personal knowledge, and having reviewed the
17 evidence the government intends to introduce against you, are you
18 personally convinced that the government could prove this fact by
19 competent evidence?
20 ACC: Yes, sir.
21 MJ: Allegation number 20 is that: After the surveillance
22 course, you returned to Kandahar where he received instruction from
23 members of al Qaeda on the meaning of "jihad." You also received

1 instruction from other al Qaeda members or associates on their
2 interpretation of Islam, the meaning and obligations of jihad, and
3 related topics at other al Qaeda training camps in Afghanistan.
4 Do you understand that?
5 ACC: Yes.
6 MJ: Based on your personal knowledge, and having reviewed the
7 evidence the government intends to introduce against you, are you
8 personally convinced that the government could prove this fact by
9 competent evidence?
10 ACC: Yes, sir.
11 MJ: Allegation number 21 is that: On or about September 9,
12 2001, you traveled to Pakistan to visit a Pakistani friend. While at
13 this friend's house, you watched television footage of the September
14 11, 2001 attacks on the United States, and the friend has said he
15 interpreted your gestures as approval of the attacks. The allegation
16 includes a statement that you had no specific knowledge of the
17 attacks in advance.
18 Do you understand that?
19 ACC: Yes, sir.
20 MJ: Based on your personal knowledge, and having reviewed the
21 evidence the government intends to introduce against you, are you

1 personally convinced that the government could prove this fact by
2 competent evidence?
3 ACC: Yes, sir.
4 MJ: Allegation number 22 is that: On or about September 12,
5 2001, you returned to Afghanistan to join with al Qaeda. Also that
6 you had heard reports that the attacks were conducted by al Qaeda and
7 that America was blaming Usama bin Laden.
8 Do you understand that?
9 ACC: Yes, sir.
10 MJ: Based on your personal knowledge, and having reviewed the
11 evidence the government intends to introduce against you, are you
12 personally convinced that the government could prove this fact by
13 competent evidence?
14 ACC: Yes, sir.
15 MJ: Allegation number 23 is that: On or about the 1st of
16 October -- and I would understand that to be 2001 -- Saif al Adel --
17 then al Qaeda's deputy military commander and head of the security
18 committee for al Qaeda's shura council, who was organizing al Qaeda
19 forces at locations where it was expected there would be fighting
20 against the United States, Northern Alliance, or other Coalition
21 forces -- informed you that you could go to three different locations
22 to position yourself with combat forces; city, mountain, or airport.

1 The allegation includes that you chose to join a group of al Qaeda
2 and Taliban fighters near the Kandahar Airport.
3 Do you understand that?
4 ACC: Yes, sir.
5 MJ: Based on your personal knowledge, and having reviewed the
6 evidence the government intends to introduce against you, are you
7 personally convinced that the government could prove this fact by
8 competent evidence?
9 ACC: Yes, sir.
10 MJ: Allegation number 24 is that: You traveled to the Kandahar
11 Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic
12 rifle. On your own, however, you armed himself with six ammunition
13 magazines, approximately 300 rounds of ammunition, and three grenades
14 to use in fighting the United States, Northern Alliance, and other
15 Coalition forces.
16 Do you understand that?
17 ACC: Yes, sir.
18 MJ: Based on your personal knowledge, and having reviewed the
19 evidence the government intends to introduce against you, are you
20 personally convinced that the government could prove this fact by
21 competent evidence?
22 ACC: Yes, sir.

1 MJ: Allegation number 25 is that: On or about October 7, 2001,
2 when the Coalition Forces initiated a bombing campaign at the start
3 of Operation Enduring Freedom, you had been at the Kandahar airport
4 for about 2 weeks and entrenched in the area where the initial
5 military strikes occurred. At this site, other al Qaeda forces were
6 in battle positions based a couple of hundred meters in all
7 directions and were under the direction of another al Qaeda leader.
8 Do you understand that?
9 ACC: Yes, sir.
10 MJ: Based on your personal knowledge, and having reviewed the
11 evidence the government intends to introduce against you, are you
12 personally convinced that the government could prove this fact by
13 competent evidence?
14 ACC: Yes, sir.
15 MJ: Allegation number 26 is that: On or about October 10,
16 2001, after 2 nights of bombing you were reassigned and joined an
17 armed group outside the airport where you guarded a Taliban tank.
18 For about the next week you guarded the Taliban tank and every day
19 received food, drink, and updates on what was happening from the fat
20 al Qaeda leader in charge who was on a bicycle.
21 Do you understand that?
22 ACC: Yes, sir.

1 MJ: Based on your personal knowledge, and having reviewed the
2 evidence the government intends to introduce against you, are you
3 personally convinced that the government could prove this fact by
4 competent evidence?
5 ACC: Yes, sir.
6 MJ: Allegation number 27 is that: You heard radio reports that
7 fighting was heavy at Mazar-e Sharif, that Kabul would be the next
8 target, and that western countries including the United States had
9 joined with the Northern Alliance.
10 Do you understand that?
11 ACC: Yes, sir.
12 MJ: Based on your personal knowledge, and having reviewed the
13 evidence the government intends to introduce against you, are you
14 personally convinced that the government could prove this fact by
15 competent evidence?
16 ACC: Yes, sir.
17 MJ: Allegation number 28 is that: You implemented the tactics
18 you had learned with al Qaeda and attempted to train some of the
19 others positioned with you at Kandahar. After apparent resistance to
20 his training and with no enemy at sight in Kandahar you decided to
21 look for another opportunity to fight in Kabul.
22 Do you understand that?
23 ACC: Yes, sir.

1 MJ: Based on your personal knowledge, and having reviewed the
2 evidence the government intends to introduce against you, are you
3 personally convinced that the government could prove this fact by
4 competent evidence?
5 ACC: Yes, sir.
6 MJ: Allegation number 29 is that: On or about October 17,
7 2001, you told the fat al Qaeda leader of your plans, and then
8 traveled to Kabul. And that you also took your weapon and your
9 ammunition.
10 Do you understand that?
11 ACC: Yes, sir.
12 MJ: Based on your personal knowledge, and having reviewed the
13 evidence the government intends to introduce against you, are you
14 personally convinced that the government could prove this fact by
15 competent evidence?
16 ACC: Yes, sir.
17 MJ: Allegation number 30 is that: You arrived in Kabul and met
18 a friend from LET who told you that he was headed to the front lines
19 in Konduz. You asked to travel with this LET friend.
20 Do you understand that?
21 ACC: Yes, sir.
22 MJ: Based on your personal knowledge, and having reviewed the
23 evidence the government intends to introduce against you, are you

1 personally convinced that the government could prove this fact by
2 competent evidence?
3 ACC: Yes, sir.
4 MJ: Allegation number 31 is that: On or about November 9,
5 2001, you and your LET friend arrived at Konduz the day before Mazar-
6 e Sharif was captured by the Northern Alliance and U.S. Special
7 Forces. Sometime after you arrived at Konduz you went to the
8 frontline outside the city for 2 hours where you joined a group of al
9 Qaeda, Taliban, or other associated fighters engaged in combat
10 against Coalition forces. You spent 2 hours on the frontline before
11 it collapsed and you were forced to flee. During the retreat, you
12 saw bullets flying and the Northern Alliance tanks coming over the
13 trenches.
14 Do you understand that?
15 ACC: Yes, sir.
16 MJ: Based on your personal knowledge, and having reviewed the
17 evidence the government intends to introduce against you, are you
18 personally convinced that the government could prove this fact by
19 competent evidence?
20 ACC: Yes, sir.
21 MJ: Allegation number 32 is that: You spent 2 to 3 days
22 walking back to Konduz while being chased and fired upon by the
23 Northern Alliance.

1 Do you understand that?

2 ACC: Yes, sir.

3 MJ: Based on your personal knowledge, and having reviewed the
4 evidence the government intends to introduce against you, are you
5 personally convinced that the government could prove this fact by
6 competent evidence?

7 ACC: Yes, sir.

8 MJ: Allegation number 33 is that: You made it safely back to
9 the city of Konduz where you approached some of the Arab fighters and
10 asked about their plans. The Arabs fighters said that they were
11 going to stay in Konduz in order to fight to the death. You instead
12 decided to use your Australian passport and flee to Pakistan.

13 Do you understand that?

14 ACC: Yes, sir.

15 MJ: Based on your personal knowledge, and having reviewed the
16 evidence the government intends to introduce against you, are you
17 personally convinced that the government could prove this fact by
18 competent evidence?

19 ACC: Yes, sir.

20 MJ: Allegation number 34 is that: You then moved within Konduz
21 to a madafah, or an Arab safe house. That you wrote a note for your
22 LET associates that said not to come look for you because you were
23 okay, and then you ran away from the safe house. At this time you

1 still had your weapon and went to find a shopkeeper that you had met
2 a few days earlier in the city market area. The shopkeeper took you
3 to his home where you stayed for about 3 weeks. Later the shopkeeper
4 gave you some clothes and helped you sell your weapon so that you
5 could pay for a taxi to Pakistan.
6 Do you understand that?
7 ACC: Yes, sir.
8 MJ: Based on your personal knowledge, and having reviewed the
9 evidence the government intends to introduce against you, are you
10 personally convinced that the government could prove this fact by
11 competent evidence?
12 ACC: Yes, sir.
13 MJ: Allegation number 35 is that: In or about December 2001, 1
14 week after the control of Konduz changed from the Taliban to the
15 Northern Alliance, you took a taxi and fled towards Pakistan.
16 However, you were captured without any weapons by the Northern
17 Alliance in Baghlan, Afghanistan.
18 Do you understand that?
19 ACC: Yes, sir.
20 MJ: Based on your personal knowledge, and having reviewed the
21 evidence the government intends to introduce against you, are you

1 personally convinced that the government could prove this fact by
2 competent evidence?
3 ACC: Yes, sir.
4 MJ: Mr. Hicks, based on your personal knowledge, and having
5 reviewed the evidence the government intends to introduce against
6 you, are you personally convinced that these facts that we've just
7 discussed either individually or taken together are sufficient to
8 establish your guilt to this specification and to The Charge beyond a
9 reasonable doubt?
10 ACC: Yes, sir.
11 MJ: Mr. Hicks, with regard to your review of the evidence that
12 I've referred to -- and this is the evidence that the government
13 intends to introduce against you -- what sort of a review have you
14 made of this evidence?
15 ACC: Notes by interrogators taken from other people.
16 MJ: Anything else?
17 ACC: No.
18 MJ: So I understand that at some point you were interrogated by
19 someone, is that right?
20 ACC: That's correct.
21 **[END OF PAGE]**

1 MJ: And as a result of those interrogations you made some
2 statements and then there were notes made about the statements that
3 you made. Is that correct?
4 ACC: That's correct.
5 MJ: Okay, and do I also understand that you have been shown
6 notes of interrogations that were made of other people as well?
7 ACC: That's correct.
8 MJ: And you've had a chance to review paper copies of those
9 things?
10 ACC: Yes.
11 MJ: Anything else; tape recordings or videos of any of those
12 things?
13 ACC: No.
14 MJ: Now these paper copies that you've seen, were they written
15 in a form that you could read them?
16 ACC: Yes.
17 MJ: Did you go over them with your attorney?
18 ACC: Yes, I have.
19 MJ: Have you spoken with your attorney about what portions of
20 the material is likely to be admitted as evidence in the event that
21 you pleaded not guilty and this case was contested?
22 ACC: Yes.

1 MJ: Based on that, are you satisfied and personally convinced
2 in fact that that evidence would be sufficient to establish your
3 guilt to the specifications and prove up those facts that we just
4 talked about?
5 ACC: Yes, sir.
6 MJ: Are you satisfied with your lawyer's advice with regard to
7 the state of the evidence in this case?
8 ACC: Yes, sir.
9 MJ: As far as the advice, I note in the pretrial agreement that
10 the pretrial agreement was signed on the 26th of March 2007, is that
11 correct?
12 ACC: [Examining document.] Yes, sir.
13 MJ: And so your review of this material was conducted before
14 that time, is that right?
15 ACC: Yes, sir.
16 MJ: And I note that on the pretrial agreement Mr. Dratel, who
17 was with us earlier, also signed on that agreement as well. Is that
18 correct?
19 ACC: Yes, sir.
20 MJ: And so your review of the evidence and your decision with
21 regard to pleading guilty was made at a time when he was still
22 advising you about things?
23 ACC: Yes, sir.

1 MJ: Does either counsel believe any further inquiry is
2 required?
3 PROS: No, sir.
4 DDC: No, sir.
5 MJ: Mr. Hicks, pursuant to the Manual for Military Commissions,
6 the maximum punishment for the offense to which you have entered a
7 plea of guilty is confinement for life. In this case, however, based
8 on your pretrial agreement, the maximum punishment which can be
9 adjudged by the commission members is confinement for a period of 7
10 years.
11 Do you understand that?
12 ACC: Yes.
13 MJ: Trial and defense counsel, do you agree?
14 PROS: Yes, sir.
15 DDC: Yes, sir.
16 MJ: Mr. Hicks, do you have any questions as to the sentence
17 that could be adjudged by the commission members as a result of your
18 guilty plea?
19 ACC: No, I don't.
20 MJ: Alright, we're going to talk about the pretrial agreement
21 in this case. The offer to plead guilty and the Appendix A thereto
22 are marked as Appellate Exhibit 27.

1 Mr. Hicks, do you have a copy of Appellate Exhibit 27 in
2 front of you?
3 ACC: Yes, sir.
4 [The accused and his detailed defense counsel conferred.]
5 MJ: It's divided into two sections. The first section is
6 referred to as the Offer for Pretrial Agreement and then there's an
7 Appendix A portion. The offer portion including signature page is
8 five pages. The Appendix A including the signature page is two
9 pages. Is that what you have there?
10 ACC: [Examining document.] Yes, sir.
11 MJ: On the fifth page of the Offer section -- actually on the
12 fourth page of the Offer section above your typed name there is a
13 signature. Is that your signature?
14 ACC: [Examining document.] Yes, sir.
15 MJ: Then on the first page of Appendix A above your typed name
16 there's also a signature. Is that also your signature?
17 ACC: [Examining document.] Yes, sir.
18 MJ: Before you signed this document in those two places did you
19 read it completely and discuss it with your counsel?
20 ACC: Yes, I did.
21 MJ: Do you understand the contents of your pretrial agreement
22 and this document?
23 ACC: Yes, sir.

1 MJ: Did anyone force you to enter into this pretrial agreement?
2 ACC: No, sir.
3 MJ: Now I'll note, and I'm going to refer to in a moment what's
4 been marked as Appellate Exhibit 30 of the pretrial agreement which
5 is a copy of it with some bold portions inserted clarifying some
6 terms. Do you have a copy of Appellate Exhibit 30 in front of you?
7 ACC: [Examining document.] Yes, I do.
8 MJ: Have you had a chance to go over that with your counsel?
9 ACC: Yes.
10 MJ: Mr. Hicks, does this agreement that's in Appellate Exhibit
11 27 with some clarifying remarks in Appellate Exhibit 30 contain all
12 the understandings or agreements that you have in this case?
13 ACC: Yes, sir.
14 MJ: Has anyone made any promises to you that are not written
15 into this agreement in an attempt to get you to plead guilty in this
16 case?
17 ACC: No.
18 MJ: Counsel, is Appellate Exhibit 27 the full and complete
19 agreement in this case, and are you both satisfied with the
20 clarifying language contained in Appellate Exhibit 30 -- and when I
21 say "satisfied" you agree that that reflects the intent of the
22 parties at the time the agreement was signed in the first instance?
23 PROS: Yes, sir.

1 DDC: Yes, sir.

2 MJ: Mr. Hicks, as a general rule in a pretrial agreement an
3 accused agrees to enter pleas of guilty to some or all of the charges
4 and specifications in a case, and in return the convening authority
5 agrees to approve and order executed no sentence greater than that
6 set forth in the sentence limitation portion of the agreement which
7 in this case is listed as Appendix A.

8 Do you understand that?

9 ACC: Yes. Could I just speak Mr. [sic] Mori for just a minute?

10 MJ: Yes, go ahead.

11 [The accused and his detailed defense counsel conferred.]

12 DDC: Sir, could we take a recess?

13 MJ: Yes. I'd say 10 minutes, but that's impossible. So do you
14 want a 10-minute break?

15 DDC: Yes, sir.

16 MJ: Okay, we're going to take a short break and then we'll be
17 back in.

18 Court's in recess.

19 **[The session recessed at 0922 hours, 30 March 2007.]**

20 **[The session was called to order at 0951 hours, 30 March 2007.]**

21 MJ: The commission will come to order. All parties present
22 when we recessed are again present.

1 Mr. Hicks, before we talk more about the pretrial agreement
2 I just want to revisit the factual allegations that we talked about a
3 moment ago with regard to the allegations in The Specification. Many
4 of the factual allegations contained facts about your personal
5 actions, decisions, and knowledge and then we talked about the
6 evidence that you reviewed. I also wanted to ask, with regard to the
7 facts having to do with your personal actions, are those allegations
8 also consistent with your own recollection about what you did?
9 ACC: Yes, sir.
10 MJ: Alright, now I'm turning to the pretrial agreement. Mr.
11 Hicks, as a general rule in a pretrial agreement you agree to enter
12 pleas of guilty to some or all of the charges in a case and in return
13 the convening authority agrees to approve and order executed no
14 sentence greater than that set forth in the sentence limitation
15 portion of your agreement.
16 Do you understand that?
17 ACC: Yes, sir.
18 MJ: The law requires that I discuss the conditions of your
19 pretrial agreement with you.
20 MJ: Trial counsel and defense counsel, as we go along I will
21 also be asking you if you agree with my interpretations of the
22 various provisions.
23 Do you understand that?

1 PROS: Yes, sir.

2 DDC: Yes, sir.

3 MJ: Lieutenant Colonel [REDACTED], with regard to your
4 responses, may I correctly understand that in this discussion of the
5 pretrial agreement and the provisions therein, you are also speaking
6 on behalf of the convening authority and binding her?

7 PROS: That's correct, Your Honor.

8 MJ: As I noted, I'll be referring to the pretrial agreement
9 contained in Appellate Exhibit 27 and also referring to what's
10 referred to in the Appellate Exhibit 30 as the military judge's
11 marked up version of the pretrial agreement.

12 Mr. Hicks, I'm going to go through this essentially
13 paragraph by paragraph.

14 Paragraph 1 states that you are presently the accused under
15 a military commission charge that was sworn on February 2, 2007, and
16 referred to trial on March 1, 2007. It states here that you've read
17 The Charge and specifications against you and they have been
18 explained to you by your detailed defense counsel, Major Michael D.
19 Mori, and by civilian defense counsel, Mr. Joshua Dratel.

20 Now I'll note that Mr. Dratel is referred to several times
21 in here and as we've discussed before this was apparently agreed to
22 and signed before our hearing the other day. Are you still satisfied
23 with this pretrial agreement and do you still wish to go forward with

1 it despite the fact that Mr. Dratel has not entered a notice of
2 appearance and is not representing you here today?
3 ACC: Yes, sir.
4 MJ: Okay, it states in here that you understand The Charge and
5 specifications and that you are aware that you have a legal right to
6 plead not guilty and to leave upon the United States the burden of
7 proving you're guilty beyond a reasonable doubt and by competent
8 evidence. It states here that understanding the things I've just
9 said and the conditions that we're going to talk about here below and
10 in consideration for -- that means in exchange for -- the convening
11 authority's agreement to approve a sentence in accordance with the
12 limitations that are set forth in Appendix A which is the sentence
13 limitation portion of the agreement or the last two pages; that you
14 offer to plead as follows, and then it says to Specification 1 of The
15 Charge and to The Charge, guilty.
16 Now as it turns out we modified the plea here to be to The
17 Specification, guilty with exceptions and substitutions and to The
18 Charge, guilty.
19 Does the government agree that the accused is in compliance
20 with the terms written here with that plea with exceptions and
21 substitutions?
22 PROS: Yes, sir.

1 MJ: Then it goes on to say that you understand that this offer
2 when accepted by the convening authority will constitute a binding
3 agreement and that you assert that you are in fact guilty of the
4 offense to which you are pleading guilty and that you understand that
5 this agreement absolves the United States of its obligation to
6 present any evidence in court to prove your guilt and that you are
7 offering to plead guilty freely and voluntarily because you are
8 guilty and because it would be in your best interest that the
9 convening authority grant you the relief set forth in Appendix A.
10 That you understand that you waive your right to avoid self-
11 incrimination insofar as the plea of guilty will incriminate you.
12 Do you understand all those things we just talked about
13 there?
14 ACC: Yes, sir.
15 MJ: And that essentially reviews some of the things we talked
16 about previously, right?
17 ACC: Sorry?
18 MJ: That reviews some of the things that we talked about
19 earlier today as far as the rights you had and your waiver of those
20 rights?
21 ACC: Yes.
22 MJ: Now in this term I note in the military judge's markup in
23 Appellate Exhibit 30 that the preceding paragraph used the term

1 "binding agreement." It was indicated to me during our conferences
2 that the parties both agree that that term did not in any way
3 abrogate Mr. Hicks' right to withdraw from his guilty plea at any
4 time prior to the announcement of sentence and that being in
5 accordance with the rules set forth in Rule for Military Commission
6 910(h).
7 So, Mr. Hicks, do you understand that you can withdraw your
8 guilty plea at any time until sentence is announced in this case and
9 that is still true despite the fact that we have this agreement here
10 in place.
11 Do you understand that?
12 ACC: Yes, sir.
13 MJ: The next term talks about upon acceptance of the offer by
14 the convening authority, Mr. Hicks, you agree in here that you will
15 enter into a reasonable stipulation of fact with the United States to
16 support the element of the offenses to which you are pleading guilty.
17 We noted that it uses the word "offenses" and the parties agreed
18 during our conference that that was just a typo and should have been
19 referring to the "offense."
20 Now with regard to the stipulation of fact we've already
21 discussed and entered into evidence Prosecution Exhibit 1 which is a
22 stipulation of fact. Does the government concur that that

1 stipulation of fact satisfies Mr. Hicks' requirements under this
2 agreement to enter into a stipulation of fact?
3 PROS: Yes, sir.
4 MJ: Okay the next paragraph -- now I'm at paragraph 2b.
5 Mr. Hicks, you say in here that you agree that you will not
6 communicate with the media in any way regarding the illegal conduct
7 alleged in The Charge and specifications, plural, or about the
8 circumstances surrounding your capture and detention as an unlawful
9 enemy combatant for a period of 1 year. It says in here that you
10 agree that this includes any direct or indirect communication made by
11 you, your family members, your assigns, or any third party made on my
12 behalf.
13 In our conferences we clarified that the parties intended
14 at the time this was signed that that period of 1 year discussed in
15 here was intended to commence upon the date that sentence is
16 announced. Additionally, the parties agreed to strike the following
17 language from the term there: "my family members, my assigns, or any
18 other third party made on my behalf." So that paragraph b now, the
19 last sentence as I understand it would read, "I agree that this
20 includes any direct or indirect communications made by me."
21 Do you understand that, Mr. Hicks?
22 ACC: Yes, sir.

1 MJ: And when I ask as we go along here "do you understand," if
2 you have any questions or are unsure about any provision here, I'd
3 like you to say, "I need to talk with my lawyer about that," and then
4 we can talk about it some more. But if you are saying you understand
5 it, then I'm not going to question you much more about that.
6 ACC: Okay.
7 MJ: Alright, paragraph 2c, it says here that you agree that as
8 a material term of this agreement you will cooperate fully,
9 completely, and truthfully in post-trial briefings and interviews as
10 directed by competent United States or Australian law enforcement and
11 intelligence authorities. You agree in here to provide truthful,
12 complete, and accurate information; and if necessary, truthful,
13 complete, and accurate testimony under oath at any grand juries,
14 trials or other proceedings, including military commissions and
15 international tribunals. You understand that if you testify
16 untruthfully in any way that you could be prosecuted for perjury.
17 It says here you further agree to provide all information
18 concerning your knowledge of, and participation in al Qaeda, Lashkar-
19 e Tayyiba -- or LET which we referred to earlier -- or any other
20 similar organizations. You agree that you will not falsely implicate
21 any person or entity, and that you will not protect any person or
22 entity through false information or omission.

1 In our conference the parties agreed that in an initial
2 determination with regard to compliance with this term in the
3 preceding paragraph would be made by the convening authority.
4 Mr. Hicks, do you understand that term?
5 ACC: Yes, I do.
6 MJ: The term talks about "cooperation" and that's the sort of
7 term that whether someone cooperates or not that's the sort of thing
8 that somebody might disagree with about afterwards.
9 Do you understand that?
10 ACC: Yes.
11 MJ: We certainly hope that doesn't happen, but I just mention
12 that -- and I'm talking about disagreement about cooperation, that's
13 what I'm hoping doesn't happen -- but I just mention that with regard
14 to whether there is compliance or not, the initial decision in that
15 belongs to the convening authority and then after that point that
16 would have to be worked out there.
17 Do you understand that?
18 ACC: Yes, I do.
19 MJ: Some terms it's very clear whether it's complied with or
20 not. The stipulation of fact, for example; it was entered, it was
21 signed, the government's already said that term is done. A term like
22 this talks about something in the future and I just want to alert you

1 this is the kind of term that sometimes there can be a disagreement
2 about whether you cooperated or not.
3 Do you understand that?
4 ACC: Yes, sir, I do.
5 MJ: It's not an unusual term for a pretrial agreement, I just
6 want to point out to you that it's not the same where "yes, he
7 definitely this or he definitely did that," alright?
8 Do you understand that?
9 ACC: Yes.
10 MJ: And have you talked about that with your lawyer?
11 ACC: Yes, I have.
12 MJ: Alright. Okay, in paragraph 2d it states here, you hereby
13 assign to the government of Australia any profits or proceeds which
14 you may be entitled to receive in connection with any publication or
15 dissemination of information relating to the illegal conduct alleged
16 in the charge sheet. This assignment shall include any profits or
17 proceeds for your benefit, regardless of whether such profits and
18 proceeds are payable to me -- that's you -- or to others directly or
19 indirectly for your benefit or for the benefit of your associates or
20 a current or future member of your family.
21 You're representing in here that you have not previously
22 assigned, and you agree that you will not circumvent this assignment
23 to the government of Australia by assigning the rights to your story

1 to an associate or to a current or future member of your family, or
2 to another person or entity that would provide some financial benefit
3 to you, to your associates, or to a current or future member of your
4 family. It states here that moreover, you will not circumvent this
5 assignment by communicating with an associate or a family member for
6 the purpose of assisting or facilitating his or her profiting from a
7 public dissemination, whether or not such an associate or other
8 family member is personally or directly involved in such
9 dissemination.
10 In this agreement you agree that this assignment is
11 enforceable through the Australian Proceeds Act of 2002, and any
12 other applicable provision of law that would further the purpose of
13 this paragraph's prohibition of personal enrichment for yourself, for
14 your family, your heirs or assigns through any publication or
15 dissemination of qualifying information, and that you acknowledge
16 that your representations herein are material terms of this
17 agreement.
18 And the parties in here agree that the preceding paragraph
19 is intended to provide a basis for civil action rather than amounting
20 to a provision the violation of which would support vacation of a
21 portion of this sentence that might be suspended pursuant to the
22 terms in this agreement. The parties also concurred that the term
23 "illegal conduct alleged" as used in this preceding paragraph

1 includes all the matters on the charge sheet to which were referred
2 to the commission for trial and is not just limited to the matters
3 contained in Specification 1 of The Charge.
4 Mr. Hicks, do you understand that term in the pretrial
5 agreement?
6 ACC: Yes, I do.
7 MJ: Okay, paragraph 3 states here you are satisfied with your
8 detailed defense counsel, Major Mori, and again here it references
9 here civilian defense counsel, Mr. Dratel, who have advised you with
10 respect to this offer and that you consider them competent to
11 represent you in this military commission and agree that they have
12 provided you with effective assistance of counsel.
13 Do you understand that term?
14 ACC: Yes, I do.
15 MJ: It states here that no person or persons have made any
16 attempt to force or coerce you into making this offer or to plead
17 guilty. And that it's done as a matter of a free decision on your
18 part with full knowledge of its meaning and effect.
19 Is that also correct?
20 ACC: Yes, sir.
21 MJ: It states here also that you're agreeing that your counsel
22 have advised you of the nature of The Charge and specifications
23 against you, the possibility of your defending against them, any

1 defense that might apply, and the effect of the guilty plea that you
2 are offering to make. It says here that you fully understand the
3 advice of these defense counsel and the meaning and effect of the
4 consequences of this plea.
5 Is that all true?
6 ACC: Yes, sir.
7 MJ: Do you understand all of that?
8 ACC: Yes, sir.
9 MJ: Then paragraph d there says that you understand that the
10 signature of the convening authority to this offer and Appendix A, or
11 any other modified version of Appendix A -- and I'm not aware of any
12 other modified version of Appendix A -- will transform the agreement
13 into a binding agreement between you and the United States.
14 In the markup there I have restated what I said before
15 about the "binding agreement." It does not change the fact that you
16 can still seek to withdraw from your guilty plea at any time until
17 sentence is announced.
18 Do you understand that?
19 ACC: Yes.
20 MJ: Okay, paragraph 3e states that you understand that the
21 convening authority can withdraw from this agreement and that the
22 agreement will become null and void which means have no effect, in
23 the event that you fail to plead guilty as required by this agreement

1 -- and you've already done that -- the commission refuses to accept
2 your plea of guilty to any charge. And when it says "commission"
3 there, the parties agree that that term more properly refers to the
4 military judge since that's part of my role as opposed to the
5 commission members who would do the determination of sentence. Or if
6 the commission, and more correctly the military judge, sets aside
7 your plea of guilty for whatever reason, including upon your later
8 request before sentence is announced. Or if you fail to satisfy any
9 material obligation of this agreement or if it's determined that
10 you've misrepresented any material term of this agreement.
11 In our discussion in the 802 the parties agree that the
12 standard understanding is in place that the parties agree that
13 determination with regard to initial compliance with the terms of
14 this agreement as mentioned in these preceding paragraphs will be
15 made by the military judge prior to the entry of sentence in this
16 case and thereafter by the convening authority.
17 Then there's another term there which states that it could
18 become null and void and that's if you fail to agree -- if the
19 parties fail to agree to a satisfactory stipulation of fact and as
20 we've mentioned, that's already been accomplished in this case.
21 Do you understand all of those circumstances in which the
22 convening authority could withdraw from this agreement?
23 ACC: Yes, sir.

1 MJ: The next paragraph describes that you you'll understand and
2 agree that if the agreement does become null and void for any reason,
3 your offer to plead guilty and your offer for this pretrial agreement
4 cannot be used against you in any way at any time to establish your
5 guilt of The Charge alleged against you, but that the United States
6 may prosecute The Charge and specifications alleged against you, and
7 the limitations then that are set forth in Appendix A as far as
8 sentence limitations would be of no effect.
9 Do you understand that?
10 ACC: Yes, sir.
11 MJ: And the parties agree that with regard to the use of the
12 offer by the accused and the statements in the providence inquiry and
13 the stipulation of fact, the parties agreed the preceding paragraph
14 is intended to be read in a manner consistent with provisions that
15 address those matters in Military Commission Rule of Evidence 410.
16 Paragraph 3g provides that you understand and agree that
17 your failure -- and that really should be "any failure by you" to
18 fully cooperate with the Australian or United States authorities may
19 delay your release from confinement or custody under applicable
20 provisions of Australian law.
21 The parties agreed that with regard to this term, it would
22 be a representative of the Australian government that would make any

1 determination associated with Mr. Hicks' compliance with the terms of
2 this preceding paragraph.
3 Do you understand that, Mr. Hicks?
4 ACC: Yes.
5 MJ: Okay, there's a statement in here that as part of this
6 pretrial agreement you are acknowledging and agree that you are an
7 alien unlawful enemy combatant as defined by the Military Commissions
8 Act of 2006, Title 10 United States Code Section 948c.
9 In our conference the parties agreed that the words and
10 figures herein "948c" in the preceding paragraph are incorrect
11 because in actuality that section refers to definitions that are
12 contained elsewhere and the more correct statement there would be,
13 "Section 948a parts 1 and 3." The parties concurred that was an
14 administrative oversight, but the intent by the parties was the same
15 at the initial signing of this agreement.
16 Have you talked about that term with your counsel as well,
17 Mr. Hicks?
18 ACC: Yes, I have.
19 MJ: Do you understand it?
20 ACC: Yes, I do.
21 MJ: Paragraph 3i includes as part of this pretrial agreement an
22 agreement by you that you have never been illegally treated by any
23 person or persons while in the custody and control of the United

1 States. This includes the period after your capture and transfer to
2 the United States custody in Afghanistan in December 2001, through
3 the entire period of your detention by the United States at
4 Guantanamo Bay, Cuba. And that you agree that this agreement puts to
5 rest any claims of mistreatment by the United States.
6 In our conferences the parties agreed that the term
7 "illegally treated" in the preceding paragraph was intended to be
8 interpreted consistently with the definition of illegal treatment
9 contained in paragraph 50 of the stipulation of fact which is
10 Prosecution Exhibit 1. The parties also agreed in conference that
11 the preceding paragraph was intended to reflect a statement by Mr.
12 Hicks concerning his belief in the truth of this statement with
13 regards to the time period from on or about the 15th of December
14 2001, until the date of trial. The parties also agreed to strike the
15 following language from the preceding paragraph, that part about "I
16 agree that this agreement puts to rest any claims of mistreatment by
17 the United States" and that paragraph was deleted from the preceding
18 paragraph because it is more fully addressed in paragraph 5 below.
19 Now have you talked about that term with your counsel as
20 well, Mr. Hicks?
21 ACC: Yes, I have.
22 MJ: Okay, and do you agree with that term as well?
23 ACC: Yes, sir.

1 MJ: Okay, paragraph 3j states that you agree and understand
2 that the entire period of detention as an unlawful enemy combatant is
3 based upon your capture during armed conflict and has been lawful
4 pursuant to the law of armed conflict and is not associated with, or
5 in anticipation of, any criminal proceedings against you.
6 In our conference the parties agreed that the intent of the
7 preceding paragraph reflects an acknowledgement by the defense and
8 the prosecution and the convening authority that the accused will not
9 be afforded any pretrial confinement credit to be counted against any
10 sentence to confinement adjudged by this military commission.
11 Have you talked about that with your defense counsel, Mr.
12 Hicks?
13 ACC: Yes, I have.
14 MJ: Okay, do you understand that?
15 ACC: Yes, sir.
16 MJ: In paragraph 4 it states that in exchange for the
17 undertakings made by the United States in entering this pretrial
18 agreement you voluntarily and expressly waive all rights to appeal or
19 collaterally attack your conviction, sentence, or other matters
20 relating to this prosecution whether such a right to appeal or
21 collateral attack arises under the Military Commissions Act of 2006,
22 or any other provision of United States or Australian law. In
23 addition herein it states that you voluntarily and expressly agree

1 not to make, participate in, or support any claim, and not to
2 undertake or participate in, or support any litigation, in any forum
3 against the United States or any of its officials whether uniformed
4 or civilian in their personal or official capacities with regard to
5 your capture, treatment, detention, or prosecution.
6 In our conference the parties agree that this preceding
7 paragraph is intended to be read in a matter consistent with Rule for
8 Military Commission 1110 such that the accused agrees to waive
9 appellate review of his conviction in this case at the earliest time
10 allowed under that rule which would be immediately after the time
11 sentence is announced in this case.
12 Have you talked about that provision with your counsel as
13 well, Mr. Hicks?
14 ACC: Yes, I have.
15 MJ: Do you understand and agree to that?
16 ACC: Yes, sir.
17 PROS: Your Honor, may I be heard?
18 MJ: Yes.
19 PROS: The government requests, Your Honor, to note the parties
20 understanding that that provision also applies with the legal affect
21 of voluntary and express waiver to any habeas past, present, and
22 future and that the accused would be actually removed from a party of
23 any habeas case in light of that provision.

1 MJ: Is that also the understanding of defense?

2 DDC: Yes, sir.

3 MJ: Is that also your understanding, Mr. Hicks?

4 ACC: Yes, sir.

5 MJ: Have you talked about that with your counsel?

6 ACC: Yes, sir.

7 MJ: Do you need any more time to talk about that with your

8 counsel?

9 ACC: No, no, I understand.

10 MJ: Okay, we're good to go with that one?

11 ACC: Yes, sir.

12 MJ: Paragraph 5 it says that you agree that for the remainder

13 of your natural life, should the government of the United States

14 determine that you've engaged in conduct proscribed -- which means

15 prohibited -- by Sections 950q through w of Chapter 47A of Title 10

16 United States Code -- and that's in the Military Commissions Act --

17 after the date of the signing of this pretrial agreement, the

18 government of the United States may immediately invoke any right it

19 has at that time to capture and detain you, outside the nation of

20 Australia and its territories, as an unlawful enemy combatant.

21 It also states that if you engage in conduct proscribed by

22 Sections 950q through w of Chapter 47A of Title 10 of the United

23 States Code after the date of the signing of this pretrial agreement

1 and during the period in which any part of your sentence is suspended
2 pursuant to the terms of the Appendix to this agreement, the
3 convening authority may vacate any period of suspension agreed to in
4 this pretrial agreement or as otherwise approved by the convening
5 authority and the previously suspended portion of the sentence could
6 be imposed upon you. Finally, it states in that paragraph that this
7 pretrial agreement resolves all charges against you under the
8 Military Commissions Act of 2006 and United States law that may have
9 occurred before the signing of this agreement.
10 So there's three sections of that paragraph. The first one
11 talks about other offenses that might be committed by you under the
12 Military Commissions Act in the future, that the United States
13 government would have the authority to prosecute you for those
14 offenses. The second section talks about how future violations of
15 the Military Commissions Act, if they occur during a period of time
16 in which some of the sentence that might be adjudged by this
17 commission are suspended could provide a basis to vacate or put back
18 in place the suspended portion of the sentence.
19 Do you understand those two parts?
20 ACC: Yes, sir.
21 MJ: Continuing jurisdiction in the future for new offenses
22 under the Military Commissions Act, that's one piece. The second
23 piece is future offenses like that providing the basis for the United

1 States government to seek to vacate or put back in place any
2 punishment that might be suspended pursuant to the terms of this
3 agreement.
4 Do you understand those two things?
5 ACC: Yes, sir.
6 MJ: Then the third part speaks in the way of transactional
7 immunity for you for offenses that have occurred before the signing
8 of this agreement which is the 26th of March 2007, that might be
9 chargeable under the M.C.A. or other portions of United States law.
10 Do you understand that?
11 ACC: Yes, sir.
12 MJ: Okay, have you talked about that with your counsel?
13 ACC: Yes, I have.
14 MJ: Major Mori, are you satisfied I've correctly characterized
15 that paragraph?
16 DDC: Yes, sir.
17 MJ: Trial counsel, do you affirm that the convening authority
18 has been authorized to agree to the transactional immunity provision
19 that's contained in paragraph 5 of the agreement here?
20 PROS: Yes, Your Honor.
21 MJ: And that's authorization as required by Rule for Military
22 Commissions 704(c). Is that right?
23 PROS: Correct, sir.

1 MJ: Okay. Paragraph 6 there says that this document along with
2 Appendix A which we're going to talk about in a moment, includes all
3 the terms of the pretrial agreement and that there are no other
4 promises or inducements that have been made to you by the convening
5 authority or any other person which have affected your offer to plead
6 guilty or enter into this pretrial agreement.
7 Is that also correct?
8 ACC: Yes.
9 MJ: I realize that some of these questions I seem to ask you
10 repeatedly, but that's just the way it works out.
11 So do you have any questions about any of the provisions in
12 the first part of the pretrial agreement?
13 ACC: No, sir.
14 MJ: You understand all of them?
15 ACC: yes, sir.
16 MJ: Now we're going to review the provisions in Appendix A to
17 the agreement which is the last two pages. I've already made some
18 reference to that because in paragraph 1a it states that the first
19 part of paragraph 1a states that the maximum confinement which can be
20 adjudged by the military commission members and approved by the
21 convening authority in this case is 7 years. Now I referred to that
22 earlier because I told you that under the Manual for Military

1 Commissions the offense to which you've pleaded guilty which carries
2 a maximum permissible punishment of confinement for life.
3 Do you understand that?
4 ACC: Yes, sir.
5 MJ: I told you that earlier, right?
6 ACC: Yes, sir.
7 MJ: It's part of the pretrial agreement, however, the convening
8 authority has agreed that the maximum in this case here today that
9 the members will be instructed about that they can provide -- or
10 adjudge I should say -- is confinement for a period of 7 years.
11 Do you understand that?
12 ACC: Yes, sir.
13 MJ: In paragraph 1a the convening authority further agrees to
14 suspend any confinement adjudged by the commission members which
15 exceeds a certain period of time. That period of time is contained
16 within the last two words of paragraph 1a. Without stating that
17 period of time, do you see that provision that I'm talking about in
18 paragraph 1a?
19 ACC: Yes, sir.
20 MJ: Have you talked about that with your counsel?
21 ACC: Yes, I have.
22 MJ: Again, without stating the period of time that's discussed
23 there at the end of paragraph 1a, do you then understand that portion

1 of any adjudged confinement that will have to be suspended by the
2 convening authority pursuant to paragraph 1a?
3 ACC: Yes, sir.
4 MJ: Now with regard to the duration of the period of
5 suspension, with regard to any confinement that might be suspended
6 pursuant to the terms of this agreement, both sides have advised me
7 that the period of suspension that was intended by the parties at the
8 time the agreement was signed is for a period of 7 years from the
9 date the sentence is announced. That would be the period of time
10 that the confinement would be suspended.
11 Do you understand that, Mr. Hicks?
12 ACC: I'll just read it, sir. [Reads the document.]
13 MJ: Okay.
14 ACC: Yes, sir.
15 MJ: Okay, because what it says in there, the maximum period of
16 confinement that may be adjudged and approved is 7 years. Then it
17 says that the convening authority agrees to suspend any portion of a
18 sentence to confinement in excess of "blank" and we're not going to
19 discuss that right now. When confinement is suspended that means if
20 there's any confinement adjudged in excess of the time there at the
21 end, that will be suspended. That means it won't be executed and it
22 won't be served, but rather it will be held in suspension for a
23 certain period of time as I indicated to the parties in our meetings,

1 the term did not specifically for how long the confinement would be
2 suspended and that is a requirement in the law that there be a
3 definite period of suspension.
4 During our conference both sides indicated to me that at
5 the time this agreement was signed it was the intention of both
6 parties that the period of suspension be for 7 years from the date
7 sentence is announced after which time, unless sooner vacated -- that
8 means put back in place because you violated some term of the
9 agreement or committed some other act which we talked about -- that
10 suspended period would be remitted or go away and no longer have an
11 affect after a certain period of time and that is a 7 year period.
12 Do you understand that?
13 ACC: Yes.
14 MJ: And have you talked about that with Major Mori?
15 ACC: Yes, I have.
16 MJ: Is his explanation of that exactly the same as mine?
17 ACC: Yes.
18 MJ: Good.
19 Now with regard to the sentence that's adjudged we've
20 indicated that if it's above a certain period of time anything above
21 that period of time is going to be suspended for 7 years and then it
22 will be remitted or go away unless vacated sooner, right?
23 ACC: Yes, sir.

1 MJ: Now, on the other hand, if the sentence adjudged by this
2 commission is less than the one provided for in your agreement, do
3 you also understand that the convening authority cannot increase the
4 sentence adjudged?
5 ACC: Yes, sir.
6 MJ: In paragraph 1b of Appendix A it states that the convening
7 authority agrees to dismiss Specification 2 of The Charge with
8 prejudice, at or before the time of sentencing.
9 Do you understand that?
10 ACC: Yes, sir.
11 MJ: Okay, so the government has agreed that so long as this
12 pretrial agreement goes forward to its conclusion that that second
13 specification is not going to be prosecuted and is going to go away.
14 Do you understand that?
15 ACC: Yes.
16 MJ: In paragraph 1c the convening authority agrees that the
17 military judge will instruct the members that the maximum sentence to
18 confinement which they may adjudge is 7 years. We've already talked
19 about that, right?
20 ACC: Yes, sir.
21 MJ: In paragraph 1d the convening authority agrees that the
22 United States will transfer custody and control of you to the

1 government of Australia no later than 60 days after the sentence is
2 announced.
3 Do you understand that?
4 ACC: Yes, sir.
5 MJ: In paragraph 1e you and the convening authority or the
6 government make reciprocal promises and agreements. Prosecution
7 agrees that it will not offer any evidence in aggravation under Rule
8 for Military Commission 1001(c)(2) which is the rule governing
9 evidence in aggravation, although both sides have agreed that this
10 provision permits the stipulation of fact to be given to the members
11 for their consideration and use on sentencing.
12 Do you understand that?
13 ACC: Yes, sir.
14 MJ: The defense has agreed and that is you too have agreed not
15 to present any evidence in mitigation under R.M.C. 1001(c)(1)(B).
16 Do you understand that?
17 ACC: Yes, sir.
18 MJ: That's the rule that provides you with the right to
19 represent such matters in extenuation in the defense.
20 Do you understand that?
21 ACC: Yes, sir.
22 MJ: Here you're essentially waiving that right.

1 Do you understand that?

2 ACC: Yes, sir.

3 MJ: The parties also agree that this preceding paragraph was

4 intended at the time the agreement was signed to include an agreement

5 by the defense not to offer evidence in extenuation either. So the

6 rights that you have to present evidence on sentencing extend to

7 extenuation and mitigation. The pretrial agreement discussed not

8 providing mitigation, but the parties have advised me that the

9 intention there was for there to be a waiver of the right to present

10 evidence in extenuation and mitigation.

11 Do you understand that?

12 ACC: Yes, sir.

13 MJ: Have you talked about what both of those terms mean with

14 your defense counsel?

15 ACC: Yes, I have, sir.

16 MJ: Regardless of the language in here, the provision as

17 specifically provides that you may make an unsworn statement during

18 the sentencing proceedings here in accordance with Rule for Military

19 Commission 1001(c)(2)(C).

20 Do you understand that?

21 ACC: Yes, sir.

22 MJ: Both sides indicated to me that they agreed with my

23 interpretation that as there is no specific statement in the

1 agreement concerning this matter, the prosecution may under Rule for
2 Military Commission 1001(c)(2)(C) present evidence to rebut any
3 statement of fact contained in your unsworn statement.
4 Do you understand that?
5 ACC: Yes, sir.
6 MJ: Mr. Hicks, with regard to all the things I've said about
7 the pretrial agreement from start to finish, is that a correct
8 statement of what you understand you and the convening authority have
9 agreed to?
10 ACC: Yes, sir.
11 MJ: Have you had enough time to discuss your agreement with
12 your defense counsel?
13 ACC: Yes, I have.
14 MJ: Are you satisfied with your defense counsel's advice
15 concerning this pretrial agreement?
16 ACC: Yes.
17 MJ: Did you enter this agreement of your own free will?
18 ACC: Yes.
19 MJ: Has anyone tried to force you into making this pretrial
20 agreement?
21 ACC: No.

1 MJ: Do you have any questions about any provision in your
2 pretrial agreement?
3 ACC: No, sir.
4 MJ: Do you fully understand all the terms of the pretrial
5 agreement and how they will affect your case?
6 ACC: Yes, sir.
7 MJ: Mr. Hicks, are you pleading guilty not only because you
8 hope to receive a lighter sentence, but because based on your
9 examination of the evidence against you and your own recollection of
10 the events, you are convinced that the government could prove you
11 guilty of the elements of the offense beyond a reasonable doubt?
12 ACC: Yes, sir.
13 MJ: Do counsel for both sides agree completely with my
14 interpretation of the pretrial agreement?
15 PROS: Yes, Your Honor.
16 DDC: Yes, sir.
17 MJ: Mr. Hicks, have you had enough time and opportunity to
18 discuss your case with Major Mori?
19 ACC: Yes, I have.
20 MJ: Major Mori, have you had enough time and opportunity to
21 discuss your case with your client?
22 DDC: Yes, sir.

1 MJ: Mr. Hicks, have you fully consulted with your counsel and
2 are you satisfied that you've received the full benefit of his
3 advice?
4 ACC: Yes, sir.
5 MJ: Are you satisfied that his advice to you has been in your
6 best interest?
7 ACC: Yes.
8 MJ: And are you satisfied with your defense counsel?
9 ACC: Yes, sir.
10 MJ: Are you pleading guilty voluntarily and of your own free
11 will?
12 ACC: Yes.
13 MJ: Has anyone made any threat or in any way tried to force you
14 to plead guilty here today?
15 ACC: No, sir.
16 MJ: Do you have any questions as to the meaning and effect of
17 your plea of guilty in this case?
18 ACC: No, sir.
19 MJ: Do you fully understand the meaning and effect of your plea
20 of guilty?
21 ACC: Yes.
22 MJ: Do you still want to plead guilty in this case?
23 ACC: Yes, sir.

1 MJ: Mr. Hicks, I find that your plea of guilty has been made
2 voluntarily and with full knowledge of its meaning and effect. I
3 further find that you have knowingly, intelligently, and consciously
4 waived your rights against self-incrimination and to a trial of the
5 facts by this military commission, and to be confronted by the
6 witnesses against you. Accordingly, your plea of guilty is provident
7 and is accepted.
8 I will also advise you that you may request to withdraw
9 your guilty plea at any time before the sentence is announced in this
10 case, and if you have a good reason for such a request, I will allow
11 you to do so.
12 Do you understand that?
13 ACC: Yes, sir.
14 MJ: Does the government intend to go forward on Specification 2
15 or the excepted words of Specification 1 to which Mr. Hicks has
16 entered a plea of not guilty?
17 PROS: No, sir.
18 MJ: Do you move to amend Specification 1 of The Charge to
19 conform with the pleas of the accused?
20 PROS: Yes, Your Honor.
21 MJ: Very well, the motion to amend Specification 1 of The
22 Charge to conform to with the plea of the accused is granted, and the
23 amendment is ordered.

1 MJ: Government, do you then move to dismiss with prejudice
2 Specification 2 of The Charge?
3 PROS: No, sir, not at this time. The government moves to
4 dismiss Specification 2 of The Charge without prejudice, to ripen
5 into dismissal with prejudice upon announcement of the sentence.
6 MJ: Is there any objection to that?
7 DDC: No, sir.
8 MJ: Is defense satisfied that is in accordance with the
9 pretrial agreement?
10 DDC: Yes, sir.
11 MJ: Very well. The motion to dismiss Specification 2 of The
12 Charge and the excepted language with regard to Specification 1 is
13 granted and the dismissal is ordered. It will ripen into dismissal
14 with prejudice at the time the sentence is announced in this case.
15 Specification 1 of The Charge is ordered to be renumbered then as
16 "The Specification of The Charge."
17 Accused and counsel please rise.
18 [The accused and his detailed defense counsel did as directed.]
19 **[END OF PAGE]**

MJ: David Matthew Hicks, in accordance with your plea of guilty, this commission finds you as follows:

Of The Specification of The Charge and to The Charge:	**Guilty of a violation of Title 10 United States Code Section 950v Part 25, "Providing Material Support for Terrorism."**

You may be seated.

[The accused and his detailed defense counsel did as directed.]

MJ: Mr. Hicks, when the members come in we'll start the sentencing phase of this trial. Pursuant to the terms of the pretrial agreement in this case, the government may offer no evidence in aggravation, but it may offer a stipulation of fact that we have previously discussed.

Do you understand that?

ACC: Yes, sir.

MJ: Under the laws governing these commissions you have the right to present matters in extenuation and mitigation. Included in these rights are the rights that you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the prosecutor and questioned by me or the members. If you make an unsworn statement, you may not be cross-examined by the prosecutor or questioned by me or the members.

1 The government may, however, provide evidence in rebuttal of any
2 statement of fact made in an unsworn statement. An unsworn statement
3 may be made orally or in writing, personally or through counsel, or
4 you may use a combination of these methods. If you elect to remain
5 silent, the commission members will be instructed not to draw any
6 adverse inference from your silence.
7 Do you understand that?
8 ACC: Yes, sir.
9 MJ: Now we previously discussed in your pretrial agreement that
10 you agreed to forego the right to present matters in extenuation and
11 mitigation and to limit your presentation of matters during the
12 presentencing hearing to an unsworn statement. Are you still
13 satisfied with that aspect of your pretrial agreement?
14 ACC: Yes, sir.
15 MJ: Alright, at this time we're going to be taking a recess and
16 I'll advise the parties about a restart time as soon as I'm advised
17 of when the members will be available to us.
18 Is there anything else we need to address at this time
19 before we recess?
20 Government?
21 PROS: No, Your Honor.
22 DDC: No, sir.
23 MJ: Very well, we're in recess.

[The session recessed at 1045 hours, 30 March 2007.]

[The session was called to order at 1433 hours, 30 March 2007.]

MJ: The commission will come to order. All parties present when the commission recessed are again present.

First, I'd like to clarify for the record one thing about my finding. In citing the US Code section with regard to The Charge to which a finding of guilty was entered, I want to clarify that that was to Title 10 United States Code Section 950v(b)(25).

Trial counsel, has a sentence worksheet been marked as an appellate exhibit?

PROS: It has, Your Honor.

[The court reporter handed AE 26 to the military judge.]

MJ: I've been handed what has been marked as Appellate Exhibit 26, the sentencing worksheet in this case.

Major Mori, have you had the opportunity to inspect Appellate Exhibit 26?

DDC: I have, sir, and I have no objection.

MJ: Thank you. I noted earlier today that during our series of conferences over the past couple of days we had discussions of the voir dire of the members as well as the sentencing instructions. During the course of that process I provided trial and defense counsel with a copy of my planned group voir dire of the members

1 which is developed in part based on the input from both sides, and
2 also my planned sentencing instructions for the members.
3 Have both sides had an opportunity to inspect my planned
4 group voir dire and sentencing instructions?
5 PROS: Yes, sir.
6 DDC: Yes, sir.
7 MJ: Is there any objection to any of that or a request for
8 additional group voir dire or instructions?
9 PROS: No, sir.
10 DDC: None from the defense, sir.
11 MJ: Major Mori, have you had an opportunity to inspect the
12 members' folders which have been placed in the jury box?
13 DDC: Yes, sir.
14 MJ: Is their any objection to any of that?
15 DDC: No, sir.
16 MJ: And there should be a copy of the convening order and the
17 modification thereto, each member's own member questionnaire, a copy
18 of the cleansed charge sheet, and a blank pad of paper. Is that in
19 accord with what you saw?
20 DDC: Yes, sir.
21 MJ: Major Mori, have you had an opportunity to review the
22 members' questionnaires to include their responses?
23 DDC: Yes, sir.

1 MJ: Those will be collectively marked as Appellate Exhibit 31.
2 Does either side have any other materials which could be marked at
3 this time?
4 PROS: No, sir.
5 DDC: No, sir.
6 MJ: Is there anything else from either side before we call the
7 members?
8 PROS: No, sir.
9 DDC: No, sir.
10 MJ: Very well, please call all the members into the courtroom.
11 [The bailiff did as directed.]
12 Bailiff: All rise.
13 [All persons in the courtroom did as directed.]
14 [The members entered the courtroom.]
15 **[END OF PAGE]**

[The commission was called to order at 1439 hours, 30 March 2007, pursuant to the orders previously inserted in the record, and as amended by Military Commission Convening Order Number 07-03, dated 29 March 2007.]

MJ: Members, please be seated.

[The members did as directed.]

MJ: Everyone, please be seated.

[All persons in the courtroom did as directed.]

MJ: Members, there is a folder in front of each of you with a copy of the convening order on top. Please do not open the folder at this time. Your name should be highlighted on a copy of the convening order or the modification to the convening order which should also be on top of the folder. At this time I would like for each member to examine the convening order on top of the folder to ensure that you see your name on the convening order with the correct spelling, rank, and branch of service. If you don't see your name, or if the spelling or information is incorrect, please raise your hand.

[The members did as directed.]

MJ: Negative response from the members.

The members of the commission will now be sworn.

1 Members, when I ask you to rise, when the prosecutor states
2 your name, please raise your right hand and keep it raised until the
3 oath has been administered.
4 All persons in the courtroom, please rise.
5 [All persons in the courtroom did as directed.]
6 [The members were sworn.]
7 MJ: Members, please be seated.
8 [The members did as directed.]
9 MJ: Everyone, please be seated.
10 [All persons in the courtroom did as directed.]
11 MJ: The military commission is assembled.
12 Members, it is now appropriate that I give you some
13 preliminary instructions. I'm the military judge in this case, and
14 my duty is to ensure this trial is conducted in a fair, orderly, and
15 impartial manner in accordance with the law. I preside over open
16 sessions, rule upon objections, and instruct you on the law
17 applicable to this case. You are required to follow my instructions
18 on the law and you may not consult any other source as to the law
19 pertaining to this case unless it is admitted into evidence. This
20 rule applies throughout the trial including closed sessions and
21 periods of recess and adjournment. Any questions you have of me
22 should be asked in open court.

1 At a session held earlier today the accused pled guilty to
2 The Charge and Specification which is described in the folder before
3 you. I accepted that plea and entered a finding of guilty.
4 Therefore, you will not have to determine whether the accused is
5 guilty or not guilty, as that has been established by his plea.
6 Your duty is to determine an appropriate sentence. That
7 duty is a grave responsibility requiring the exercise of wise
8 discretion. Your determination must be based upon all the evidence
9 that is presented to you and the instructions that I will give you
10 with regard to the applicable law. Since you cannot properly reach
11 that determination until all the evidence has been presented and you
12 have been instructed, it is of vital importance that you keep an open
13 mind until all the evidence and the instructions have been presented
14 to you.
15 During what is called the voir dire process, I will ask you
16 some questions and counsel will be given an opportunity to ask you
17 questions and exercise challenges. With regard to challenges, if you
18 know of any matter that you feel might affect your impartiality to
19 sit as a commission member, you must disclose that matter when asked
20 to do so. Bear in mind that any statement you make should be made in
21 general terms so as not to disqualify other members who might hear
22 the statement.

1 Grounds for challenge would include if you had investigated
2 any offense charged, or if you have formed a fixed opinion as to what
3 an appropriate punishment would be for this accused, or any other
4 matter that may affect your impartiality regarding the appropriate
5 sentence for the accused. Questions asked by myself and the lawyers
6 are not intended to embarrass you. They are also not an attack upon
7 your integrity. They are asked merely in order to determine whether
8 a basis for challenge exists.
9 It is of no adverse reflection upon a member to be excused
10 from a particular case. You will be questioned individually and
11 collectively, but in either event, you should always indicate an
12 individual response to the question asked. Unless I indicate
13 otherwise, you are required to answer all questions. In all cases an
14 affirmative response should be indicated by raising your hand. I
15 will interpret the absence of a raised hand as a negative response.
16 Do all members understand this instruction? In which case
17 you should be raising your hand. Very good.
18 [All members indicated an affirmative response.]
19 MJ: Members, you must keep an open mind throughout the trial.
20 You must impartially hear the evidence and the instructions on the
21 law. Only when you are in your closed session deliberations may you
22 properly make a determination as to an appropriate sentence, after
23 considering all the alternative punishments that I will later advise

1 you. You may not have a preconceived idea or formula as to either
2 the type or the amount of punishment which should be imposed, if any.
3 During any recess you may not discuss the case with anyone,
4 not even amongst yourselves. You must not listen to or read any
5 account of the trial, or consult any source written or otherwise as
6 to matters involved in the case. You must hold all your discussion
7 of the case until you are all together in your closed session
8 deliberations, so that all of the members will have the benefit of
9 all the discussion.
10 If anyone attempts to discuss the case in your presence
11 during a recess or adjournment, you must immediately tell them to
12 stop and report that occurrence to me during the next session. I may
13 not repeat that instruction before every break, but it applies at
14 every break and please keep it in mind.
15 During any breaks I will try to estimate the time needed
16 for recesses or hearings outside your presence. Sometimes their
17 duration, however, is extended by consideration of new issues arising
18 during such hearings. Your patience and understanding regarding
19 these matters will greatly contribute to an atmosphere that is
20 consistent with the fair administration of justice.
21 While you are present in your closed session deliberations,
22 only the members will be present, and you must remain together, and
23 you may not allow any unauthorized intrusion into your deliberations.

1 Each of you has an equal voice and vote with the other members in
2 discussing and deciding all issues that will be submitted to you.
3 However, in addition to the duties of the other members, the senior
4 member will act as your presiding officer during your closed session
5 deliberations, and will speak for the commission in announcing the
6 results.
7 This general order of events can be expected during this
8 trial are: questioning of members, challenges and excusals,
9 presentation of evidence, closing argument by counsel, instructions
10 on the law, your deliberations, and announcement of the sentence.
11 Members, the appearance and demeanor of all parties to the trial
12 should reflect the seriousness with which the trial is viewed.
13 Careful attention to all that occurs during the trial is required of
14 all parties. If it becomes too hot or too cold in the courtroom, or
15 you need a break because of drowsiness or for comfort or for any
16 reason at all, please tell me so that we can attend to your needs and
17 avoid potential problems that might occur otherwise.
18 Each of you may take notes if you desire and use them to
19 refresh your memory during deliberations, but they may not be read
20 then to or show them to the other members. At the time of any recess
21 you should cover them up if you leave them at your place in the
22 member's box, or take them with you for safe keeping until the next
23 session.

1 Are there any questions?

2 Negative response.

3 Members, at this time please open your folder and take a

4 moment to read The Charge and Specification contained therein.

5 Please simply look up when you are through reading, and take your

6 time.

7 [The members did as directed.]

8 MJ: Does any member require any additional time to review The

9 Charge or Specification?

10 Negative response.

11 Alright members, at this time I'm going to ask you a series

12 of questions and this is what I refer to as the voir dire process.

13 Again, if you have an affirmative response to any question, please

14 raise your hand and I'll just make a note of that and then we'll move

15 on. After I state your name, that will indicate that I've got it

16 marked down.

17 Does any member know the accused in this case, Mr. David

18 Hicks?

19 Negative response from the members.

20 Does anyone know any person named in The Specification?

21 Negative response from the members.

1 Having seen the accused and having read The Charge and
2 Specification, does any member feel that they cannot give the accused
3 a fair trial for any reason?
4 Negative response from the members.
5 Does anyone have any prior knowledge of the facts or events
6 in this case?
7 Negative response from the members.
8 Has any member or any member of your family ever been
9 charged with an offense similar to the offense charged in this case?
10 Negative response from the members.
11 Has any member, or any member of your family, or anyone
12 close to you personally ever been the victim of an offense similar to
13 the offense charged in this case?
14 Negative response from the members.
15 Have any of you served in Afghanistan?
16 Negative response from the members.
17 Do any of you have a family member, a friend, or close
18 professional colleague who was killed or wounded in the course of
19 service in Afghanistan?
20 Affirmative response from Colonel [REDACTED], negative
21 response from the other members.

1 Do any of you have a family member, a friend, or close
2 professional colleague who was killed or harmed as the result of what
3 might be described as an act of terrorism?
4 Negative response from the members.
5 Has any act of terrorism, the war in Afghanistan, or the
6 war in Iraq had any impact upon you, your family, relatives or
7 friends?
8 Negative response from the members.
9 Have any of you previously served as a member of some other
10 military commission, court-martial, or civilian jury?
11 Affirmative response from all the members except Colonel
12 [REDACTED], Colonel [REDACTED], and Captain [REDACTED]. Thank you.
13 Has anyone had any specialized law enforcement training or
14 experience to include duties as a military police officer, off-duty
15 security guard, civilian police officer or comparable duties other
16 than general law enforcement duties common to military personnel of
17 your rank and position?
18 Negative response from the members.
19 Is there any member here who is in the rating or evaluation
20 or supervisory chain of any other member?
21 Negative response from the members.
22 Has anyone had any dealings with any of the parties to the
23 trial to include myself, and I am Colonel [REDACTED]; the Prosecutor,

1 Lieutenant Colonel [REDACTED] over here; Prosecutor Lieutenant
2 [REDACTED]; or the Defense Counsel, Major Mori?
3 Negative response from the members.
4 Have any of you had any contact with the following persons:
5 The Convening Authority, Ms. [REDACTED]; Legal Advisor to
6 the Convening Authority, Brigadier General [REDACTED], United States
7 Air Force, retired; Colonel [REDACTED], United States Air Force;
8 Colonel Dwight Sullivan, United States Marine Corps Reserve; or any
9 other person whom you are aware has worked or served in connection
10 with the Military Commissions process?
11 Negative response from all the members with regard to all
12 those persons mentioned.
13 Members, do any of you know of anything of either a
14 personal or professional nature that would cause you to be unable to
15 give your full attention to these proceedings throughout this trial?
16 Negative response from the members.
17 Is there any member who has seen or heard any mention of
18 this case in the media within the last 5-1/2 years?
19 Affirmative response from Colonel [REDACTED], Captain
20 [REDACTED], Lieutenant Colonel [REDACTED], Colonel [REDACTED],
21 Captain [REDACTED], and Captain [REDACTED]. Negative response other
22 than the ones I mentioned.

1 Is there any member who has seen or heard any press
2 coverage of this case within the last week?
3 Affirmative response from Colonel [REDACTED], Captain
4 [REDACTED], Lieutenant Colonel [REDACTED], Captain [REDACTED]; and
5 negative response from the other members.
6 Members, have any of your ever been stationed or assigned
7 TAD or TDY here at GTMO?
8 Affirmative response from Colonel [REDACTED], negative
9 response from the other members.
10 Has any member ever been engaged in detainee operations?
11 Negative response from the members.
12 Has any member been stationed or assigned TAD or TDY in
13 Bagram?
14 Negative response from the members.
15 Has any member been stationed or assigned TAD or TDY aboard
16 the USS Peleliu?
17 Affirmative response from Captain [REDACTED]. Negative
18 response from the other members.
19 Has any member been stationed or assigned TAD or TDY aboard
20 the USS Belleau Wood?
21 Negative response from the members.
22 Members, it is a ground for challenge that you have an
23 inelastic predisposition toward the imposition of a particular

1 punishment based solely on the nature of the crime for which the
2 accused is to be sentenced. Does any member, having read The Charge
3 and Specification, believe that you would be compelled to vote for
4 any particular punishment solely because of the nature of The Charge?
5 Negative response from the members.
6 Members, you will be instructed in detail before you begin
7 your deliberations. I will instruct you on the full range of
8 punishments which ranges from no punishment up to a maximum
9 punishment which in this case is confinement for a period not to
10 exceed 7 years. You should consider all forms of punishment within
11 that range. Consider doesn't necessarily mean that you would vote
12 for a particular punishment. "Consider" means that you would think
13 about and make a choice in your mind one way or the other as to
14 whether that's an appropriate punishment. Each member must keep an
15 open mind and not make a choice, nor foreclose from consideration any
16 possible sentence until the closed session for deliberations and
17 voting on the sentence.
18 Can each of you follow this instruction? If so, you should
19 raise your hand.
20 Affirmative response from all the members.
21 Members, can each of you be fair, impartial, and
22 open-minded in your consideration of an appropriate sentence in this
23 case?

1 Affirmative response from all the members.

2 Does any member believe that participating in this

3 proceeding as a commission member could have an impact on their

4 personal or professional life?

5 Negative response from the members.

6 Does any member believe that the sentence adjudged in this

7 proceeding could have an impact on their personal or professional

8 life?

9 Negative response from the members.

10 Members, do any of you believe that the result of this

11 commission may be taken into account in any future performance

12 evaluation or selection board in your case?

13 Negative response from the members.

14 Members, can each of you reach a decision on a sentence

15 upon an individual basis in this particular case and not solely on

16 the nature of the offense of which the accused has been convicted?

17 Can each of you do that?

18 Affirmative response from all the members.

19 Members, is there anything that I've touched on or not,

20 anything at all, that you think might raise a substantial question in

21 the mind of someone else about your participation in this commission

22 as a commission member?

23 Negative response from the members.

1 Members, I'm going to ask you to step out for a few
2 minutes. There's a couple of things I need to talk about with
3 counsel before we proceed any further.
4 Bailiff: All rise.
5 [All persons in the courtroom did as directed.]
6 [The members departed the courtroom.]
7 **[END OF PAGE]**

1 **[The session was called to order at 1512 hours, 30 March 2007.]**

2 MJ: Please be seated.

3 [All persons in the courtroom did as directed.]

4 PROS: Your Honor, is it possible for counsel to meet for a

5 bench 802 -- or just a brief bench conference on one or two issues?

6 MJ: No, it's not my practice to do that, if we're going to do

7 an 802. Does it need to be done before we proceed with voir dire?

8 PROS: Yes, sir, briefly.

9 MJ: Okay, we're going to take a short recess. We're in recess.

10 **[The session recessed at 1512 hours, 30 March 2007.]**

11 **[The session was called to order at 1519 hours, 30 March 2007.]**

12 MJ: The commission will come to order. All parties present

13 when the court recessed are again present. The members are absent.

14 With regard to voir dire, does either side have any

15 additional group voir dire questions they want asked? Government?

16 APROS: Negative, sir.

17 DDC: None from the defense, sir.

18 MJ: Based on responses to the group voir dire, I intend to

19 recall Colonel [REDACTED], Colonel [REDACTED], Captain [REDACTED],

20 Captain [REDACTED], Captain [REDACTED], Colonel [REDACTED], Colonel

21 [REDACTED], and Lieutenant Colonel [REDACTED], and Colonel

22 [REDACTED]. So that would be all except for Colonel [REDACTED] for

1 individual voir dire. Does either side have any reason to recall
2 Colonel [REDACTED] for individual voir dire?
3 APROS: No, sir.
4 DDC: No, sir.
5 MJ: First if we could get Colonel [REDACTED], please.
6 [Colonel [REDACTED] entered the courtroom and was seated.]
7 **INDIVIDUAL VOIR DIRE OF COLONEL [REDACTED]**
8 **Questions by the military judge:**
9 Q. Are all the folders closed with the notes covered up there?
10 A. They are, Your Honor.
11 Q. Thank you. Sir, you indicated that you had previously
12 served as a member of another Military Commission or a court-martial
13 or a civilian jury. Is that correct?
14 A. It is.
15 Q. Could you please just tell us about that?
16 A. It was a court-martial and the offense was child abuse.
17 Q. When was that?
18 A. I'd say it was around the '99 timeframe.
19 Q. Is there anything about your participation in that
20 proceeding that you believe would have any effect on your
21 participation here today?
22 A. None at all.
23 MJ: Additional questions from the government?

1 APROS: No, sir.

2 MJ: From the defense?

3 DDC: Sir, none from the defense.

4 MJ: Sir, thank you very much. You can go back to the

5 deliberation room. And if we could have Colonel [REDACTED], please.

6 [Colonel [REDACTED] departed the courtroom and Colonel [REDACTED]

7 entered the courtroom and was seated.]

8 **INDIVIDUAL VOIR DIRE OF COLONEL [REDACTED]**

9 **Questions by the military judge:**

10 Q. Sir, you indicated an affirmative response to the question

11 whether you had a family member, friend, or close professional

12 colleague that was killed or wounded in the course of service in

13 Afghanistan. Is that correct?

14 A. That's correct.

15 Q. Could you please tell us about that?

16 A. Well it's just the branch that I'm in within the Army had

17 several folks that were in Afghanistan on a rotational basis and some

18 were wounded. So I spent about 20 years in that particular line of

19 work and I wasn't in that particular unit at the time.

20 Q. So the question was, looking that if you had in the family

21 member, friend, or close professional colleague who was wounded or

22 killed in the course of service in Afghanistan?

1 A. It wasn't killed. It was wounded and it was professional
2 colleague or colleagues in Afghanistan.
3 Q. Were these people that you also socialize with at all or
4 just people you had just served with or attended training with or
5 something like that?
6 A. I had attended training with, served with previously. Have
7 not served with in the last -- well before I'd say last time would
8 have been in the year 2000.
9 Q. Do you believe that having that experience of having known
10 these people who were wounded there would have an impact on how you
11 viewed matters or how you make decisions in this case?
12 A. I don't believe so. There wasn't any specific reference to
13 any particular case.
14 MJ: Questions by the government?
15 APROS: No, sir.
16 MJ: From the defense?
17 DDC: Yes, sir.
18 MJ: Hold on. He had a positive response on a couple of others.
19 Let me cover those first. I apologize. I should have done that.
20 **Questions by the military judge continued:**
21 Q. You indicated an affirmative response also that you had
22 seen or heard mention of this case in the media within the last 5-1/2
23 years and also within the last week. Is that correct?

1 A. That's correct.

2 Q. Could you please tell us about that?

3 A. We've been studying about it, just reading newspapers.

4 Then this morning it was on as we were driving in -- it was on

5 National Public Radio.

6 Q. Now when you say "we've been studying about it," who are

7 "we"?

8 A. In the school -- just reading that we do within the school.

9 Q. Are you attending some sort of professional schooling?

10 A. I'm an instructor right now, yes.

11 Q. Where is that?

12 A. In Washington at the National Defense University.

13 Q. Okay. What is your area of instruction?

14 A. Strategy.

15 Q. When you say "strategy," are you talking about national

16 strategy?

17 A. National security strategy, correct. I just might add that

18 it's in the broader context, not a specific context. But I did hear

19 about it on the radio today -- this morning.

20 Q. Do any of your materials have anything to do with this

21 case?

22 A. No.

1 Q. Has there been any kind of discussion within your -- do you
2 teach a seminar format or a lecture format?
3 A. It's a seminar format, yes.
4 Q. Has there been any discussion in your seminars or in the
5 hallways about what should be done with regard to people that are
6 involved in unlawful warfare or anything like that?
7 A. No. Essentially what we're doing is understanding the
8 global context. Knowing that this situation is part of the global
9 context we've looked at several functional areas within the global
10 context of which terrorism has been part of it -- the global context.
11 So we just looked at it from a functional approach not in a detailed
12 case-by-case approach.
13 MJ: Government, any additional questions?
14 APROS: No, sir.
15 MJ: Defense?
16 DDC: No, sir.
17 MJ: Thank you very much. You can go back to the deliberation
18 room and we'll take Colonel [REDACTED], please.
19 [Colonel [REDACTED] departed the courtroom and Colonel [REDACTED]
20 entered the courtroom and was seated.]

1 **INDIVIDUAL VOIR DIRE OF COLONEL [REDACTED]**

2 **Questions by the military judge:**

3 Q. You indicated an affirmative response to the question if
4 you previously served as a member of any other military commission,
5 court-martial, or civilian jury. Is that correct?

6 A. Yes, it is.

7 Q. Could you please tell us about that now?

8 A. Yes. It was several years back. It was a military, male
9 member Air Force that had abducted and assaulted a girlfriend. My
10 part of the commission there was to render -- not render judgment,
11 but to vote on judgment that was going to be rendered to him.
12 Whether to retain or not retain in service.

13 Q. This was a court-martial proceeding?

14 A. Yes, it was.

15 Q. Is there anything about your participation in that process
16 there that you think would affect your participation here today?

17 A. No, sir.

18 MJ: Questions from the government?

19 APROS: No, sir.

20 MJ: From the defense?

21 DDC: No, sir.

22 MJ: Sir, thank you very much. If you can step back into the
23 deliberation room, please. Next we'll have Captain [REDACTED].

1 [Colonel [REDACTED] departed the courtroom and Captain [REDACTED]
2 entered the courtroom and was seated.]

3 **INDIVIDUAL VOIR DIRE OF CAPTAIN [REDACTED]**

4 **Questions by the military judge:**

5 Q. Sir, you indicated an affirmative response to the two
6 questions about the media contacts that you had heard mention of this
7 case in the media within the last 5-1/2 years and also within the
8 last week. Is that correct?

9 A. That's correct.

10 Q. Can you please tell us about that?

11 A. The longer timeframe, just when detainees were first
12 brought to Guantanamo. I couldn't even tell you the source. They
13 were profiling the nationalities of all but there was one Australian
14 national that was held here. Again, this was some time ago. As to
15 the most current one, I believe it was on -- I want to say it was
16 probably Tuesday afternoon watching the news -- I believe it was Fox
17 News Channel, they run the ticker at the bottom and there was a
18 mention I think that there had been a plea reached in this case.

19 Q. Did it provide you any more information than I've provided
20 you here today as far as Mr. Hicks having pleaded and been found
21 guilty?

1 A. No, not that I recall. I think the ticker was very brief
2 saying a plea had been reached and I think that was the extent of it
3 from what I recall.
4 Q. Have you learned more about the case since you've been here
5 than when you left and what you heard on the news?
6 A. From yourself?
7 Q. Yes.
8 A. Yes. Considerably more.
9 MJ: Questions in light of that. Government?
10 APROS: No, sir.
11 DDC: None from the defense, Your Honor.
12 MJ: Thank you very much. You can go back into the deliberation
13 room, and we'll take Captain [REDACTED], please.
14 [Captain [REDACTED] departed the courtroom and Captain [REDACTED]
15 entered the courtroom and was seated.]
16 **INDIVIDUAL VOIR DIRE OF CAPTAIN [REDACTED]**
17 **Questions by the military judge:**
18 Q. You indicated an affirmative response to the two questions
19 I asked about media coverage. Both that you had heard some mention
20 of the case in the media within the last 5-1/2 years and also within
21 the last week. Is that correct?
22 A. That is correct.

1 Q. Could you please tell us about that?

2 A. I read the paper every day and it was up in the Washington
3 Post and it just caught my interest because there has been a lot of
4 publicity about GTMO anyways and I've been here so it just caught my
5 interest.

6 Q. Do you recall what you learned about this case?

7 A. Honestly, I was trying to think about whether it was the
8 paper or on TV, but I've been to Australia a couple of times and just
9 somebody from Australia caught my attention. I typically skim
10 through the paper, I don't read every article because of the amount
11 of time I have. That's about it. That's about all I can remember
12 from the paper.

13 Q. Do you recall hearing or seeing anything in the media that
14 you haven't seen or heard now in court today based on what you've
15 read?

16 A. Well the charges. I don't recall ever hearing the name in
17 the paper or on news.

18 Q. What I'm getting after, I know what you've learned here
19 today, is there anything that you heard in the media in addition to
20 that?

21 A. No.

22 Q. So you've learned more today?

23 A. Oh, absolutely.

1 Q. You mentioned and I'll this follow-up on the trip to
2 Australia. Could you tell us about that and what they were?
3 A. Liberty port call on a typical deployment. This was '87,
4 maybe '88.
5 Q. How long were you there?
6 A. About a week. In Perth.
7 Q. Did you say since you've been in here now that you had been
8 in Guantánamo before?
9 A. I've landed here to refuel. Not TDY.
10 Q. Did you get off the airfield or not?
11 A. I tried to get off as quick as I could.
12 Q. You misinterpreted my question. Was your stay here limited
13 to being on the airfield and refueling, or did you come and stay
14 overnight?
15 A. No. It was just about 20 minutes for refueling and then we
16 were off.
17 Q. You indicated that you had been stationed or assigned on
18 the USS Peleliu. Is that correct?
19 A. That's correct.
20 Q. Could you please tell us about that?
21 A. It was a typical 6-month deployment which I was a part of
22 the air wing. A detachment of two Navy helicopters for combat search
23 and rescue.

1 Q. When was that?

2 A. '97.

3 Q. Have you ever been aboard the USS Bataan?

4 A. No, I haven't.

5 MJ: Questions in light of that, government?

6 APROS: Negative, sir.

7 DDC: None from the defense, sir.

8 MJ: Sir, thank you very much. You can go back to the

9 deliberation room. If we could have Captain [REDACTED], please.

10 [Captain [REDACTED] departed the courtroom and Captain [REDACTED]

11 entered the courtroom and was seated.]

12 **INDIVIDUAL VOIR DIRE OF CAPTAIN [REDACTED]**

13 **Questions by the military judge:**

14 Q. Sir, you indicated an affirmative response to the question

15 about having heard mention of this case in the media within the last

16 5-1/2 years. Is that correct?

17 A. Yes, sir.

18 Q. Could you please tell us about that?

19 A. I just happened to go to the Yahoo! home page and read a

20 story on it one day last week. That's the extent of the media

21 coverage.

22 Q. Do you recall what that story told you?

23 A. I only recall the person's name and your name in the story.

1 Q. That's it?

2 A. That's it, and his country of origin and that he was on

3 trial here.

4 Q. Do you recall anything in that story being reported to you

5 that in any way differs from what you learned in court today?

6 A. No, sir.

7 Q. You also indicated that you served previously as a member

8 of another military commission, or court-martial, or civilian jury.

9 Is that correct?

10 A. Yes, sir.

11 Q. Which one was it?

12 A. It was a military court-martial.

13 Q. Could you tell us about that, please?

14 A. It was a case where the military member was on trial for

15 child abuse. They thought that he might be starving his child to

16 death.

17 Q. When was that?

18 A. Probably about 10 years ago when I was lieutenant

19 commander.

20 Q. Is there anything about your service with regard to that

21 court-martial that you think will have an effect on your service here

22 today as a commission member?

23 A. No, sir.

1 MJ: Questions in light of that, government?

2 APROS: No sir.

3 DDC: None from the defense, Your Honor.

4 MJ: Sir, thank you very much. You can go back to the

5 deliberation room, and we'll take Colonel [REDACTED].

6 [Captain [REDACTED] departed the courtroom and Colonel [REDACTED]

7 entered the courtroom and was seated.]

8 **INDIVIDUAL VOIR DIRE OF COLONEL [REDACTED]**

9 **Questions by the military judge:**

10 Q. You indicated that you had previously served as a member of

11 another military commission, or court-martial, or civilian jury. Is

12 that correct?

13 A. Yes, sir.

14 Q. Could you please tell us about that?

15 A. Yes, sir. It was in the mid-90s. I was assigned to a

16 court-martial. It was a sexual assault case and I ended up being the

17 president of the members for that case.

18 Q. Is there anything about your service with regard to that

19 court-martial that you think will affect how you serve with regard to

20 this military commission?

21 A. No, I do not.

1 Q. You indicated that you had seen or heard some mention of
2 this case in the media within the last 5 years. Is that correct?
3 A. Yes, that's correct.
4 Q. Could you please tell us about that?
5 A. I would say 2 to 3 weeks ago I remember in the office one
6 morning seeing a short clip on one of the news media programs and
7 that was it.
8 Q. Do you recall what was reported?
9 A. I do not.
10 Q. You just remember ----
11 A. I remember something about Guantánamo Bay and the name
12 "Hicks."
13 Q. You indicated you had been stationed, assigned, TAD, or TDY
14 at GTMO before. Is that correct?
15 A. I was on an aircraft that transited here, I think due to
16 mechanical problems. I was not assigned here for any -- we didn't
17 even spend the night.
18 Q. Did you stay on the airfield there until it was fixed?
19 A. That's correct.
20 MJ: Questions in light of that, government?
21 APROS: No, sir.
22 DDC: Sir, just one quick one.

1 **Questions by the detailed defense counsel:**

2 Q. Sir, I noticed on your questionnaire you attended

3 university with I believe Captain [REDACTED]. Is that correct sir?

4 At The Citadel?

5 A. I did attend The Citadel. I don't remember him as a

6 classmate.

7 Q. Okay. That answers the question then, sir. Thank you.

8 MJ: Anything else?

9 APROS: No, sir.

10 DDC: Nothing from the defense, sir.

11 MJ: Colonel, thank you very much. You can go back to the

12 deliberation room. If we could have Colonel [REDACTED], please.

13 [Colonel [REDACTED] departed the courtroom and Colonel [REDACTED]

14 entered the courtroom and was seated.]

15 **INDIVIDUAL VOIR DIRE OF COLONEL [REDACTED]**

16 **Questions by the military judge:**

17 Q. Sir, you indicated that you had previously served as a

18 member of another military commission, court-martial, or civilian

19 jury. Is that correct?

20 A. Yes, it is.

21 Q. Could you please tell us about that?

22 A. It was a court-martial in 2001.

1 Q. What were the general nature of the charges, do you recall?

2 A. An Airman was charged with being on -- he was found with

3 drugs on duty and convicted.

4 Q. Is there anything about your service with regard to that

5 court-martial that you think would affect your service here today as

6 a military commission member?

7 A. No, sir.

8 MJ: Additional questions?

9 APROS: No, sir.

10 DDC: None from the defense, sir.

11 MJ: Sir, thank you very much. You may go back to the

12 deliberation room. If we could have Lieutenant Colonel [REDACTED],

13 please.

14 [Colonel [REDACTED] departed the courtroom and Lieutenant Colonel

15 [REDACTED] entered the courtroom and was seated.]

16 **INDIVIDUAL VOIR DIRE OF LIEUTENANT COLONEL [REDACTED]**

17 **Questions by the military judge:**

18 Q. Ma'am, you indicated that you had previously served as a

19 member of another military commission, or court-martial, or civilian

20 jury. Is that correct?

21 A. Yes, sir.

1 Q. Could you please tell us about that?

2 A. Approximately 10 years ago I sat on a court-martial in

3 Korea. It was concerning a sexual assault.

4 Q. Is there anything about your service and that court-martial

5 that you think would have an impact on your service as a military

6 commission member in this case?

7 A. No.

8 Q. You also indicated an affirmative response to my two

9 questions about having seen mention of this case in the media. Is

10 that correct?

11 A. Yes, sir.

12 Q. Could you please tell us about that?

13 A. Tuesday morning we have something called "aim points" in

14 the Air Force. News comes to us every day and there were a couple of

15 articles in there on Tuesday morning.

16 Q. In what format does it come to you?

17 A. It's e-mail.

18 Q. Do you recall what was reported there about this case?

19 A. That there was a plea. That's about it.

20 Q. Do you recall anything being reported to you that you

21 haven't learned since being in the room here today?

22 A. No.

23 MJ: Questions in light of that?

1 APROS: Yes, sir. Just very briefly.

2 **Questions by the assistant prosecutor:**

3 Q. Ma'am, I see on your questionnaire that you have a law

4 degree. Is that right?

5 A. Correct.

6 Q. While you were in law school, did you focus on any specific

7 area of the curriculum or was it general courses?

8 A. General courses, but intellectual property.

9 Q. With an expertise track, or was it just something that you

10 had just more courses in than anything else?

11 A. More courses than anything else.

12 APROS: That's all, sir. Thank you.

13 DDC: No questions from the defense, Your Honor.

14 MJ: All right, Colonel, thank you very much. You can step back

15 into the deliberation room, please.

16 [Lieutenant Colonel [REDACTED] departed the courtroom.]

17 MJ: Does either side wish to recall any member for any

18 additional voir dire?

19 APROS: No, sir.

20 DDC: Defense does not, Your Honor.

21 MJ: Does the government have any challenge for cause?

22 APROS: No challenges for cause, sir.

23 MJ: Does the defense have any challenge for cause?

1 DDC: None for cause, Your Honor.

2 MJ: Does the government have a peremptory challenge?

3 APROS: Yes, sir. The government would like to exercise a

4 peremptory challenge against Lieutenant Colonel [REDACTED].

5 MJ: Any objection to that?

6 DDC: Yes, sir. We would ask that the government have to state

7 a basis similar to a Batson challenge.

8 MJ: Okay. Does the government have a non-gender basis for that

9 challenge?

10 APROS: Yes, sir. The specific challenge to this member comes

11 directly out of answers she provided in her questionnaire,

12 specifically 13, 17, and 20.

13 MJ: And those are referring to the questionnaires that are in

14 Appellate Exhibit 31. Is that correct?

15 APROS: That's correct, sir.

16 MJ: Could you restate those numbers, please?

17 APROS: Yes, sir, certainly; 13, 17, and 20, sir.

18 MJ: All right, the government's peremptory challenge to

19 Lieutenant Colonel [REDACTED] is granted. Does the defense have any

20 peremptory challenge?

21 DDC: Yes, sir. The defense would peremptory challenge Captain

22 [REDACTED].

23 MJ: Any objection to that?

APROS: No, sir.

MJ: Very well. That peremptory challenge is granted as well. When the members return, I'll advise them that Lieutenant Colonel [REDACTED] and Captain [REDACTED] will be excused. That will reduce our panel to 8 members. The statutory requirement is 5. With the remaining members, the commission will meet that requirement. Once I excuse them, we could go straight into the presentencing hearing or take a short break if you wish. I don't want it to be too long because then we'll be coming onto a meal time break as well. I'll solicit your input on that.

You look like you're ready to provide input. Go ahead.

DDC: Yes, sir. Mr. Hicks would like to have a short break.

MJ: Okay. Please recall all the members at this time.

[The bailiff did as directed.]

Bailiff: All rise.

[All persons in the courtroom did as directed.]

[The members entered the courtroom.]

[END OF PAGE]

1 **[The commission was called to order at 1553 hours, 30 March 2007.]**

2 MJ: Members, before you are seated, Captain [REDACTED] and
3 Lieutenant Colonel [REDACTED], you have been excused from these
4 proceedings and your presence is no longer required. I thank you
5 very much for being here today. You may leave the courtroom at this
6 time and collect up any personal matters you left in the deliberation
7 room. You are discharged with my thanks.

8 [Captain [REDACTED] and Lieutenant Colonel [REDACTED], the excused
9 members, departed the courtroom.]

10 MJ: With regard to the rest of the members, we're now going to
11 take a brief recess to reorganize your box there and take a comfort
12 break. I plan to restart these proceedings as soon as possible,
13 hopefully within 20 to 30 minutes. It takes some time to do things.
14 The members may go back to the deliberation room. If you want to use
15 the restroom facilities, right when you go out would be the best time
16 to do that.

17 [The members departed the courtroom.]

18 MJ: Let's see if we can start at 1620. We're in recess.

19 **[The commission recessed at 1555 hours, 30 March 2007.]**

20 **[The session was called to order at 1623 hours, 30 March 2007.]**

21 MJ: This military commission will come back to order. All
22 parties present when we recessed are again present. The members are
23 absent.

1 Please recall all the members to the courtroom.

2 [The bailiff did as directed and the members entered the courtroom.]

3 Bailiff: All rise.

4 [All persons in the courtroom did as directed.]

5 **[END OF PAGE]**

1 **[The commission was called to order at 1624 hours, 30 March 2007.]**

2 MJ: Members, please be seated.

3 [The members did as directed.]

4 MJ: Everyone, please be seated.

5 [All persons in the courtroom did as directed.]

6 MJ: Members, I have previously admitted into evidence

7 Prosecution Exhibit 1 which is a stipulation of fact. A copy of

8 Prosecution Exhibit 1 will be handed to you now to read before we

9 continue and you will have it with you during deliberations.

10 Trial counsel, do you have copies?

11 PROS: Yes, sir.

12 MJ: If you could please hand them to the bailiff.

13 [The prosecutor handed the copies to the bailiff.]

14 MJ: Bailiff, you can give them to the members.

15 [The bailiff handed out copies of PE 1 to the panel members.]

16 MJ: Members, go ahead and take an opportunity to read through

17 that, please. Simply look up when you're done.

18 [All members did as directed.]

19 MJ: Does any member desire any additional time to review

20 Prosecution Exhibit 1?

21 Negative response.

22 Anything further from the prosecution?

23 PROS: No, Your Honor. The government rests.

1 MJ: Defense counsel, you may proceed.

2 DDC: Yes, sir. The defense offers no documentary evidence
3 besides the stipulation of fact that it agreed to. I will exercise
4 Mr. Hicks' unsworn statement rights and provide a statement to the
5 members.

6 MJ: Very well.

7 **UNSWORN STATEMENT**

8 **David Matthew Hicks, the accused through his detailed defense**
9 **counsel, made the following unsworn statement:**

10 DDC: Members, David Hicks is very nervous today so he has asked
11 that I provide information to you on his behalf. He means no
12 disrespect by this request. In May of 1998 at the age of 22, David
13 went to Japan to work on a horse farm. This was the first time he
14 traveled outside of Australia. Injured in a fall from a horse, he
15 returned home in August of 1998. He went home, recuperated, and went
16 back to Japan to work on a horse farm in December of 1998.

17 At the age of 23, in May of '99, David traveled to Albania
18 from Japan to join the KLA, Kosovo Liberation Army. Once returning
19 from Albania and back in Australia in June of '99, David went to
20 visit Kosovo refugees near his hometown in his KLA uniform and he was
21 well received by them. David contacted on Australian Army recruiter
22 and was told that he did not have the education qualifications to

1 enlist. At the age of 24 in November of '99, David left Australia
2 for Pakistan.
3 David has been in the US custody since approximately 2001.
4 Throughout his time in US custody, David feels he tried his best to
5 provide information to US investigators. Even after David Hicks had
6 legal counsel and faced a possible trial before military commission,
7 David Hicks still provided information to US investigators and
8 different federal agencies.
9 While at Guantánamo, David has worked by correspondence on
10 his high school qualifications as he had never finished grade nine.
11 He has completed up to year 11 math and English. He wants to finish
12 his high school education and hopefully attend university. While not
13 perfect, David feels he's tried his best to behave at Guantánamo. In
14 February of 2007, Admiral Harris, the current JTF Guantánamo
15 Commander told the media that David was generally cooperative for the
16 more than 5 years he's been at Guantánamo.
17 David owes apologies to many people. Foremost David
18 apologizes to his family, he apologizes to Australia, he apologizes
19 to the United States. David wants to acknowledge the many men and
20 women of the US military who have treated him with professionalism
21 and humanity while he's been here at Guantánamo Bay. David wants to
22 thank all Australians who have extended compassion and forgiveness

1 towards him during his time in Guantánamo. He pledges not to betray
2 their support.
3 Thank you, sir. The defense rests.
4 MJ: Does the government have a case in rebuttal?
5 APROS: Your Honor, could we have 30 seconds to confirm?
6 MJ: Go ahead.
7 [The prosecutor and assistant prosecutor conferred.]
8 APROS: Sir, the government has no case in rebuttal.
9 MJ: Very well. As previously noted, I provided counsel with my
10 planned sentencing instructions in this case and at one point you
11 indicated you had no objections or requests for any other
12 instructions. Are there any such objections or requests now?
13 PROS: No, sir.
14 DDC: Defense has none, sir.
15 MJ: Very well.
16 Members, you are about to deliberate and vote on the
17 sentence in this case. It is the duty of each member to vote for a
18 proper sentence for the offense of which the accused has been found
19 guilty. Your determination of the amount of punishment, if any, is a
20 grave responsibility requiring the exercise of wise discretion.
21 Although you must give due consideration to the matters presented by
22 the defense, as well as those presented by the prosecution, you must

1 bear in mind that the accused is to be sentenced only for the offense
2 of which he has been found guilty.
3 PROS: Your Honor, excuse me. May I be heard?
4 MJ: About what?
5 PROS: Counsel's argument.
6 MJ: Okay. I'm getting a little ahead of myself. I'm going to
7 provide an opportunity for the counsel to argue on sentence. Thank
8 you.
9 Trial counsel, you may present argument.
10 PROS: Thank you, sir. Your Honor, may I use the podium?
11 MJ: Yes.
12 PROS: Today in this courtroom we are on the frontline of a
13 global war on terrorism, face to face with the enemy. The enemy is
14 sitting at defense counsel's table and though he is now in a suit and
15 tie, you can be assured that when he was on the battlefield in
16 Afghanistan with al Qaeda going north and south trying to kill
17 Americans, he was not wearing a suit and tie. Nor was he wearing a
18 uniform. In fact, he was an unlawful enemy combatant.
19 Gentlemen, the global war on terrorism is real. It is
20 affecting every aspect of our life. It is not just a literal battle
21 between armed forces of the United States and its allies -- staunch
22 allies such as Australia versus al Qaeda and its associated forces of
23 terrorists. In some ways the global war on terrorism is more about a

1 figurative battle of ideologies. Though still a literal fight to the
2 death, the global war on terrorism really is about those who love
3 lives and freedoms like people of the United States and Australia
4 versus those who hate our freedoms and want to do everything to kill
5 anyone associated with those freedoms.
6 The enemy before you has been fighting that very battle
7 with himself as well as literally against the United States. As for
8 a battle with the United States, Prosecution Exhibit 1 leaves no
9 doubt that that enemy wanted to kill Americans. As for the battle of
10 beliefs, within this enemy what you have here is David Hicks the
11 Australian. He was born and raised in Australia. For 24 years he
12 lived under their freedoms, freedoms similar to the United States in
13 that they're our cornerstones for democracy where you openly elect
14 your leaders; freedom of religion where you choose whether and how to
15 worship; freedom of association where you choose where to work, where
16 to live, what to wear, what to believe.
17 However, at the mature age of 24, this enemy, the David
18 Hicks of Australia, freely chose to walk away from those freedoms.
19 But even worse, he freely chose to associate with al Qaeda, to
20 include providing material support to this international terrorist
21 organization. This is a war crime for which he has been convicted.
22 The enemy here has joined forces with al Qaeda.

1 Al Qaeda is the antithesis of freedom. Al Qaeda is an
2 international terrorist organization. It is a collection of
3 terrorists from all over the world for the sole reason of bringing
4 death and destruction to nations and its people such as the United
5 States and Australia and other members of the coalition forces.
6 Australia was a member of the coalition forces in Afghanistan. There
7 is no doubt what al Qaeda is about. Al Qaeda has openly declared war
8 against the United States.
9 I remind you and bring to your attention Prosecution
10 Exhibit 1, the stipulation of fact signed by David Hicks, at
11 paragraphs 17 and 20. Seventeen states that the purpose and goal of
12 al Qaeda stated by Usama bin Laden and other al Qaeda leaders is for
13 violent attacks against property both military and civilians of the
14 United States and other countries for the purpose of opposing the US
15 support of Israel, another friend and ally of the United States.
16 Number 20 is in August of '96, Usama bin Laden had declared a
17 declaration of jihad, calling on the murder of US military personnel.
18 But al Qaeda doesn't stop against declaring war against the United
19 States government or even targeting its military. Al Qaeda has gone
20 after our citizens, our civilians, issuing a fatwa calling on all
21 Muslims who are able to kill Americans, whether civilian or military,
22 wherever they may find them.

1 Though I'm sure every one of your memories does not need
2 refreshing about what happened on 9/11 and that horrendous attack by
3 al Qaeda against the United States. I will remind you and bring up
4 later just what that infamous day has in relation to this enemy.
5 This enemy didn't have to hear about al Qaeda's hatred for the United
6 States or for Western ideas by reading it in the paper -- the
7 Australian newspaper or even on the Internet. He saw it firsthand.
8 He met Usama bin Laden. He heard UBL's speeches, how he
9 spewed hatred for America, for our friendship with Israel. This
10 enemy fully embraced al Qaeda. He even asked UBL why there wasn't
11 more training materials in English. Nonetheless, this enemy got
12 plenty of training by al Qaeda. For close to a year he received over
13 four al Qaeda terrorist training courses at their camps, to include
14 during that timeframe joining with al Qaeda and fighting with al
15 Qaeda on two battle fronts until he was finally captured in December
16 2001.
17 Now from the moment this enemy met al Qaeda which was
18 around January 2001, the David Hicks of Australia became Muhammad
19 Dawood of al Qaeda. Muhammad Dawood was just one of a number of
20 aliases. Abu Muslim Australia was another. Now in French these may
21 be referred to as "noms de guerre" -- war names. In Arabic and for
22 al Qaeda's purposes they were "kunyas" -- jihad or holy war names.

1 Now Muhammad Dawood chose to conceal his identity to train
2 with al Qaeda. He did this for a few reasons. One, to avoid
3 detection and not be apprehended as a terrorist, but more importantly
4 Muhammad Dawood wanted to train with al Qaeda so he could return free
5 and virtually invisible to a Western society with the training that
6 he had and effectively do al Qaeda's deadly work. There was no doubt
7 that al Qaeda saw in Muhammad Dawood an invaluable asset.
8 Now maybe that made Muhammad Dawood feel good. He
9 shouldn't have. Al Qaeda places zero value on life. It utilizes
10 suicide bombers, innocent children both as decoys and victims.
11 Muhammad Dawood shouldn't feel good about himself. Who knows, as he
12 sits here or if he'll ever know that by providing material support
13 for terrorism all he has become is a mere tool for terrorism. Proof
14 of that is found in Prosecution Exhibit 1, paragraph 31 were Muhammad
15 Dawood meets Muhammad Atef, al Qaeda's number three leader and chief
16 al Qaeda military commander. Don't let that mislead you. That
17 military commander is a term al Qaeda might have used on him. Their
18 military had no semblance of a bona fide armed force. No uniforms,
19 no following the laws of war.
20 But Muhammad Dawood met with Muhammad Atef and he was
21 screened. He was screened about his knowledge of UBL, about al
22 Qaeda, about his ability to travel around the world as a Westerner --
23 as an Australian, specifically to Israel. If not for the US, al

1 Qaeda probably hated Israel more than the US for its freedoms but
2 also because of the holy land. But al Qaeda diabolically uses our
3 Western freedoms against us.
4 Now Muhammad Dawood, he can still when he wants to fool
5 someone. He can dress up. He can look like David Hicks again. This
6 enemy here can look on the outside to be a Westerner, to be a law-
7 abiding Australian citizen. These features allow him to blend in
8 with virtually any of the free Western societies. That's why this
9 enemy, al Qaeda, chose to send him to some of their advanced courses.
10 Muhammad Dawood's last two al Qaeda trainings were some of the most
11 telling for why al Qaeda trusted in him and wanted to develop him.
12 After attending the basic training and the guerrilla
13 training, he went on to -- after also meeting with Atef -- he went on
14 to be able to go to a city tactics training where they train on a
15 mock city. There they learn such terrorist tactics as how to kidnap
16 and how to assassinate. From there Muhammad Dawood would move on to
17 the surveillance course. At this course the al Qaeda instructor
18 cited the USS Cole bombing as a positive example of what their
19 training can do for them. Paragraph 33 of Prosecution Exhibit 1
20 details of Muhammad Dawood and other student operatives -- is what
21 they call themselves -- doing for practical exercises. They actually
22 submitted real world surveillance to al Qaeda.

1 One of those surveillances was on the American embassy in
2 Kabul. Now on that point, don't for a minute be fooled that there is
3 somehow something harmless about doing practical exercises on an
4 American embassy building that may not have had diplomatic relations,
5 may not have even been occupied, this was not a Boy Scout activity
6 that Muhammad Dawood was doing. It is absolutely immaterial what
7 that building was being used for at the time. Yes, what he acquired
8 was limited to that building, but the real purpose for that training
9 was to teach him terrorist skills and those terrorist skills are
10 transferable.
11 Now what matters to al Qaeda is that once they possess this
12 information it is still death data. They could still use it if that
13 building is ever occupied at a later date. I point to prosecution
14 exhibit 24 -- excuse me, Prosecution Exhibit 1, paragraph 24. It
15 references what al Qaeda does with information about embassies and it
16 has embassies of Kenya and Tanzania in '98 and how al Qaeda destroyed
17 them. Now do you think that when Muhammad Dawood was attending the
18 surveillance course that the instructor specifically cites to you the
19 USS Cole bombing as a positive example and that Cole bombing occurred
20 in October of 2000, do you think he might have mentioned the Kenya
21 and Tanzania bombings that occurred in '98 when he is sending them
22 specifically out to conduct surveillance on embassies? That's what
23 he's training on.

1 As I mentioned, what matters most about that skill is that
2 it is transferable. It's not laughable that it could be a criminal
3 offense, and it was by providing material support. Once that
4 terrorist skill is required, it travels with Muhammad Dawood to
5 whatever country he goes to. He knows what kind of information al
6 Qaeda wants. He knows also how to get it to them. He will always
7 know how to get it to them.
8 When you conduct that surveillance on a building, you
9 provide to al Qaeda what's the moral equivalent of providing raw
10 materials to a time bomb to someone you know that can assemble and
11 detonate it. Now Muhammad Dawood, he's an enemy who will always
12 possess the skills he has. You will never be able to get rid of his
13 training with al Qaeda, his terrorist knowledge, the people he knows,
14 the inner workings of al Qaeda. If he wanted to make connection with
15 them, he could.
16 Muhammad Dawood always will be a threat unless he changes
17 his beliefs, his extremist ideology. Now how strong are Muhammad
18 Dawood's beliefs? Well 9/11 is a microcosm of that. On 9/11 that
19 day we were being attacked by al Qaeda, Muhammad Dawood was in
20 Pakistan at a friend’s watching those attacks. He had just returned
21 from a few days in August of 2001 attending that surveillance course,
22 his fourth al Qaeda training. Now watching that attack, he expressed
23 approval and that comes from his own friend’s evidence. Was his

1 friend's perception accurate? Well look at Muhammad Dawood's actions
2 after 9/11.
3 The next day he returns -- he goes from Pakistan back into
4 Afghanistan. He was in Pakistan with his Australian passport and
5 once again with the liberty and the freedom to return, to travel
6 anywhere but chooses -- he freely chooses to go back in the fight and
7 join up and rejoins with al Qaeda. He reports for duty to al Qaeda
8 and this is even after watching the 9/11 attacks and seeing those
9 planes used as fuel, the missiles, the people around them.
10 How he could have safely stayed out of that fight. He
11 could have stayed in Pakistan. He did not have to go into
12 Afghanistan. He could have returned to Australia with his passport,
13 but he went into Afghanistan because he knew America was coming after
14 al Qaeda, and he wanted to help them out.
15 Now when he got to his first battle position in Kandahar
16 and acquired his AK-47, acquired his rounds, acquired his hand
17 grenades, he wasn't satisfied that the enemy wasn't showing fast
18 enough. So he goes out of his way and traverses hundreds of miles
19 from the south in Kandahar, Afghanistan, up to Kabul up to Konduz for
20 another battle. Now do you think he really wanted to kill Americans?
21 If he didn't, he could have stayed in Pakistan. If he didn't want to
22 kill Americans, he could have stayed in Kandahar. Even better, if he

1 didn't want to kill Americans, he could have stayed in Australia.
2 But he chose to go up to the battle were he heard the action was.
3 Now the fact that when he got up there they had to go into
4 full retreat within hours, that's not a reflection of his character,
5 of his intent. There is no voluntary withdrawal there. There is no
6 moral mitigation. The only reason he stopped fighting was because he
7 was captured. But for him being captured, if he was able to and
8 managed to flee to Pakistan like he tried to after Konduz fell and he
9 went back into the city; if he was able to flee again to Pakistan,
10 there was every reason to believe he would again eventually have
11 joined up with al Qaeda's forces. Why? Because he did that very
12 thing on 9/11. He was so called free of al Qaeda after their
13 training and he voluntarily went back to them.
14 Now the enemy of Muhammad Dawood sits here today. There is
15 no way of knowing when you look at him whether he truly knows what he
16 did was wrong, or will ever appreciate it. All we know for a fact is
17 that he does possess the skill of a terrorist, and the free David
18 Hicks who chose to leave Australia at the age of 24 and train with al
19 Qaeda and take up arms against the US on two fronts, he didn't stop
20 until he was captured. Now that he's been captured and convicted of
21 a war crime, what is a just punishment?
22 Well there’s basically three reasons to punish someone.
23 You have your retribution, a mere measure of justice for what has

1 been done. You have your specific deterrence to stop him from doing
2 again. And you have general deterrence to stop others from following
3 in his footsteps. That's where you get to the real damage of a
4 Muhammad Dawood. He is known throughout the world. He had left a
5 free society to join up with al Qaeda. Other confused, lost souls
6 might follow in his footsteps. Certainly, even al Qaeda being able
7 to tout a Westerner who left our freedoms to join al Qaeda, that
8 helps their recruiting goals. That helps prolong the global war on
9 terrorism. That's damage Muhammad Dawood has done that can never be
10 undone.
11 But the most compelling reason to punish Muhammad Dawood is
12 simply for what he has done and to prevent him from repeating those
13 acts and one way to do that is while he's in confinement, we know he
14 can’t do it again. David Hicks -- not Muhammad Dawood, but David
15 Hicks walked away from Australian freedoms at the age of 24 only to
16 travel thousands of miles to attack the United States' freedoms.
17 Muhammad Dawood, as he sits there, he’s still a vigorous 31. But
18 maybe being sentenced to the maximum authorized might help David
19 Hicks, the Australian, reemerge. To help him come to his senses
20 again to what the value is to live in a free society and not abuse
21 those privileges by trying to attack them and kill its people.
22 But because we can never know that, what should be done is
23 that Muhammad Dawood who sits there, he should not experience true

1 freedom again for at least the next 7 years. So on behalf of the
2 United States government, that without any doubt, reservation, or
3 apology, the prosecution recommends that you sentence this enemy to
4 the maximum authorized punishment -- to be confined for a period of 7
5 years. Thank you.
6 DDC: Sir, may I approach the podium?
7 MJ: Yes, and you may argue.
8 DDC: Good afternoon, members. You're here to punish David
9 Hicks, set a sentence for him, for what he did -- the offense he
10 violated. When the prosecutor got up here and started having to use
11 analogies about David Hicks, why did they have to do that? Why does
12 the prosecutor have to stand up here and say, "It was like putting
13 the parts to a bomb together"? It's an analogy, means he didn't do
14 it. The prosecutor stood up here and spit hate and wanted to rile
15 your emotions up and wanted to tell you, he met Usama bin Laden, so
16 give him the max. He was a Westerner who actually thought he might
17 explore Islam, give him the max punishment.
18 But that's not the offense that you need to punish him for,
19 and I do not want to minimize at all the offense that David Hicks has
20 been found guilty of. He was found guilty of providing material
21 support to an international terrorist organization. Understand what
22 that is. That's not support to commit a terrorist act.

1 All the attacks that they list in Prosecution Exhibit 1, is
2 there anything in the stip of fact that says, David Hicks provided
3 one ounce of support to help those actual attacks? No. And what's
4 not in the stip speaks louder than what is. Does anywhere in that
5 stip say David Hicks hurt anyone? It doesn't. Does it say David
6 Hicks shot at a US Special Forces soldier in Afghanistan? It
7 doesn't. Does it say David Hicks planted a mine to attack US forces?
8 No.
9 It actually says what did David Hicks do in the actual
10 sphere of combat in Afghanistan was he sat in a trench at the airport
11 and got bombed. He stood at a tank that never fired. Then as he got
12 up to the front up near Konduz, he was there for 2 hours -- it
13 doesn't say he shot at anyone. Then he ran away for 3 days.
14 Let's take a step back and say a little bit about who David
15 Hicks is, because you have to sentence the individual David Hicks.
16 He's a young man who left Australia for the first time to go work in
17 Japan. He then worked in Japan a second time, and then he traveled
18 to Kosovo and Albania to join the KLA. He was there for 4 weeks and
19 came right back and went to go visit Kosovo refugees. Obviously the
20 experience must have got him interested in the military because
21 that's what he next sought to do -- to join the Australian military,
22 but he never finished in ninth grade and didn't have the
23 qualifications.

1 Then he was in Pakistan and he joined with Lashkar-e
2 Tayyiba. Now why isn't Lashkar-e Tayyiba on the charge sheet? Why
3 isn't he being charged with a crime for being with Lashkar-e Tayyiba?
4 Why? Because it's not a crime.
5 PROS: Objection.
6 MJ: Basis?
7 PROS: Misstatement of law, sir.
8 MJ: I'm sorry, I didn't hear you.
9 PROS: I said, "misstatement of law," sir.
10 DDC: Should I respond, sir?
11 MJ: Members, at this time I'm going to ask that you step into
12 the deliberation room, please.
13 Bailiff: All rise.
14 [The members departed the courtroom.]
15 **[END OF PAGE]**

1 **[The session was called to order at 1706 hours, 30 March, 2007.]**

2 MJ: Everyone, please be seated.

3 [All persons in the courtroom did as directed.]

4 MJ: Why don't you go back to your table. You can leave those

5 things there if you want.

6 DDC: I just need them for reference, sir.

7 [The detailed defense counsel returned to defense table.]

8 MJ: Government, why don't you go ahead and explain to me your

9 objection.

10 PROS: Yes, sir. Sir, defense stated that supporting Lashkar-e

11 Tayyiba is not a crime. Lashkar-e Tayyiba -- though the accused has

12 not been charged with that -- Lashkar-e Tayyiba (LET) is listed as an

13 FTO just as al Qaeda has been. An international organization

14 includes FTO's. So providing support to LET is in fact providing

15 support to an international terrorist organization. So to say that

16 providing support to LET is not a crime is a misstatement of the law.

17 What prosecution is willing to acknowledge is that he has not been

18 charged with that offense.

19 MJ: Okay. Major Mori?

20 DDC: Sir, I was under the impression -- and if I'm mistaken --

21 that Lashkar-e Tayyiba was not a prohibited organization until 26

22 December 2001. As such, it wouldn't have been prohibited.

23 MJ: You say it was not listed until when?

1 DDC: It was not listed -- if you look at the stip the fact,
2 paragraph six, it was designated a federal [sic] terrorist
3 organization on 26 December 2001, after David Hicks was already in US
4 custody.
5 MJ: Okay. Government.
6 PROS: Sir, the FTO is only one designation. It does not mean
7 that you wouldn't be able to prove they were an international
8 terrorist organization otherwise. I did not hear a qualification
9 that provides support to LET up until 2001 would not have been a
10 crime. It was simply stated that it was not a crime.
11 MJ: Okay. Major Mori, you also stated that -- or were making
12 the argument that why isn't what he was doing with LET not on the
13 charge sheet which actually it is, right? It is part of the factual
14 allegations that are part of the charge sheet. Isn't that correct?
15 DDC: Yes, sir. I was going to distinguish -- I was going to
16 continue and distinguish between what was in the stip of fact, the
17 full paragraphs and the stip of fact and what's in the cleansed
18 charge sheet. I could begin my argument and I will clarify my point
19 that -- I will just reference to the members that it was -- I was
20 referring to the designation. It was not designated a foreign
21 terrorist organization and pick up from there, sir.
22 MJ: [Pause.] Would the government's concern be addressed if
23 during the course of his argument he clarified that at the time that

1 he was interacting with this LET, they had not yet been designated as
2 a foreign terrorist organization, and then referencing paragraph six
3 of the stipulation which shows that they were not designated at that
4 time, but then also shows that they were designated sometime
5 thereafter which would be indicating then that that is a distinction
6 which the members I think will then take on board and to give it some
7 weight. Would that satisfy your concern?
8 PROS: If they also could include, sir -- the government just
9 does not want to concede that even with the statement that the
10 conduct occurred before LET was an FTO would therefore not constitute
11 a crime. Our position is that you could still prove an international
12 terrorist organization without being an FTO. So I think a solution
13 may be to simply have defense explain that what they meant was simply
14 that -- that they had not been designated an FTO and somehow withdraw
15 the idea that it's still not a crime to provide support before or
16 after.
17 MJ: [Pauses to write notes.] Okay. I'm going to read
18 something that I have drafted up here which may satisfy the concerns
19 of both parties. I'd like you just to listen to it and then if it
20 correctly addresses those things, the next issue would be whether I
21 would read it myself as a matter of clarification, or whether the
22 defense counsel can just put this in his argument. It would start

1 before the defense counsel continues or before I continue, depending
2 on who's reading it.
3 I'd like to clarify my remark -- or the remark -- about Mr.
4 Hicks' association with LET during the time period in question. As
5 agreed to by the prosecution and defense and Mr. Hicks in the
6 stipulation of fact, al Qaeda was designated as an FTO and thereby
7 automatically recognized under US law as an international terrorist
8 organization in October 1999. The LET, however, was not similarly
9 designated under US law until 26 December 2001, which was after the
10 time Mr. Hicks had already been captured. Accordingly, it may be
11 subject to dispute whether his association with that organization
12 standing alone would be found to be a violation of US law.
13 PROS: Government is satisfied with that, sir.
14 MJ: Because that leaves the stipulation intact ----
15 DDC: Yes, sir.
16 MJ: ---- it leaves a point worthy of note in your argument ----
17 DDC: Yes, sir.
18 PROS: Your Honor, I know you provided defense the option, the
19 government preference ----
20 MJ: I didn't provide them the option, I just said we're
21 thinking about it right now. I wanted to first deal with the
22 language and then we'll get to the best way to pitch it either
23 through instruction or his argument.

1 So let me ask you first. Once again, you're happy with the
2 language?
3 DDC: Yes, sir. Fine.
4 MJ: Okay. Now what would be your preference?
5 DDC: I think you're instruction will be fine, sir.
6 MJ: Okay, couched very similarly as in basically my typical
7 deadpan. Okay?
8 DDC: Yes, sir.
9 MJ: Okay.
10 PROS: And that's the government preferences as well, sir.
11 MJ: Well, very good then. All right, let's recall the members.
12 [The bailiff did as directed.]
13 Bailiff: All rise.
14 [All persons in the courtroom did as directed.]
15 [The members entered the courtroom.]
16 **[END OF PAGE]**

1 **[The commission was called to order at 1723 hours, 30 March 2007.]**

2 MJ: Members, please be seated.

3 [The members did as directed.]

4 MJ: Everyone, please be seated.

5 [All persons in the courtroom did as directed.]

6 MJ: Before Major Mori continues, I'd like to clarify one aspect
7 about his remarks with regard to Mr. Hicks' association with the
8 organization known as LET and discussed in the stipulation of fact
9 and on the charge sheet that you have during the time period in
10 question.

11 As agreed to by the prosecution and defense and Mr. Hicks
12 in the stipulation of fact, al Qaeda was designated as a foreign
13 terrorist organization and thereby automatically recognized under US
14 law as an international terrorist organization in October 1999. The
15 LET, however, was not similarly designated under US law until 26
16 December 2001, which was after Mr. Hicks had already been captured.
17 Accordingly, it may be subject to dispute whether his association
18 with that organization standing alone would be found to be a
19 violation of US law.

20 Major Mori, you may continue.

21 DDC: Members, I would like to address a little bit on what
22 drove David Hicks. The government stood up here and said it was
23 anti-West. I think if you look at the facts in the stip of fact then

1 you see how David's involvement -- and from the unsworn statement --
2 David's involvement that ended up leading to him being in a
3 battlefield in Afghanistan began back in the Kosovo liberation. He
4 only went to train there and he came back and what was his desire?
5 To join the Australian Army. Then he went to Pakistan and he got
6 involved with Lashkar-e Tayyiba and the only time he actually fired
7 at someone is when he's shooting at a bunker. Does that sound like a
8 soldier or does that sound like a terrorist?
9 Now granted, he might have just wanted to be a wannabe. A
10 wannabe soldier because he didn't have the education to join a real
11 service. And what did he do in Afghanistan. In the conflict, did he
12 act like a terrorist, or did he act like a soldier? I submit that he
13 acted like a soldier. The government would say he went through all
14 this training and you should punish him for what might have happened.
15 You should punish him for taking training, for people he met. But
16 that's not what you need to punish him for. You need to punish him
17 for what he did, and what he did was provide support as a soldier.
18 His person --he provided his person and he guarded a tank and he sat
19 in the trench and was bombed for it.
20 Have there been consequences for David Hicks? Because
21 that's what you need to factor in what the appropriate sentence
22 should be. The government says to max him. There is no question.
23 Most of the prosecutor's argument was why David is guilty. How do we

1 know why he's guilty? Because David accepted responsibility and pled
2 guilty. That's not in contention here. We are not arguing whether
3 this is or whether this is not a violation, we're talking how much
4 punishment and does David Hicks rate the most severe punishment for
5 it. Is the facts of David Hicks' case really deserving of 7 years
6 punishment.
7 The consequences he's already suffered is one, he was
8 bombed. He was shot at by the Northern Alliance running away. He
9 was scared and I think he finally got his first taste of what really
10 serving in a combat zone was for those 2 hours running away from the
11 Northern Alliance. It was something he didn't like and he ran away.
12 The wannabe finally got a real taste of it, and he ran away.
13 Then you see in the stipulation of fact he gets back to
14 Konduz and the other Arab fighters are saying "we're going to fight
15 to the death" -- he says, "I'm out of here," and he left. That's
16 when he made a decision, I'm out of here, this is not for me. He
17 sought out the shopkeeper who took him in and took pity on him. Does
18 that rate 7 years? Does he rate the maximum punishment for this?
19 Now members, you're going to hear and I anticipate the
20 judge will instruct you that a commission is different than a court-
21 martial. Many of you have experienced a court-martial where someone
22 who may be in the brig prior to a court-martial gets credit for that
23 time served. In a military commission, that is not the case. The

1 judge will instruct you on that. So the sentence -- you should not
2 adjudge in excess of sentence thinking that he will get credit for
3 the 5 years and 4 months he has already sat in a cell and thought
4 about the conduct that brought him here today. We're not talking
5 about someone that you need to punish for what just happened last
6 year. We are talking about punishing someone who has already sat in
7 a cell and had to think about it.
8 Now the prosecutor would like you to think that David hates
9 the West. He hates America, and he hates America so much that he
10 started cooperating with the US investigators right away. Does that
11 make sense? Of course not. He cooperated with US investigators
12 because he doesn't hate America. Why would he collaborate with
13 investigators even after facing criminal proceedings and he's willing
14 still to participate and assist US federal agencies. Because he has
15 no personal animosity against you or I or Americans.
16 Why does he behave here? Why did he try to behave? Why
17 would the commander of Guantánamo Bay just last month say for over 5
18 years generally he's been compliant? Is that the al Qaeda secret
19 trick, you know, you give them all the information they want and then
20 behave really well and they'll let you go? No. His heart wasn't
21 with al Qaeda. He wanted to be a soldier and actually this was the
22 only place he could do it. He shouldn't have been there. I'm not
23 minimizing him being there. But it wasn't out of hate and it wasn't

1 out of supporting or actually accomplishing or assisting any of the
2 most severe and egregious things you see in that charge sheet that
3 have nothing to do with David Hicks.
4 David Hicks was not responsible one bit for blowing up the
5 embassies in Africa. He was not responsible for the bombing against
6 USS Cole, and he wasn't responsible for the September 11 attacks.
7 And to even use as the prosecutor did that death and destruction can
8 somehow describe as David Hicks when he hasn't hurt one person and
9 yet they asked the maximum punishment for this offense.
10 You need to consider -- I just want to address one thing
11 before I get to sentencing factor and that was the government's
12 theory that David Hicks is somehow the invaluable resource to al
13 Qaeda. The government by their sort of emotional plea to you that he
14 somehow went from Usama bin Laden to David Hicks to the rest of al
15 Qaeda around the world. That's not the case. And how do we know
16 that? What is the most objective facts that we know that David Hicks
17 really -- even though we can't put anybody from al Qaeda here to
18 testify -- that he was nothing but the PFC but they put in a trench.
19 Because that's what they did. They put him in the trench at the
20 airport.
21 The government wants you to believe that David Hicks was
22 somehow the Australian al Qaeda member who was willing to travel all
23 around the world to do all this stuff and to punish him for what

1 might have happened. But the reality is, David Hicks was put in a
2 trench and I would think if I was a commander for al Qaeda if I had a
3 Westerner who was willing to do that type of thing, it sounds like a
4 pretty valuable person. And the government even recognizes that.
5 That would be a valuable tool. Would any of you put that supposed
6 valuable tool in a trench at an airport to be bombed? Would you
7 assign him to guard the tank? Would you let him run off on his own
8 up to Konduz and then run away? Because the most objective facts are
9 that David Hicks was not an invaluable resource, he was a PFC run
10 amuck, abandoning his post.
11 You also have to recognize that David Hicks, because he is
12 from Australia, your decision will have an impact and reach outside
13 our nation and it will be important to consider, and to determine
14 really based on what he did. That's what I'll ask for you to do.
15 Really what he did and what is his consequences.
16 I would like you to consider first of all the sentencing
17 factor of rehabilitation, and the judge will instruct you on that.
18 His plea of guilty establishes that he's already begun
19 rehabilitation, but that happened now, 5 years and 4 years [sic]
20 later. How do we know he's already rehabilitated? Because he
21 started cooperating with US investigators from the first involvement
22 with them. He's cooperated even after being charged. He's behaved
23 at Guantánamo. He started working on improving himself even here at

1 Guantánamo by taking correspondence courses in high school to improve
2 his education. He's recognized that he needed his education and he
3 started working hard to solve that.
4 How much further punishment is it necessary for David Hicks
5 to sit in his cell and think about what he's done? He's already done
6 5 years and 4 months. The government wants you to send a message
7 with David Hicks. The David Hicks people are going to know about.
8 They asked for 7 years. The prosecutor asked you to make him sit in
9 a cell for 7 years. He's already done 5 years and 4 months. He
10 won't get credit for that. Even though the prosecutor says 7 years,
11 you can give the prosecutor what he wants which is put David in jail
12 for 7 years. You can do that by sentencing him to 1 year and 8
13 months. That would be David Hicks has sat in his cell for 8 [sic]
14 years to think about the conduct that put him there.
15 Does he need to do a full 7 years more, or is 7 years
16 enough? I would submit his behavior since coming initially into
17 contact with US forces and cooperating, his behavior here at
18 Guantanamo Bay for 5 years and 4 months. He hasn't behaved just for
19 a few months in the brig before the trial, it's 5 years and 4 months.
20 Significant representation of his rehabilitative potential.
21 Is he a threat? Is Australia ever going to let him go? Is
22 he somehow -- people are going to forget who he was or do you think
23 he'll be watched? Easily, he'll be watched. People know his name.

1 He's not a threat. And I think by providing him the opportunity
2 after 1 year and 8 months from now to get out, to go back and finish
3 his education, you'll give him the opportunity to not let down those
4 people that have supported him.
5 He sits here today recognizing the US service members who
6 treated him kindly and professionally here. Why? Because that shows
7 you the person he is. He is a big enough man to accept
8 responsibility for his actions by pleading guilty and thanking those
9 who have helped him. All I would like you to do is give him an
10 opportunity to try to make a new start in life -- the new start that
11 he's already started here with his education. Sentence him to 1 year
12 and 8 months. You can give the prosecution their request and he'll
13 spend 7 years in a cell. But you also give David Hicks an
14 opportunity and you send a message that to have justice, you must
15 also have mercy. Thank you.
16 MJ: Members, you are about to deliberate and vote on the
17 sentence in this case. It is the duty of each member to vote for a
18 proper sentence for the offense of which the accused has been found
19 guilty. Your determination of the amount of punishment, if any, is a
20 grave responsibility requiring the exercise of wise discretion.
21 Although you must give due consideration to the matters presented by
22 the defense, as well as to those presented by the prosecution, you

1 must bear in mind that the accused is to be sentenced only for the
2 offense to which he has been found guilty.
3 Some of you may have experience with courts-martial wherein
4 an accused is given credit for confinement served prior to trial.
5 This is not the case at a military commission or upon review of the
6 commission's sentence. Therefore, you must not adjudge an excessive
7 sentence in reliance upon any possible credit for Mr. Hicks'
8 detention prior to today's session. You must not adjudge an
9 excessive sentence in reliance upon possible mitigating action by the
10 convening authority or some other authority.
11 The maximum punishment that may be adjudged in this case is
12 confinement for a period of 7 years. The maximum punishment is a
13 ceiling on your discretion. You are at liberty to arrive at any
14 lesser legal sentence. In adjudging a sentence in this case, you are
15 restricted to adjudging confinement or you may adjudge no punishment.
16 There are several matters which you should consider in
17 determining an appropriate sentence. You should bear in mind that
18 our society recognizes many reasons for the sentence of those who
19 violate the law. They include rehabilitation of the wrongdoer,
20 punishment of the wrongdoer, protection of society from the
21 wrongdoer, and deterrence of the wrongdoer and those who know of his
22 crime and his sentence from committing the same or similar offenses.
23 The weight to be given to any or all of these reasons along with all

1 other sentencing matters in this case rests solely within your
2 discretion.
3 Now I'll review the types of punishment you can adjudge. I
4 have already indicated that this commission may sentence the accused
5 to confinement for a period not to exceed 7 years. You may also
6 sentence the accused to no punishment. In selecting a sentence, you
7 should consider all of the matters presented by the defense and the
8 prosecution. Thus, all the evidence you have heard in this case is
9 relevant on the subject of sentencing.
10 You should consider evidence admitted as to the nature of
11 the offense of which the accused stands convicted, plus matters to
12 include: the accused's age of 31 years; the accused's education, the
13 highest level of education which the accused obtained was the eighth
14 grade; that the accused has been detained for approximately 5 years
15 and 4 months; that the accused is a citizen of Australia.
16 The commission will not draw any adverse inference from the
17 fact that the accused has elected to make a statement which is not
18 under oath. An unsworn statement as was made in his case is an
19 authorized means for the accused to bring information to the
20 attention of the commission and must be given appropriate
21 consideration. The accused cannot be cross-examined by the
22 prosecution or interrogated by the members of the commission or by me
23 upon an unsworn statement, but the prosecution may offer evidence to

1 rebut statements of fact contained in an unsworn statement. The
2 weight and significance to be attached to an unsworn statement rests
3 within the sound discretion of each member. You may consider that
4 the statement is not under oath, its inherent probability or
5 improbability, whether it is supported or contradicted by the
6 evidence in the case, as well as any other matter that might have a
7 bearing upon its credibility. In weighing an unsworn statement, you
8 are expected to use your common sense and your knowledge of human
9 nature and the ways of the world.
10 A plea of guilty is a matter in mitigation which must be
11 considered along with all the other facts and circumstances of the
12 case. Considerable time, effort, and expense to the government have
13 been saved by the accused's plea of guilty in this case. Such a plea
14 may demonstrate the accused's willingness to take responsibility for
15 his conduct and it may be the first step towards rehabilitation.
16 During their arguments, trial and defense counsel recommend
17 that you consider a specific sentence -- or two different specific
18 sentences in this case. You are advised that the arguments of
19 counsel are their recommendations, and are only individual
20 suggestions and may not be considered as the recommendation or
21 opinion of anyone other than the counsel.
22 Members, when you close to deliberate and vote, only the
23 members will be present. I remind you that you must all remain

1 together in the deliberation room during all of the deliberations. I
2 also remind you that you may not allow any unauthorized intrusion
3 into your deliberations. You may not make communications to or
4 receive communications from anyone outside the deliberation room, by
5 telephone or otherwise.
6 Should you need to take a recess or have a question, or
7 when you have reached a decision, you may notify the bailiff who will
8 be stationed outside the deliberation room who will then notify me of
9 your desire to return to open session to make your desires or
10 decision known.
11 Your deliberations should begin with a full and free
12 discussion on the subject of sentencing. The influence of
13 superiority in rank shall not be employed in any manner to control
14 the independence of the members in the exercise of their judgment.
15 When you have completed your discussion, then any member who desires
16 to do so may propose a sentence. You do that by writing it out on a
17 slip of paper and writing out a complete sentence. The junior member
18 collects the proposed sentences and submits them to the president,
19 who will then arrange them in order of their severity.
20 You then vote on the proposed sentences by secret, written
21 ballot. All of you must vote, and you may not abstain from the vote.
22 You vote on each proposed sentence in its entirety, beginning with

1 the lightest that has been proposed, until you arrive at the required
2 concurrence, which is two-thirds or in this case, six members.
3 The junior member will collect and count the votes. The
4 count is then checked by the president who shall announce the result
5 of the ballot to the members. Based on my review of the members'
6 questionnaires, I have determined that Colonel [REDACTED] is the
7 senior commission member and will serve as the president officer
8 during the deliberations and announce the decision as the president
9 of the commission. Colonel [REDACTED] is the junior member of the
10 commission.
11 If you vote on all of the proposed sentences without
12 arriving at the required concurrence of two-thirds or six, you may
13 then repeat the process of discussion, proposal of sentences and
14 voting. But once a proposal has been agreed to by the required
15 concurrence, then that is your sentence.
16 Members, you may reconsider your sentence at any time prior
17 to it being announced in open session of the commission. If after
18 you determine your sentence, any member suggests that you reconsider
19 the sentence, please open the commission session through notice to
20 the bailiff, and the president must announce that reconsideration has
21 been proposed without reference to whether the proposed reballot
22 concerns increasing or decreasing the sentence. In the event that we

1 should have such a notice provided, I will give you specific
2 instructions on the procedure for reconsideration.
3 As an aid in putting the sentence in proper form, the court
4 shall use the Sentence Worksheet which has been marked as Appellate
5 Exhibit 26.
6 Have both sides had an opportunity to review Appellate
7 Exhibit 26?
8 PROS: Yes, sir.
9 DDC: Defense has, Your Honor.
10 MJ: Any objections?
11 PROS: No, sir.
12 DDC: None from the defense.
13 MJ: Bailiff, please now hand Appellate Exhibit 26 to Colonel
14 [REDACTED].
15 [The bailiff did as directed.]
16 MJ: Appropriate care should be exercised in using this
17 worksheet and in selecting the sentence which properly reflects the
18 sentence of the commission. If you have any questions concerning
19 sentencing matters, you should request further instructions in open
20 session in the presence of all parties to the trial. In this
21 connection, you are again reminded that you may not consult any
22 publication or writing not properly admitted or received during this
23 trial.

1 My instructions should not be interpreted as indicating an
2 opinion as to the sentence which should be adjudged, for you
3 gentlemen alone have the responsible for determining an appropriate
4 sentence in this case. In arriving at your determination, you should
5 select the sentence which will best serve the needs of the accused
6 and the welfare of society. When the commission has determined a
7 sentence, the inapplicable portions of the Sentence Worksheet should
8 be lined through. When the commission returns, I will examine the
9 Sentence Worksheet and then the president will then announce the
10 sentence in open court.
11 Do counsel have any objection to my instructions or request
12 for any other instructions?
13 PROS: No, Your Honor.
14 DDC: No, sir.
15 MJ: Does any member of the commission have any questions for me
16 at this time?
17 [Affirmative response from Colonel [REDACTED].]
18 MJ: Colonel [REDACTED]?
19 MEMBER [COL [REDACTED]]: During part of the testimony today it
20 was pointed out that the defendant either provided information to the
21 US government while he was a detainee or cooperated with the US
22 government to some extent and that we should use that as a mitigating
23 factor as we deliberate the sentence. My question is -- how does --

1 because we don't know what that information is, so how can we use
2 that as a mitigating factor -- or how should we?
3 MJ: Okay. That information was provided to you during the
4 course of the accused's unsworn statement which was provided to you
5 in an authorized fashion through counsel. I've already read you the
6 instruction about unsworn statements. Upon your request, sir, I will
7 review that instruction with you again.
8 MEMBER [COL [REDACTED]]: No, sir.
9 MJ: I will also note then that following an unsworn statement,
10 the government has an opportunity to present a case in rebuttal, if
11 they wish, with regard to any statement of fact in the unsworn
12 statement. That did not happen.
13 Counsel in this case are each responsible for presenting
14 the case on the side of their party. They have done so at this time.
15 You have now received the evidence that you have to work with. What
16 I will tell you is you must base your consideration of the sentence
17 on the evidence that has been presented to you.
18 Does that answer your question?
19 MEMBER [COL [REDACTED]]: To the extent that defense counsel
20 made the same statement in his arguments, it was not just in the
21 unsworn statement, sir. That's what is kind of ----
22 MJ: Okay. With regard to that, I'll advise you that the
23 arguments of counsel are not evidence in this case. They are made

1 for the purpose of helping you understand the evidence that you have
2 received and it is counsel's opportunity to draw your attention to
3 the evidence that you've received in a fashion that they think is
4 appropriate for you to consider.
5 MEMBER [COL [REDACTED]]: That's perfect. That's all I need.
6 Thank you.
7 MJ: Does either side have any objection to that instruction or
8 request for any other instruction?
9 PROS: No, sir.
10 DDC: Defense does not, sir.
11 MJ: Any other questions for me at this time?
12 [Negative response from the members.]
13 MJ: Colonel [REDACTED], when you go into closed session
14 deliberations, as I've indicated, you all must stay in there together
15 during all that time. If at any time during your deliberations, you
16 desire to take a recess, we must first formally reconvene the
17 commission in open court, and then recess so that you're all at
18 recess together. Nobody can step out even to go to the head by
19 themselves. You must all be together for all of the deliberations.
20 We will also, upon your call, provide you with an evening meal and
21 you can just tell me about that.
22 Knowing this, would you like to take a brief recess before
23 you begin deliberations, sir, or would you like to begin immediately?

1 PRES: Brief recess before deliberation.

2 MJ: Very well. We'll take a recess at this time. While we
3 take this break here I'm going to remind you again. You've received
4 all the evidence and you've received my instructions, but you should
5 not begin discussion or consideration of the matter even in your own
6 mind during this break. Let's just take a break, I'll bring you
7 back, then we'll send you into deliberations.

8 The members are excused.

9 Bailiff: All rise.

10 [All persons in the courtroom did as directed.]

11 [The members departed the courtroom.]

12 **[The commission recessed at 1752 hours, 30 March 2007.]**

13 **[END OF PAGE]**

1 MJ: Okay, we're going to take an in-place recess and stand by
2 for them here. Everyone else that has to do whatever can do it after
3 they've gone into their deliberations. We're in recess.
4 **[The session recessed at 1753 hours, 30 March 2007.]**
5 **[The session was called to order at 1759 hours, 30 March 2007.]**
6 MJ: The commission is called to order. All parties present
7 when court recessed are again present.
8 Please recall all the members.
9 [The bailiff did as directed.]
10 Bailiff: All rise.
11 [All persons in the courtroom did as directed.]
12 [The members entered the courtroom.]
13 **[END OF PAGE]**

[The commission was called to order at 1800 hours, 30 March 2007.]

MJ: Colonel [REDACTED], are the members ready to begin their deliberations?

PRES: We are ready, Your Honor.

MJ: Gentlemen, you can gather up your notes and retire to the deliberation room.

[The members did as directed and departed the courtroom.]

MJ: Court is closed for deliberations.

[The commission closed at 1801 hours, 30 March 2007.]

[END OF PAGE]

1 **[The session was called to order at 2002 hours, 30 March 2007.]**

2 MJ: The commission will come to order. All parties present

3 when the court closed are again present. The members are absent.

4 I've been advised that the members have concluded their

5 deliberations. Please recall all the members to the courtroom.

6 [The bailiff did as directed.]

7 Bailiff: All rise.

8 [All persons in the courtroom did as directed.]

9 [The members entered the courtroom.]

10 **[END OF PAGE]**

1 **[The commission opened at 2003 hours, 30 March 2007.]**

2 MJ: Members, please be seated.

3 [The members did as directed.]

4 MJ: Everyone, please be seated.

5 [All persons in the courtroom did as directed.]

6 MJ: Colonel [REDACTED], have the members reached a sentence in

7 this case?

8 PRES: Yes, Your Honor.

9 MJ: Is the sentence reflected on the sentence worksheet?

10 PRES: Yes, Your Honor.

11 MJ: Have you signed it at the bottom?

12 PRES: Yes, Your Honor.

13 MJ: Colonel [REDACTED], please fold the sentence worksheet and

14 give it to the bailiff.

15 Bailiff, please recover that and without looking at it,

16 please give it to me so I may I examine it.

17 [The bailiff retrieved AE 26 from the president and handed it to the

18 military judge.]

19 MJ: [Examines AE 26.] Bailiff, I'm going to have you hand this

20 back to the president.

21 Colonel [REDACTED], I need for you to look at it again and

22 I'd like you just to circle the parts that are applicable and to

23 cross out all those parts that are not applicable.

1 [The bailiff retrieved AE 26 from the military judge and handed it to
2 the president.]
3 [The president marked AE 26.]
4 MJ: Okay, have you accomplish that, sir?
5 PRES: Yes, Your Honor.
6 MJ: Bailiff, please recover that again.
7 [The bailiff retrieved AE 26 from the president and handed it to the
8 military judge.]
9 MJ: [Examines AE 26.] I'm going to hand it back once more.
10 There's two sections in there. One is number 1, and one is number 2.
11 If you look at that again, you need to be operating under number 1 or
12 under number 2 and not under both, because that would be
13 inconsistent.
14 [The bailiff retrieved AE 26 from the military judge and handed it to
15 the president.]
16 [The president marked AE 26 again.]
17 MJ: Okay, bailiff, if you could please recover that.
18 [The bailiff retrieved AE 26 from the president and handed it to the
19 military judge.].
20 MJ: [Examines AE 26.] Okay. I have examined the sentence
21 worksheet and it appears to be in the proper format.
22 If you could please return it to the president of the
23 commission.

1 [The bailiff retrieved AE 26 from the military judge and handed it to
2 the president.]
3 MJ: Accused and counsel, please rise.
4 [The accused and his detailed defense counsel did as directed.]
5 MJ: Colonel [REDACTED], if you could please announce the
6 sentence of the commission.
7 PRES: David Matthew Hicks, this commission sentences you:
8 **To be confined for 7 years.**
9 MJ: You may be seated.
10 [The accused and his detailed defense counsel did as directed.]
11 MJ: Bailiff, please retrieve the sentence worksheet from the
12 president of the commission.
13 [The bailiff did as directed and handed AE 26 to the court reporter.]
14 MJ: Members of the commission, you have now completed your
15 duties and you are discharged with my thanks. Please leave -- well I
16 don't think you have any of the original exhibits with you, if you
17 did, you would need to leave those behind. You may take your own
18 personal notes with you which includes everything in your folders, or
19 you may leave those behind and they will be destroyed for you by the
20 court reporter.
21 In an effort to assist you in determining what you may
22 discuss about this case now that it is over, the following guidance
23 is provided. When you took your oath as members, you swore not to

1 disclose nor discover the vote or opinion of any particular member of
2 this commission unless required to do so in due course of law. This
3 means that you may not tell anyone about the way you or anyone else
4 on the commission voted or what opinion you or they had, unless I or
5 another judge require you to do so in open session.
6 You are each entitled to this privacy. Other than that,
7 you are free to talk to anyone about the case, including me, the
8 attorneys, or anyone else. You may also decline to participate in
9 such discussion, if that is your choice. Be mindful that there may
10 be certain service-specific or Department of Defense rules or
11 regulations which might also govern your contacts with the media.
12 Any advice may be obtained from a Public Affairs official.
13 Members, your deliberations are carried out in the secrecy
14 of the deliberation room to permit the utmost freedom of debate and
15 so that each one of you can express your views without fear of being
16 subjected to public scorn or criticism by the accused, the convening
17 authority, or anyone else. In deciding whether to answer questions
18 about this case, and if so, what to disclose, you should have in mind
19 your own interests and the interests of the other members of the
20 commission.
21 Does any member have any questions at this time?
22 Negative response from the members.

1 MJ: Members of the commission, I want to thank you again for
2 your participation and attentiveness during this case. You may now
3 depart the courtroom and resume your normal duties.
4 Bailiff: All rise.
5 [All persons in the courtroom did as directed and the members
6 departed the courtroom.]
7 MJ: Everyone, please be seated.
8 [All persons in the courtroom did as directed.]
9 MJ: Mr. Hicks, we are now going to discuss the operation of
10 your pretrial agreement on the sentence of the commission. We
11 discussed the portion of the appendix before, and now let me review
12 the pertinent part here.
13 The first part of the sentence limitation was that the
14 convening authority agreed that the maximum that could be adjudged
15 and approved was 7 years. That was the first part of the sentence
16 limitation. The convening authority also agreed in paragraph 1a of
17 the pretrial agreement to suspend any portion of a sentence adjudged
18 to confinement in excess of 9 months. That means here the commission
19 adjudged a sentence of 7 years which means anything in excess of 9
20 months is suspended pursuant to the terms of this agreement which
21 would be 3 months from the first year and then the 6 years after
22 that. So 6 years and 3 months of the 7 years adjudged are suspended
23 pursuant to the terms of this agreement.

1 Do you understand that?

2 ACC: Yes, sir.

3 MJ: And was that also your understanding of how this would

4 work?

5 ACC: Yes, it was.

6 MJ: Now with regard to section 1d, the government of the United

7 States is bound to transfer custody and control of you to the

8 government of Australia by not later than 60 days from the date upon

9 which the sentence is announced. That just happened today, and so 60

10 days from today would be the 29th of May, 2007.

11 Do you understand that?

12 ACC: Yes, sir.

13 MJ: And is that also your understanding of how that term would

14 work?

15 ACC: Yes, it was.

16 MJ: Do counsel concur with my interpretation of the pretrial

17 agreement with regard to those terms, because I think all the rest of

18 them were addressed before?

19 PROS: Yes, sir.

20 DDC: Defense does, Your Honor.

21 MJ: Now Mr. Hicks, as we discussed while going over the

22 pretrial agreement earlier, one of the conditions of the agreement

23 was that you waive your appellate rights as provided for -- and I

1 mean the waiver of appellate rights provided for in Rule for Military
2 Commission 1110.
3 Major Mori, do you have a waiver of appellate rights in
4 accordance with Rule for Military Commission 1110 before you?
5 DDC: Yes, sir.
6 MJ: Is it signed?
7 DDC: Yes, sir.
8 MJ: Bailiff, please recover that from the defense counsel.
9 Please show it to the government counsel.
10 [The bailiff did as directed.]
11 MJ: Trial counsel, does this satisfy the accused's requirements
12 with regard to the R.M.C. 1110 provision?
13 PROS: Yes, sir.
14 MJ: If I could have that marked as the appellate exhibit next -
15 - Appellate Exhibit 33, I believe.
16 [The bailiff handed the document to the court reporter who had it
17 marked.]
18 MJ: Are there other matters to take up before we adjourn?
19 PROS: No, Your Honor.
20 DDC: None from defense, Your Honor.
21 MJ: Very well. This military commission is adjourned.
22 **[The commission adjourned at 2014 hours, 30 March 2007.]**

AUTHENTICATION OF RECORD OF TRIAL

IN THE CASE OF

UNITED STATES v. DAVID MATTHEW HICKS, also known as DAVID MICHAEL HICKS, ABU MUSLIM AUSTRALIA, ABU MUSLIM AUSTRAILI, ABU MUSLIM PHILIPPINE, and MUHAMMAD DAWOOD
ISN: 0002

I received the completed record of trial for review and authentication on 19 April 20 07,

and authenticated same on 19 April, 20 07).

/SIGNED/
[REDACTED]
Colonel, USMC
Military Judge

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received the completed record of trial for review in the foregoing case on 10 April 20 07.

/SIGNED/
Michael D. Mori
Major, USMC
Detailed Defense Counsel

PROSECUTION
EXHIBITS ADMITTED

UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a/ "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

Stipulation of Fact

29 March 2007

1. This stipulation of fact is entered into by the Prosecution and Defense knowingly and voluntarily in the case of *United States v. David Hicks* (hereinafter "the accused"). It is hereby stipulated and agreed, by and between the Prosecution and Defense, with the express consent of the accused, that the following facts are true.

2. The accused acknowledges and agrees that he is an alien unlawful enemy combatant, as defined by the Military Commissions Act of 2006 (MCA), Title 10, United States Code, Section 948a(1) and (3). The accused is and has been at all times relevant to these proceedings, a person subject to trial by military commission, pursuant to Section 948c of the MCA.

3. On 30 September 2004, the Combatant Status Review Tribunal (CSRT) made the determination that the accused is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda; as defined by Rule for Military Commission (RMC) 202.

4. The accused was born on August 7, 1975 in Adelaide, Australia.

5. In or about the middle of May 1999, the accused traveled to Tirana, Albania from Japan and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanians. The accused completed a four-week basic military training course at a KLA camp before returning to Australia on or about 27 June 1999.

6. After returning to Australia, the accused converted to Islam in September of 1999. In or about November 1999, he traveled to Pakistan where, in the middle of 2000, he joined a terrorist organization known as Lashkar-e Tayyiba (LET), meaning "Army of the Righteous" or "Army of the Pure;" designated a Foreign Terrorist Organization (FTO), on 26 December 2001, pursuant to Section 219 of the Immigration and Nationality Act.

7. The LET is the armed wing of Markaz-ud-Daawa-wal-Irshad (MDI), (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.

8. The LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to occupy Indian-controlled Kashmir and violent opposition of Hindus, Jews, Americans, and other westerners.

Prosecution Exhibit 1

9. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

10. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and in India, itself.

11. On or about April 23, 2000, in a bulletin posted on the internet, LET claimed that it had recently killed Indian soldiers and destroyed an Indian government building, both located in Indian-controlled Kashmir.

12. After joining LET, the accused trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading, land navigation, and troop movement.

13. Following the training at Mosqua Aqsa, the accused, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir where he engaged in hostile action against Indian forces by firing a machine gun at an Indian Army bunker.

14. In or about January 2001, the accused, with assistance from LET, traveled to Afghanistan and attended al Qaeda training camps.

15. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

16. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

17. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

18. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

19. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

20. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

21. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

22. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

23. In or about 2001, al Qaeda's media committee, which created the Media Foundation As Sahab ("The Clouds"), orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for declaring war against the United States.

24. Since 1989, members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

25. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

26. In or about January 2001, the accused traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.

27. Upon entering Afghanistan, the accused traveled to Kandahar where he stayed at an al Qaeda guest house and met associates or members of al Qaeda. While attending al Qaeda's training courses, the accused would use the *kunya*, or alias, "Abu Muslim Australia," "Abu Muslim Austraili," "Abu Muslim Philippine," or "Muhammad Dawood;" and later was referred to as "David Michael Hicks."

28. The accused then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, the accused trained in weapons familiarization and firing, land mines, tactics, topography, small unit fire, maneuver tactics, field movements, and other areas.

29. In or about April 2001, the accused returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship;

small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence and supplies to al Qaeda operatives.

30. While the accused trained at al Farouq, Usama bin Laden visited the camp on several occasions. During such visits, any weapons the trainees had were removed from them and they were seated as a group to hear bin Laden speak in Arabic. During one visit, the accused asked bin Laden why there were no training materials provided in the English language.

31. After the accused completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and individually interviewed certain attendees. The accused was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel. After this interview with Muhammed Atef, the accused attended al Qaeda's urban tactics training course at Tarnak Farm.

32. In or about June 2001, the accused traveled to Tarnak Farm and participated in the training in a mock city located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

33. In or about August 2001, the accused participated in a four-week al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting windows and doors; documenting persons coming and going to and from certain structures; and, submitting reports to the al Qaeda instructor, who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. The course also included practical application where the accused and other student operatives conducted surveillance of various locations in Kabul, including the former American and British Embassy buildings. During this training, the accused personally conducted intelligence on the former American Embassy building.

34. After the surveillance course, the accused returned to Kandahar, where he received instruction from members of al Qaeda on the meaning of *jihad*. The accused also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.

35. On or about September 9, 2001, the accused traveled to Pakistan to visit a Pakistani friend. While at this friend's house, the accused watched television footage of the September 11, 2001 attacks on the United States, and the friend has said he interpreted the accused's gestures as approval of the attacks. The accused had no specific knowledge of the attacks in advance.

36. On or about September 12, 2001, the accused returned to Afghanistan to join with al Qaeda. The accused had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.

37. On or about the first of October, Saif al Adel--then al Qaeda's deputy military commander and head of the security committee for al Qaeda's *shura* council, who was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces--informed Mr. Hicks that he could go to three different locations to position himself with combat forces (city, mountain, or airport). Mr. Hicks chose to join a group of al Qaeda and Taliban fighters near the Kandahar Airport.

38. The accused traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, the accused armed himself with six (6) ammunition magazines, approximately 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

39. On or about October 7, 2001, when the Coalition Forces initiated a bombing campaign at the start of Operation Enduring Freedom, the accused had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.

40. On or about October 10, 2001, after two nights of bombing, the accused was reassigned and joined an armed group outside the airport where he guarded a Taliban tank. For about the next week the accused guarded the Taliban tank, and every day received food, drink, and updates on what was happening from the fat al Qaeda leader in charge who was on a bicycle.

41. The accused heard radio reports that fighting was heavy at Mazar-e Sharif, that Kabul would be the next target, and that western countries, including the United States, had joined with the Northern Alliance.

42. The accused implemented the tactics that he had learned with al Qaeda and attempted to train some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, the accused decided to look for another opportunity to fight in Kabul.

43. On or about October 17, 2001, the accused told the fat al Qaeda leader of his plans, and then traveled to Kabul. The accused also took his weapon and all his ammunition.

44. The accused arrived in Kabul and met a friend from LET, who told the accused he was headed to the front lines in Konduz. The accused asked to travel with his LET friend.

45. On or about November 9, 2001, the accused and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after the accused arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban, or other associated fighters, engaged in combat against Coalition forces. The accused spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, the accused saw bullets flying and Northern Alliance tanks coming over the trenches.

46. The accused spent two to three days walking back to Konduz while being chased and fired upon by the Northern Alliance.

47. The accused made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going to stay in Konduz in order to fight to the death. The accused, instead, decided to use his Australian passport to flee to Pakistan.

48. The accused then moved within Konduz to a *madafah*, an Arab safe house. The accused wrote a note for his LET associates that said not to come look for him because he was okay, and then ran away from the safe house. At this time the accused still had his weapon, and went to find a shopkeeper that he had met a few days earlier in the city market area. The shopkeeper took the accused to his home where he stayed for about three weeks. Later, the shopkeeper gave the accused some clothes and helped the accused sell his weapon so he could pay for a taxi to Pakistan.

49. In or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, the accused took a taxi and fled towards Pakistan. However, the accused was captured without any weapons by the Northern Alliance in Baghlan, Afghanistan.

50. The accused acknowledges that he has never been the victim of any illegal treatment at the hands of any personnel while in the custody or control of the United States. This acknowledgement includes the entire period after the accused was captured and transferred to U.S. custody in Afghanistan on or about 15 December 2001. The acknowledgment also includes the entire period for which the accused was detained by the United States at Guantanamo Bay, Cuba. The term "illegal treatment" means any treatment in violation or contravention of Common Article III of the Geneva Conventions, the Convention Against Torture, the Detainee Treatment Act, and Title 18 of the U.S. Code.

DAVID M. HICKS
Accused

29/3/07
DATE

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

29 MAR 07
DATE

Lieutenant Colonel, U.S. Marine Corps
Prosecutor

07 03 29
DATE

Prosecution Exhibit 1

APPELLATE EXHIBITS

There were no Convening Orders published in 2006

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MILITARY COMMISSION CONVENING ORDER
NUMBER 07-01 1 March 2007

Pursuant to the authority vested in the Secretary of Defense in accordance with the Military Commissions Act of 2006, 10 U.S.C. § 948h, and my appointment as Convening Authority for Military Commissions on February 6, 2007, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The military commission is convened with the following members:

MEMBERS

RANK	NAME	SVC	ASSIGNMENT
COL		USA	
Col.		USAF	
Col.		USAF	
Capt.		USN	
COL		USA	
Capt.		USN	
Capt.		USN	
Col.		USMC	
Lt.Col.		USAF	
MAJ		USA	

Susan J. Crawford
Convening Authority
for Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Reference Set (1)

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
DAVID MATTHEW HICKS

2. ALIASES OF ACCUSED:
a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood"

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0002

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER *(LAST, FIRST, MI)*	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs, II, Marvin, W.	O-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Kevin M. Chenail
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

O-5
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Signature

Blocks I through IV of this MC Form 458, including the continuation sheets for Block II, are duplicate originals, replacing misplaced originals. SDC 3-1-06

IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Kevin M. Chenail, LtCol, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1000 hours, on 6 Feb. '07, at the Office of the Convening Authority for Military Commissions, Arlington, VA.
Location

For the Convening Authority: Jennifer D. Young
Typed Name of Officer

CW3, USA
Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority Appointed 6 Feb. 2007	Arlington, VA	20070301

Referred for trial to the (non)capital military commission convened by military commission convening order 07-01 dated 1 March 2007.

subject to the following instructions[1]: See Continuation Sheet

By _____ X
Command, Order, or Direction

Hon. Susan J. Crawford
Typed Name and Grade of Officer

Convening Authority
Official Capacity of Officer Signing

Signature

10 U.S.C. Sec. 948h

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

Typed Name of Trial Counsel

Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

CONTINUATION SHEET – MC FORM 458 JAN 2007, Block VI Referral

In the case of UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a, "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

The following charge and specifications are referred to trial by military commission:

Specifications 1 and 2 of Charge I, as amended, and Charge I.

Other matters incorporated by reference in Block 4 of MC Form 458 pertaining to the accused, including those sections entitled "INTRODUCTION", "JURISDICTION", and "BACKGROUND" are in the nature of a bill of particulars and are not referred to trial.

The following charge and specification are dismissed and are not referred to trial:

The Specification of Charge II and Charge II.

This case is referred non-capital.

Date 3-1-07

Susan J. Crawford

Hon. Susan J. Crawford
Convening Authority
for Military Commissions

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS a/k/a "David Michael Hicks" a/k/a/ "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	**CHARGES:** Providing Material Support for Terrorism; and, Attempted Murder in Violation of the Law of War

INTRODUCTION

1. The accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this military commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and, the final determination of September 30, 2004 by the Combatant Status Review Tribunal (CSRT) that Hicks is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The charged conduct of the accused is triable by military commission.

BACKGROUND

4. Hicks was born on August 7, 1975 in Adelaide, Australia.

5. In or about May 1999, Hicks traveled to Tirana, Albania and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanian Muslims. Hicks completed basic military training at a KLA camp and engaged in hostile action before returning to Australia.

6. While in Australia, Hicks converted to Islam. In or about November 1999, he traveled to Pakistan where, in early 2000, he joined a terrorist organization known as Lashkar-e Tayyiba (LET), meaning "Army of the Righteous" or "Army of the Pure."

a. The LET is the armed wing of Markaz-ud-Daawa-wal-Irshad (MDI), (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.

b. The LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to occupy Indian-controlled Kashmir and violent opposition of Hindus, Jews, Americans, and other Westerners.

c. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

d. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and India, itself.

e. In 1998, Saeed called for holy war against the United States after LET members were killed by United States missile attacks against terrorist training facilities in Afghanistan.

f. On or about April 23, 2000, in a bulletin posted on the internet, LET claimed that it had recently killed Indian soldiers and destroyed an Indian government building, both located in Indian-controlled Kashmir.

g. On or about December 26, 2001, the United States designated LET a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act.

7. After joining LET, Hicks trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading and land navigation, and troop movement.

8. Following training at Mosqua Aqsa, Hicks, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir, where he engaged in hostile action against Indian forces.

9. In or about January 2001, Hicks, with assistance from LET, traveled to Afghanistan and attended al Qaeda training camps.

GENERAL ALLEGATIONS

10. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

11. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

12. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the

United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

13. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

14. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

15. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

16. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

17. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

18. In or about 2001, al Qaeda's media committee which created As Sahab ("The Clouds") Media Foundation which has orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for its declared war against the United States.

19. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

20. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

21. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

SKC 3-1-07

CHARGE I: VIOLATION OF SECTION AND TITLE OF CRIME IN ~~PART IV OF M.M.C.~~
SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

22. SPECIFICATION 1: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

23. That Paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 1 of Charge I.

24. That the material support or resources provided by the accused, included, but were not limited to, the following:

    a. That in or about January 2001, Hicks traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.

    b. That upon entering Afghanistan, Hicks traveled to Kandahar where he stayed at an al Qaeda guest house and met Richard Reid ("Abdul Jabal"), Feroz Abbasi ("Abu Abbas al-Britani"), and other associates or members of al Qaeda. While attending al Qaeda's training, Hicks would use the *kunya*, or alias, "Abu Muslim Austraili," among others.

    c. That Hicks then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, Hicks trained in weapons familiarization and firing, land mines, tactics, topography, field movements, basic explosives, and other areas.

    d. That in or about April 2001, Hicks returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence to al Qaeda operatives.

    e. That while Hicks was training at al Farouq, Usama bin Laden visited the camp on several occasions. During one visit, Hicks expressed to bin Laden his concern over the lack of english al Qaeda training material.

    f. That after Hicks completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and

individually interviewed certain attendees. Hicks was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel; and his willingness to go on a martyr mission. After this interview, Muhammed Atef recommended Hicks for attendance at al Qaeda's urban tactics training course at Tarnak Farm.

g. That in or about June 2001, Hicks traveled to Tarnak Farm and participated in this course. A mock city was located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

h. That in or about August 2001, Hicks participated in an advanced al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This course included practical application where Hicks and other student operatives conducted surveillance of various targets in Kabul, including the American and British Embassies. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting embassy windows and doors; documenting persons coming and going to the embassy; and, submitting reports to the al Qaeda instructor who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. During this training, Hicks personally collected intelligence on the American Embassy.

i. That during the surveillance course, Richard Reid ("Abdul Jabal") visited on two separate occasions. After the course, Hicks returned to Kandahar airport, where Abdul Jabal taught a class on the meaning of *jihad*. Hicks also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.

j. That on or about September 9, 2001, Hicks traveled to Pakistan to visit a friend. While at this friend's house, Hicks watched television footage of the September 11, 2001 attacks on the United States, and expressed his approval of the attacks.

k. That on or about September 12, 2001, Hicks returned to Afghanistan and, again, joined with al Qaeda. Hicks had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.

l. That upon arriving in Kandahar, Afghanistan, Hicks reported to Saif al Adel, then al Qaeda's deputy military commander and head of the security committee for al Qaeda's shura council, who was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces. Hicks was given a choice of three different locations (city, mountain, or airport), and he chose to join a group of al Qaeda fighters near the Kandahar Airport.

m. That Hicks traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, Hicks armed himself with six (6)

MJ

ammunition magazines, 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

n. That on or about October 7, 2001, when the Coalition Forces, Operation Enduring Freedom, bombing campaign began, Hicks had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.

o. That on or about October 10, 2001, after two nights of bombing, Hicks was reassigned and joined an armed group outside the airport where he guarded a tank. For about the next week Hicks guarded the tank, and every day received food, drink, and updates on what was happening from the al Qaeda leader in charge.

p. That Hicks heard fighting was heavy at Mazar-e Sharif, that Kabul would be next, and that western countries, including the United States, had joined with the Northern Alliance.

q. That Hicks implemented the tactics he had learned with al Qaeda and trained some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, Hicks decided to look for another opportunity to fight in Kabul.

r. That on or about October 17, 2001, Hicks told the al Qaeda leader in charge of his plans, and then traveled to Kabul. Hicks also took his weapon and all his ammunition.

s. That Hicks arrived in Kabul and met a friend from LET, who requested Hicks go to the front lines in Konduz with him, and Hicks agreed.

t. That on or about November 9, 2001, Hicks and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after Hicks arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban, or other associated fighters, including John Walker Lindh, engaged in combat against Coalition forces. Hicks spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, Hicks saw bullets flying and Northern Alliance tanks coming over the trenches.

u. That Hicks spent two to three days making his way back to Konduz while being chased and fired upon by the Northern Alliance.

v. That Hicks made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going back into Konduz in order to fight to the death. Hicks, instead, decided to use his Australian passport and flee to Pakistan.

WG

w. That Hicks then moved secretly within Konduz to a *madafah*, an Arab safe house. Hicks wrote the Arabs a letter that said not to come look for him because he was okay, and left the safe house. At this time Hicks still had his weapon, and moved again, secretly, to another house where he stayed for about three weeks. Later, a man who spoke some english helped Hicks sell his weapon so he could flee to Pakistan.

x. That in or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, Hicks took a taxi and fled towards Pakistan. However, Hicks was captured by the Northern Alliance in Baghlan, Afghanistan.

25. SPECIFICATION 2: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, provide material support or resources to be used in preparation for, or in carrying out, an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

26. That paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 2 of Charge I.

27. That paragraph 24 and its subparagraphs (a) through (x) of Specification 1 are realleged and incorporated by reference for Specification 2 of Charge I.

~~CHARGE II: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.~~
SECTION 950t ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

28. SPECIFICATION: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from on or about September 11, 2001, through in or about December 2001, attempt to commit murder in violation of the law of war, by directing small arms fire, explosives, or other means and methods, with the intent to kill divers persons of the United States, Northern Alliance, or other Coalition forces, while the accused was without combatant immunity as an unlawful enemy combatant who was part of, or supporting, al Qaeda, Taliban, or associated forces engaged in hostilities against the United States or its Coalition partners, and that the conduct of the accused took place in the context of and was associated with an armed conflict.

SJC
3-1-07

WO

From:
Sent: Tuesday, March 06, 2007 3:51 PM
To:

Cc:

Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks
Attachments: Biographical Summary.doc

has directed that I send the email below to the parties.

v/r,

Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From:
Sent: Tuesday, March 06, 2007 12:31
To: DoD OGC
Subject: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

Please forward this Email to the appropriate persons ICW the subject case.

All,

1. In my capacity as Chief Judge, Military Commissions Trial Judiciary, I have detailed myself as Military Judge in U.S. v. Hicks.

2. The addressees on this email have been identified as detailed trial or defense counsel, or civilian counsel. The Chief Prosecutor and Chief Defense Counsel shall immediately advise, by return email, that all such counsel are addressees on this email.

3. Civilian Defense Counsel participating in this case should provide a signed copy of the agreement addressed in RMC 502(d)(3)(E) to not later than 1600 EST on 12 March 2007.

4. All email traffic with the Military Judge will also be addressed to:

a. - all of the Office of Military Commissions Trial Judiciary.

b. All counsel, civilian and military, on the case.

c. The Chief Prosecutor and Chief Defense Counsel, along with the Chief Legal NCOs for the Prosecution and the Defense, and the paralegals assisting the counsel.

5. I have selected 20 March 2007 as the date for the arraignment IAW RMC 904 at Guantanamo Naval Base, Cuba. All counsel are directed to make all necessary arrangements to be present in the GTMO Courtroom for this session.

6. As authorized by RMC 804, I will be issuing Rules of Court for the Military Commissions as soon as they have been prepared. Until those Rules are issued, I will provide preliminary procedural and other instructions as appropriate. I will also provide a trial guide for use at the 20 March session.

7. Should either side wish to conduct any *voir dire* of the Military Judge, you must submit your questions to me by email not later than 1200 EST on 13 March 2007. A mini-biography for me is attached.

8. At the 20 March 2007 session, I will establish a full schedule for the litigation of this case. Prior to the session, counsel are encouraged and urged to discuss this matter and endeavor to agree upon a schedule that works as well as possible for both sides. Counsel must take into account, *inter alia,* the time constraints set forth in RMC 707 and appropriate phasing of motions (i.e.: discovery; witness production; law motions; evidentiary motions).

9. If either side believes they cannot comply with the schedule set forth above, the lead counsel - on behalf of all counsel for either side - will immediately request a continuance setting forth a requested date and stating the reasons why such a continuance is necessary. This request shall be contained in the body of an email and must be filed not later than 1700 hours, EST, 9 March.

V/R,

Colonel, U.S. Marine Corps

<<...>>

Colonel, U.S. Marine Corps

Born December 5, 1958, in Paterson, New Jersey.

Education. Bachelor of Science, United States Naval Academy, 1980.

Juris Doctor, The Delaware Law School, Widener University, 1987.

Master of Law (Military Law), The Judge Advocate General's School, U.S. Army, 1994.

Master of Arts (National Security and Strategic Studies), United States Naval War College, 2002.

Military Experience. Initially designated a Combat Engineer Officer. Served as platoon and detachment commander and company executive officer in 7th Engineer Support Battalion, 1st Force Service Support Group. Served as company executive officer and company commander in 3rd Combat Engineer Battalion, 3d Marine Division. Designated as a Judge Advocate in 1987.

Awards and Decorations. Legion of Merit, Meritorious Service Medal with 3 stars, Joint Service Commendation Medal, Navy-Marine Corps Commendation Medal.

Legal Experience. Trial Counsel, Senior Defense Counsel, Deputy Branch Head (Military Law Branch, Headquarter Marine Corps), Executive Secretary and USMC Working Group Member for Joint Service Committee on Military Justice, Faculty Member (Criminal Law Department, The Judge Advocate General's School, U.S. Army), Military Judge, Law Center Director, Staff Judge Advocate.

Judicial Experience. Military Judge 1998-2001 and July 2005-Present.

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

March 1, 2007

Eastern Judicial Circuit
Navy-Marine Corps Trial Judiciary

Colonel

In accordance with Rule for Military Commissions 503(b)(2) of the Manual for Military Commissions, you are hereby appointed as the Chief Judge of the Military Commissions Trial Judiciary. You were selected from a pool of certified military judges nominated for that purpose by The Judge Advocates General of each of the military departments. R.M.C. 503(b)(1). The Military Commissions Trial Judiciary shall consist of the Chief Trial Judge and such military judges as have been nominated under R.M.C. 503(b)(1) to comprise the pool from which military judges will be detailed to military commissions. R.M.C. 503(b)(3).

Susan J. Crawford

Hon. Susan J. Crawford
Convening Authority
for Military Commissions

Printed on Recycled Paper

From: , DoD OGC
Sent: Friday, March 09, 2007 12:35 PM
To:

Cc:

Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

COL has directed that I send the email below to the parties.

(MAJ Mori s last email has been copied and pasted below in order to maintain a single email thread on this issue.)

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Friday, March 09, 2007 12:23
To: LTC, DoD OGC
Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

Please forward this email to all appropriate persons.

All,

1. The defense has requested a continuance of the established arraignment date from 20 March until 27 March. They further advised that a continuance until 26 March satisfies their concerns.

2. The request is premised on the accused's apparent wish that a Mr. Dratel be present at the hearing in the capacity of civilian defense counsel.

3. I find that granting this request serves the interests of justice and that this continuance does not interfere with the best interest of either the public or the accused in providing a prompt trial for the accused as contemplated in R.M.C. 707(b)(4)(E).

4. I further find that for the purposes of R.M.C. 707, the defense is responsible for the delay occasioned by the granting of this continuance.

5. The defense request for a continuance of the arraignment date from 20 March to 26 March 2007 is granted. All counsel are directed to make all necessary arrangements to be

present in the GTMO Courtroom at 1300 on 26 March 2007 for this session.

6. Counsel are also reminded that should either side wish to conduct any voir dire of the Military Judge, you must submit your questions to me by email not later than 1200 EST on 13 March 2007.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From: Mori, Michael, MAJ, DoD OGC
Sent: Friday, March 09, 2007 11:26
To:

Subject: RE: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

The 26th will be fine. Sorry for the delay, I had to confirm Mr. Dratel could get a flight into GTMO on the 25th. He got the last seat on Lynx air arriving late afternoon.

I would request a start time "on the record" at 1300. This will allow Mr. Dratel some prep time, meeting with Mr. Hicks and time for any RMC 802 conferences, if needed.

I would request that Mr. Hicks be available at the commission building by 0830.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From:
Sent: Friday, March 09, 2007 9:49
To:

-- sir, the prosecution is prepared for the arraignment on 20 Mar. The prosecution, however, does not oppose the defense continuance request provided that, if granted: (1) it is excludable delay in accordance with RMC 707(b)(4); and, (2) the rescheduled date is the 26th, vice 27th, due to cited travel availability. Thank you.

V/r--

LtCol, USMC
Prosecutor, Office of Military Commissions

-----Original Message-----
From: DoD OGC
Sent: Friday, March 09, 2007 08:28
To:

Subject: RE: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

MAJ Mori,

has directed me to request further information regarding the pending defense continuance request. We are currently awaiting a response from the prosecution. The defense continuance request asked that the hearing be moved to 27 MAR. In the previous email regarding this matter, you noted that 26 or 27 MAR would be acceptable. Due to the logistics of travel to and from GTMO, 26 MAR would be preferable. (There is a regularly scheduled flight from GTMO on 27 March that could handle much of the exit requirements). Would a continuance to 26 March adequately address the defense concerns?

Thank you.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From: Mori, Michael, MAJ, DoD OGC
Sent: Thursday, March 08, 2007 19:08
To:

Subject: RE: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

In response to your e-mail, I request a continuance of the arraignment until 27 March 2007. As previously mentioned, Mr. Dratel has U.S. federal court commitments during the week of 19 March 2007. The continuance will enable Mr. Hicks to exercise his right to have civilian defense counsel by permitting Mr. Dratel attendance at the arraignment on 27 March 2007.
v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: DoD OGC
Sent: Thursday, March 08, 2007 16:10
To:

Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Thursday, March 08, 2007 16:04
To: DoD OGC
Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

Please forward this email to Maj Mori and all other appropriate persons.

Maj Mori,

1. Thank you for clarifying your earlier message.

2. Since you are not requesting a continuance, the arraignment date remains in place for 20 March 2007.

3. As previously noted, I will provide preliminary procedural instructions for counsel in the near future. These instructions will address the appearance of civilian counsel issue.

4. Also as previously noted, at the 20 March 2007 session, I will establish a full schedule for the litigation of this case. I again recommend that prior to the session, the government and the defense discuss this matter and endeavor to agree upon a schedule that works as well as possible for both sides.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From:
Sent: Thursday, March 08, 2007 14:41
To:

Subject: RE: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

The defense is not requesting a continuance. Perhaps it would be helpful to review how we got to where we are now. On 2 March, of the Office of Military Commissions Trial Judiciary asked Col about counsel availability for the weeks of 19 and 26 March. The same day, Col informed that the detailed counsel were to be TAD the week of 19 March, in part to interview witnesses and investigate the facts of the case. On 6 March, it was announced that the arraignment had been scheduled for 20 March. Detailed defense counsel cancelled their TAD to attend the 20 March arraignment. On 8 March, the defense informed Your Honor that civilian defense counsel could not attend the scheduled arraignment due to previously scheduled federal court appearances in three different cases.

It is Mr. Hicks' intention to invoke his right to civilian defense counsel at the 20 March hearing. Mr. Hicks intends to appoint Mr. Dratel as lead counsel. The defense is not

requesting a continuance. Rather, detailed defense counsel is simply informing Your Honor that the civilian counsel Mr.
Hicks plans to request cannot attend the 20 March hearing. Should the arraignment proceed on 20 March, detailed counsel will be there.
Alternatively, should Your Honor wish to begin the commission on a date when civilian defense counsel can be present so that more can be accomplished at the first hearing, I have provided dates when civilian defense counsel can attend, assuming the legal vacuum addressed below has been filled.

It is unclear why this case is proceeding before the military commission process has been completely set up. The RMC 502(d)(3)(E) issue raised by myself and Col Sullivan, which has so far gone unaddressed, highlights the legal difficulties that arise when a case begins before the implementing regulations are adopted. Under existing commission regulations, it is legally impossible for a civilian defense counsel to enter a case because the Secretary of Defense has not yet issued the form that RMC 502(d)(3)(E) requires. The government is responsible for the current legal posture of the case in which charges are proceeding against David Hicks despite the absence of necessary implementing regulations.

V/R
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: DoD OGC
Sent: Thursday, March 08, 2007 12:23
To:

Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor

Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Thursday, March 08, 2007 12:17
To:
Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

Please forward this email to Maj Mori and all other appropriate persons.

Maj Mori,

1. I established a 20 March 2007 arraignment date in my email of 6 March 2007.

2. Are you requesting a continuance from 20 March to 26 March?

3. For the Prosecution: If Maj Mori clarifies that the Defense is requesting a continuance in this matter, please respond ASAP whether the Government opposes the requested continuance.

4. The attachment contains the appointing letter from the Convening Authority.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From:
Sent: Thursday, March 08, 2007 10:53
To:

Subject: RE: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

I request the arraignment date be set for 26 or 27 March. Your office was informed by Col Sullivan that Mr. Hicks detailed counsel would be TAD until 23 March. As a result of your e-mail, we are turning off our TAD. Unfortunately, Mr. Dratel, Hicks' civilian counsel, has several federal court commitments set for 19, 20 and 22 March in three different federal terrorism cases. The hearing on the 22nd is being held in Dallas, Texas and Mr. Dratel must travel there 21 March. Mr. Dratel is available for an arraignment in GTMO on 26 and 27 March.

In your e-mail you reference an agreement addressed in RMC 502(d)(3)(E) which needs to be signed by civilian counsel. I do not believe this agreement exists yet. If your office has it, could you please send it to me and I will get it to Mr. Dratel ASAP.

Would you also be able to provide a copy of any document which was created to appoint you as the Chief Military Judge for Military Commissions.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil <mailto:morim@dodgc.osd.mil>

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From:
Sent: Tuesday, March 06, 2007 15:51
To:

Subject: FW: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From:
Sent: Tuesday, March 06, 2007 12:31
To: DoD OGC
Subject: Detail of Military Judge, and Scheduling of First Session, United States v. Hicks

Please forward this Email to the appropriate persons ICW the subject case.

All,

1. In my capacity as Chief Judge, Military Commissions Trial Judiciary, I have detailed myself as Military Judge in U.S. v. Hicks.

2. The addressees on this email have been identified as detailed trial or defense counsel, or civilian counsel. The Chief Prosecutor and Chief Defense Counsel shall immediately advise, by return email, that all such counsel are addressees on this email.

3. Civilian Defense Counsel participating in this case should provide a signed copy of the agreement addressed in RMC 502(d)(3)(E) to not later than 1600 EST on 12 March 2007.

4. All email traffic with the Military Judge will also be addressed to:

a. - all of the Office of Military Commissions Trial Judiciary.

b. All counsel, civilian and military, on the case.

c. The Chief Prosecutor and Chief Defense Counsel, along with the Chief Legal NCOs for the Prosecution and the Defense, and the paralegals assisting the counsel.

5. I have selected 20 March 2007 as the date for the arraignment IAW RMC 904 at Guantanamo Naval Base, Cuba. All counsel are directed to make all necessary arrangements to be present in the GTMO Courtroom for this session.

6. As authorized by RMC 804, I will be issuing Rules of Court for the Military Commissions as soon as they have been prepared. Until those Rules are issued, I will provide preliminary procedural and other instructions as appropriate. I will also provide a trial guide for use at the 20 March session.

7. Should either side wish to conduct any voir dire of the Military Judge, you must submit your questions to me by email not later than 1200 EST on 13 March 2007. A mini-biography for me is attached.

8. At the 20 March 2007 session, I will establish a full schedule for the litigation of this case. Prior to the session, counsel are encouraged and urged to discuss this matter and endeavor to agree upon a schedule that works as well as possible for both sides. Counsel must take into account, inter alia, the time constraints set forth in RMC 707 and appropriate phasing of motions (i.e.: discovery; witness production; law motions; evidentiary motions).

9. If either side believes they cannot comply with the schedule set forth above, the lead counsel - on behalf of all counsel for either side - will immediately request a continuance setting forth a requested date and stating the reasons why such a continuance is necessary. This request shall be contained in the body of an email and must be filed not later than 1700 hours, EST, 9 March.

V/R,

Colonel, U.S. Marine Corps

<<...>>

Colonel, U.S. Marine Corps

Born December 5, 1958, in Paterson, New Jersey.

Education. Bachelor of Science, United States Naval Academy, 1980.

Juris Doctor, The Delaware Law School, Widener University, 1987.

Master of Law (Military Law), The Judge Advocate General's School, U.S. Army, 1994.

Master of Arts (National Security and Strategic Studies), United States Naval War College, 2002.

Military Experience. Initially designated a Combat Engineer Officer. Served as platoon and detachment commander and company executive officer in 7th Engineer Support Battalion, 1st Force Service Support Group. Served as company executive officer and company commander in 3rd Combat Engineer Battalion, 3d Marine Division. Designated as a Judge Advocate in 1987.

Awards and Decorations. Legion of Merit, Meritorious Service Medal with 3 stars, Joint Service Commendation Medal, Navy-Marine Corps Commendation Medal.

Legal Experience. Trial Counsel, Senior Defense Counsel, Deputy Branch Head (Military Law Branch, Headquarter Marine Corps), Executive Secretary and USMC Working Group Member for Joint Service Committee on Military Justice, Faculty Member (Criminal Law Department, The Judge Advocate General's School, U.S. Army), Military Judge, Law Center Director, Staff Judge Advocate.

Judicial Experience. Military Judge 1998-2001 and July 2005-Present.

DoD OGC

From: DoD OGC
Sent: Friday, March 09, 2007 3:38 PM
To:

Cc:

Subject: FW: Preliminary Procedural Instructions: U.S. v. Hicks
Attachments: MJ Procedure for Counsel (Hicks).pdf

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From:
Sent: Friday, March 09, 2007 15:14
To: DoD OGC
Subject: Preliminary Procedural Instructions: U.S. v. Hicks

Please send the attached Preliminary Procedural Instructions for U.S. v Hicks to the appropriate persons.

V/R,

Colonel, U.S. Marine Corps

UNITED STATES OF AMERICA	}	**Preliminary Procedural Instructions**
v	}	
DAVID MATTHEW HICKS a/k/a "David Michael Hicks a/k/a "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	}	**9 March 2007**

Part I - Introduction

1. I have detailed myself as military judge in the above-styled case in my capacity as Chief Judge, Military Commissions Trial Judiciary.

2. Rules of Court (see R.M.C. 108 and 801) have not yet been promulgated. This document shall serve to establish procedures for the trial of the above styled case until such Rules of Court are published. The military judge may make exceptions to the below procedures as are necessary in the interests of justice and, when and if such exceptions are made, the parties shall be so advised.

3. This document shall be read to be consistent with the Military Commissions Act of 2006 (M.C.A.) and the Manual for Military Commissions 2007 (M.M.C.), and it will not be interpreted or applied so as to contravene the M.C.A. or the M.M.C. In the event of any actual or apparent inconsistency, the M.C.A. and the M.M.C. shall control.

4. When used in these instructions, the "OMCTJ staff" shall consist of the Senior Attorney Advisor to the Military Commissions Trial Judiciary, any other Attorney Advisor to the Military Commissions Trial Judiciary, and the NCOIC of the Military Commissions Trial Judiciary.

Part II – Communications, Contact, and Problem Solving

1. This part establishes general procedures for communications among counsel, the military judges and OMCTJ staff. These procedures are designed to avoid *ex parte* communications, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications. *Ex parte* communication by a party with the military judge or *vice versa* concerning the case is prohibited except as authorized by the M.C.A. or the M.M.C. (e.g. R.M.C. 701-703 and Mil. Comm. R. Evid. 505).

2. The preferred, and most reliable, method of communication among the military judges and counsel is email with CCs to all opposing counsel, clerks and paralegals, the entire OMCTJ staff, and the Chief Prosecutor/Chief Defense Counsel and their chief legal clerks. The following email conventions will be followed. Failure to comply with these rules will result in the communication being returned for compliance with these rules.

a. Do not send e-mail directly to the military judge. The military judge should be listed as CC only. The OMCTJ staff is the support staff for the military judges and is the clearing house through which their communications are routed. Communications sent directly to military judges will not be acted upon by the military judge, but will be forwarded to the OMCTJ staff for appropriate action. Communications will not be deemed to be received by a military judge unless and until the OMCTJ staff has been included on the e-mail.

b. All e-mail to the OMCTJ staff for action by a military judge shall be sent to all members of the OMCTJ staff. The email will also be CC'd to counsel for both sides, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Clerks for the Prosecution and Defense, and the paralegals assigned to the case.

c. Do not send classified information or Protected Information in the body of an email or as an attachment.

d. Keep emails to a single subject, and use a simple yet descriptive subject line. If the email concerns an item that has a filings designation (see Part IV *infra*), the filing designation shall be included in the subject line.

e. Identify, in the body of the email, each attachment being sent.

f. Every paragraph and sub-paragraph of any email to the military judge or OMCTJ staff that contains more than one paragraph or sub-paragraph will be numbered or lettered to provide for easy reference. A logical numbering or lettering scheme shall be used, such as: 12 a (1) (a) (i) (ii). Roman numerals will not be used.

g. All attachments to a filing will be sent in the same email as the document to which it is an attachment. If such email would exceed the capabilities of the LAN, permission for an exception to send an attachment by separate email should be requested. (This practice will be used judiciously.)

h. Text attachments will be, in order of preference, 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 OMCTJ staff if you need to send other file formats.

i. Save all emails you send for your record copy of the communication.

j. Avoid archiving or compressing files (such as WinZip). Before sending an archived or compressed file, get permission from the OMCTJ staff.

k. If the military judge will need to know classified information to resolve the matter, advise him/her of that fact in the email and the location of the materials that he/she will need to review (if such facts or locations are not classified or Protected).

l. Given the potential number of counsel and 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 and all CC's of the failure to include the person.

3. Because of potential changes to the composition of trial teams, the military judge or OMCTJ staff may elect to send an email to the Chief Defense Counsel or Prosecutor, and/or their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. The OMCTJ staff and the military judge will be copied on the email that is forwarded to those to whom distribution was directed in compliance with these instructions.

4. When a telephonic conference is necessary, the military judge will designate the person to arrange the conference call. Conference calls will be IAW M.M.C., R.M.C. 802.

5. When authorized by these instructions, or directed by the military judge, any member of the OMCTF staff may sign for and issue directions, instructions, requests, or rulings to the parties and others "For the Military Judge" or "By Direction of the Military Judge." Signatures "for" or "by direction of" carry the same force and effect as if signed by, or personally issued by, the military judge

Part III – Motion Practice

1. Definitions.

a. A "motion" is an application to the military judge for particular relief or for the military judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C. 905, 906, and 907.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, special request for 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.

2. How motions are made. Motions shall be made in writing in accordance with these instructions unless the military judge permits or directs otherwise. Should a matter come to the attention of a party at such a time or in a situation in which they have insufficient time to file a

written motion, they shall immediately notify the military judge, all opposing counsel, and the OMCTJ staff of the nature of the motion, the nature of the relief sought, and the reasons why the motion cannot be made in writing. When done by email, follow the instructions in Part II above.

3. Special requests for relief. A special request for relief relieves counsel of the specialized format for filings (motions, reply, and response) generally. A special request, and the responses and replies thereto, can be in the body of an email.

a. Ordinarily, requests for relief will be in the form of a motion using the format established herein. Counsel may at times have requests for relief that do not involve extensive facts or citations to authority. Common special requests for relief could address, for example, requests to: supplement a filing, for an extension to submit a filing, for an extension of a timing requirement, to adjust the "received" date of a filing, to append or attach documents to a previously made filing, or like matters that do not involve contested matters of law or fact.

c. The military judge, or on behalf of the military judge, an OMCTJ Attorney Advisor may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the military judge .

d. The content of a special request for relief will contain the name 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.

4. Sending and receiving filings.

a. 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 (undeliverable email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received.

b. A filing is "received" by the opposing party when it is sent to the proper parties with the following exceptions:

(1). The recipient was OCONUS when the email was sent, in which case the filing is received on the first duty day following return from OCONUS.

(2). The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3). Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Chief Deputies on behalf of their counsel, the military judge 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.

5. Timing for filing motions, responses, and replies.

a. Motions.

(1). Timing. Motions addressed in R.M.C. 905(b)(1) – (5) must be raised and made by the time provided in R.M.C. 905 (b) unless the military judge directs otherwise. As to other motions, the military judge will ordinarily establish a deadline for the filing of motions by way of an Order.

(2). Format of a motion: *See* Enclosure 1.

(3). Waiver. Motions which are not made in a timely fashion shall be waived. Requests for exceptions to waiver must be addressed to the military judge with motion-specific reasons for failure to make the motion in a timely fashion.

b. Responses.

(1). Timing. Unless the military judge provides otherwise, a response is due within 7 calendar days after a motion is received.

(2). Format of a response: *See* Enclosure 2.

c. Replies.

(1). Counsel may submit a reply to a response, however Counsel 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 that 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.

(2). Timing: Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

(3). Format for a reply: *See* Enclosure 3.

6. Burdens of proof and persuasion in motion practice.

a. As a general rule, the burden of proof (production of evidence and preponderance of evidence), and the burden of persuasion are on the moving party. (*See* R.M.C. 905(c)). 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 in the filing:

(1). A statement of the burden of proof (production of evidence) in the particular motion,

(2). A statement of the burden of persuasion in the particular motion,

(3). The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party, and

(4). The legal argument in support of the statement.

b. A response must address those matters raised by the moving party.

7. Rulings on motions.

a. The military judge shall make final rulings on all motions submitted to him/her based upon the written filings of the parties submitted in accordance with this document, and the facts and law as determined by the military judge, unless:

(1). Material facts necessary to resolution of the motion are in dispute and require the taking of evidence; or

(2). 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 military judge from ruling on the filings alone.

b. The military judge, in his/her sole discretion, determines that oral argument is necessary to provide a full and fair trial.

c. *See also* R.M.C. 905(e).

Part IV – Marking and Handling Documents

1. The OMCTJ staff may assign a unique filing designation to each motion, filing, order, or other document as it is presented to the military judge or issued by the military judge. (Counsel should not endeavor to assign filing designations.) The designations are:

a. First letter designations:
- First Letter **D** for motions filed by the defense.
- First letter **P** for motions filed by the prosecution.
- First letter **M** for matters originating with the military judge (such as a show cause, protective, or docketing order).

b. Numbers: After the letter designation shall be an Arabic number.

c. Suffix: After the number may be a suffix.
- The original filing, such as a motion, shall have no suffix.

- Example: D-1 is the first motion filed by the defense.

• The next filing on the same topic shall be an A.

- Example: D-1-A is a response to the motion D-1. While the A suffix is usually a response to a motion, it need not be, as when a supplement is filed after the motion and before the reply.

2. The OMCTJ staff will preserve the communications and filings of the parties marking them as Appellate Exhibits (AE), as directed by the military judge, and keeping an index of Appellate Exhibits. Copies of all Appellate Exhibits (except in the case of material requiring special handling) will be made available to counsel for both sides and in the courtroom during any session. Once a session has been held, the original copy of the Appellate Exhibits will be provided to the Chief Clerk for Military Commissions for safekeeping and for being made available at the next session.

3. Once marked and approved by the military judge, electronic copies of the Appellate Exhibits will be provided to the Chief Clerk for Military Commissions. Neither the military judge nor the OMCTJ staff will perform any security or other review for classified, Privacy Act, or Sensitive But Unclassified information. As a general rule, the military judge takes no position on whether an Appellate Exhibit may be publicly released. However, if the military judge determines that an Appellate Exhibit should not be released in the interests of ensuring the parties receive a fair trial or for other reasons, the military judge will direct that a particular exhibit be sealed or not released to the public for a certain period. The military judge's decision to seal or not authorize the release of an Appellate Exhibit, or a portion thereof, will be communicated to counsel for both sides.

Part V - Appearance, Absence, and Excusal, Relief or Withdrawal of Counsel

1. **Detailing and appearance.**

a. Military Counsel.

(1) Detailed Counsel (DC) - Military counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by a military commission.

(2) Upon being detailed to a case, counsel will provide copies of the detailing documents to the military judge and OCMTJ staff and, if known, to opposing counsel.

(3) Pursuant to R.M.C. 503, and these preliminary procedural instructions, Detailed Defense Counsel (DDC) represents the interests of an accused upon detailing.

(4) If any DDC believes that his/her participation in the Military Commissions or representation of an accused is or may be prohibited because of ethical or other considerations, he/she shall follow the procedures set forth in R.M.C. 109.

(5) Until the DDC is relieved or excused from his/her duty of representation by competent Authority, the DDC will continue to represent the interests of an accused.

(6) Under R.M.C.109 and 506, it is the responsibility of the Chief Defense Counsel (CDC) to provide representation for an accused at all times by detailing a qualified defense counsel.

b. Civilian Counsel. A Civilian Counsel (CC) will be deemed to have entered an appearance with the commission when:

(1) The CC submits written notice of representation as counsel of record for the accused to the military judge via the CDC using the format found at Enclosure (4); and

(2) The CC has signed and submitted a statement agreeing to comply with the requirements of 10 U.S.C. §949c(b)(3)(E). *(Note: Until such time as the Secretary of Defense prescribes an agreement pursuant to 10 U.S.C. 949c(b)(3)(E), civilian counsel shall satisfy the requirement addressed in R.M.C 502(d)(3)(E) through submission of the form at Enclosure 4, which contains the required language of the M.C.A.)*

c. Other Assistants to Counsel. If a party has R.M.C. 506(d) assistant(s) who will be present at a commission session or trial, and the party desires the assistant's presence at counsel table, the party will notify the military judge, the OMCTJ staff, and opposing counsel of the identity of the assistant and the capacity in which the assistant will serve.

2. **Presence of counsel at commission sessions.** The following rules govern the presence of counsel at Commission sessions.

a. As a general rule, all DC and CC who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. Permitted Absence - Permission given by the military judge to a counsel, who has entered an appearance, to be absent from a session of the proceedings.

c. The military judge may authorize counsel's absence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking authorization for absence from a session will request permission from the military judge and provide written evidence of the waiver by the client.

d. If a counsel's presence is waived by the client and such absence has been authorized by the military judge, that absence will not limit the business that is scheduled to be accomplished at the session for which a counsel has been authorized to be absent. For example, if the Commission is scheduled to hear motions, the fact that a client has waived the appearance of a counsel would not allow a party to defer or avoid litigating a motion because the said counsel is not present. Similarly, consideration of matters that arise during a session in which a counsel's presence has been waived will not be subject to deferral simply because of the absence of the counsel whose presence has been waived.

e. The notice of waiver to the military judge will contain the following information:

(1) In the case of the defense, a signed waiver by the accused must be provided to the military judge in advance of the scheduled session. The waiver must indicate that:

(a) The accused is expressly waiving the presence of a named counsel for the scheduled Commission session and be signed by the accused, DDC, and the lead defense counsel, if other than the DDC. The waiver will be in English or, if the original is in a language other than English, translated into English.

(b) The accused and lead counsel for the defense and the counsel seeking permission to be absent are aware that absence of the counsel does not permit delay or deferral of business of the Commission because said counsel is absent, and that another counsel for the defense who will be present can fully address and litigate, if necessary, any business of the Commission.

(c) The accused understands that another of his defense counsel is responsible for ensuring all business of the Commission can be conducted at the session.

(d) The request is not for the purposes of seeking delay and will not, in fact, delay Commission proceedings.

(e) The format contained at Enclosure (5), Waiver of Counsel, may be used by the defense.

(2) In the case of the prosecution, the waiver must be approved by the Chief Prosecutor or lead prosecutor. The absence of a prosecutor for a particular session will not limit the business to be conducted at that session whether anticipated or not.

f. In lieu of the signed waiver directed by paragraphs 2.c and 2.d above, the client may, at a session at which the civilian counsel is present, state that the civilian counsel's presence is waived for all subsequent sessions at which the civilian counsel does not appear. The client must state that he understands those matters addressed in paragraph 2.e(1)(b) above and specifically that he understands that other matters may be handled at such sessions which would normally have been handled by the civilian counsel and that he waives such advice and assistance.

g. In cases in which there has been an on-the-record or written waiver of the future presence of civilian counsel at sessions, the civilian counsel will not be required to be present at all sessions.

h. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the civilian counsel, the civilian counsel will be required to be present at all subsequent trial terms of the Commission. Alternatively, the civilian counsel may request to withdraw from the case completely, and the request will be granted at the discretion of the

military judge. Any such revocation of waiver by the accused during a given trial term will not require the civilian counsel's presence during the trial term at which the revocation of waiver was made.

3. **Excusal, relief or withdrawal of counsel.**

a. Excusal/Relief/Withdrawal - The termination of all representational responsibility of a detailed counsel or a qualified civilian counsel after entering an appearance.

b. Detailed Counsel: *See* R.M.C. 505(d) and 506(b)

c. *See* R.M.C. 506(b).

Colonel, U.S. Marine Corps
Military Judge

5 Enclosures

Enclosure 1 – Format for a Motion

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**Defense Motion** to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

*NOTE: The following will be included in **separately numbered paragraphs**. Use Arabic numbers.*

1. A statement that the motion is being filed within the time frames and other established guidance or direction of the military judge.

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.

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.

7. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

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. Stating the evidence needed is not a discovery request or a request for access to evidence.

9. Additional information not required to be set forth as above.

10. A list of attachments.

Enclosure 2 - Format for a Response

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by OMCTJ staff)* **Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other established guidance or direction of the military judge.

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 – Optional. This paragraph is not required even if the motion had an overview.

4. Those facts cited in the motion that 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. The agreed upon facts 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 factual assertions 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.

7. (May be required): Address issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.

8. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

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. Stating the evidence needed is not a discovery request or a request for access to evidence.

10. Additional information not required to be set forth as above.

11. A list of attachments.

Enclosure 3 - Format for a Reply

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by OMCTJ staff)* **Defense Reply** to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other established guidance or direction of the military judge.

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.

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. Stating the evidence needed is not a discovery request or a request for access to evidence.

5. Additional information not required to be set forth as above.

6. A list of any additional attachments.

Enclosure 4 – Notice of Appearance

UNITED STATES OF AMERICA v. NAME	)))))))))	CIVILIAN DEFENSE COUNSEL NOTICE OF APPEARANCE AND AGREEMENT (DATE)

1. Pursuant to procedures of court/instruction for counsel, I, ATTORNEY'S FULL NAME, hereby provide notice to the military judge of my appearance on behalf of CLIENT'S FULL NAME. My office address, phone numbers, and e-mail address are: ADDRESS, VOICE AND FAX PHONE NUMBERS, & E-MAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: LIST BAR ADMISSIONS.

2. I understand and agree that I must comply with all the applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings. I further agree to protect any classified information received during the course of the representation of the accused in accordance with all applicable law governing the protection of classified information, and shall not divulge such information to any person not authorized to receive it.

_____
COUNSEL NAME

Enclosure 5 – Waiver of Presence of Counsel

UNITED STATES OF AMERICA	)	WAIVER OF PRESENSE OF COUNSEL
v.	)	
NAME	)	(DATE)

1. I, ACCUSED'S FULL NAME, hereby provide notice to the military judge that I waive the presence of FULL NAME OF ATTORNEY, my defense counsel for the Commission session scheduled for DATE. By my signature below, I certify that:

a. I have fully discussed this waiver with my defense counsel, NAME OF COUNSEL WITH WHOM DISCUSSED, and he/she has fully advised me of, and I understand my right to, have my defense counsel present for Commission sessions. I have also been advised and understand that the absence of NAME OF ABSENT ATTORNEY will not delay or defer the business of the Commission, whether previously scheduled or arising during the Commission session. I further understand and agree that NAME OF COUNSEL THAT WILL BE PRESENT AT THE SESSION is/are competent and fully capable of representing me and litigating all matters that are scheduled for or may come up at the Commission session. I further certify that this waiver is not made in an attempt to delay the proceedings and in fact will not delay the proceedings.

b. I am voluntarily executing this waiver of counsel after being fully advised of my right to counsel and discussing that right with my defense counsel. No one has threatened me or in anyway forced me to execute this waiver and I believe it is in my best interest to execute it.

_____
ACCUSED

I/We, NAME OF DETAILED DEFENSE COUNSEL & LEAD DEFENSE COUNSEL (if other than DDC), by my/our signature below, certify to the military judge that:

1. I/we have fully discussed the substance of this waiver with the accused, NAME OF ACCUSED, and he fully understands its content and impact.

2. This waiver will not in anyway delay or inhibit the business of the Commission, whether scheduled or that may arise at the next session, and this waiver is not offered to delay or defer the business of the Commission.

3. The Detailed Defense Counsel, NAME OF DDC TO BE PRESENT, is fully qualified and competent to litigate all matters that should arise at the scheduled Commission session.

4. I believe it is in the best interest of the accused that he execute this waiver.

_____ _____
Detailed Defense Counsel/Date Lead Defense Counsel/Date

DoD OGC

From: DoD OGC
Sent: Tuesday, March 13, 2007 5:20 PM
To:

Cc:
Subject: RE: U.S. V. HICKS - MILITARY JUDGE VOIR DIRE - PROSECUTION (SUBMISSION TIME)

Your voir dire submission was received by the OMCTJ staff at 1158, 13 March 2007. It was received prior to the time established in the notice and detailing email. There was an error in the email clock system, which has been resolved.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: DoD OGC
Sent: Tuesday, March 13, 2007 12:00
To:

Subject: RE: U.S. V. HICKS - MILITARY JUDGE VOIR DIRE - PROSECUTION (SUBMISSION TIME)

-- sir:

1. The Prosecution requests that it be noted Prosecution submitted its voir dire o/a 1154 EDT.

2. For some reason our (OCP) e-mail clocks are showing an hour later, and we are working to correct that problem.

V/r--

LtCol, USMC

AE 8 (Hicks)
Page 1 of 2

Prosecutor, Office of Military Commissions

From: DoD OGC
Sent: Tuesday, March 13, 2007 12:54
To:

Subject: U.S. V. HICKS - MILITARY JUDGE VOIR DIRE - PROSECUTION

- sir:

1. Attached is the Prosecution voir dire of 13 Mar 07.

2. Also attached is the Prosecution detailing memorandum of 28 Feb 07.

V/r--

LtCol, USMC
Prosecutor, Office of Military Commissions

From: LTC, DoD OGC
Sent: Wednesday, March 14, 2007 5:56 PM
To:

Cc:

Subject: FW: U.S. v. Hicks - Prosecution Special Request for Relief to Permit the Absence of LT Trivett from the Arraignment Session
Signed By: mike.chappell@us.army.mil

Attachments: Hicks - Pros - Detailing Memo - 070228.pdf

Hicks - Pros - Detailing Memo ...

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Wednesday, March 14, 2007 16:43
To: LTC, DoD OGC
Subject: FW: U.S. v. Hicks - Prosecution Special Request for Relief to Permit the Absence of from the Arraignment Session

Please forward my response to the counsel in this case.

1. is excused from the scheduled hearing on 26 March 2007.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From: LtCol, DoD OGC
Sent: Wednesday, March 14, 2007 13:55
To:

Subject: U.S. v. Hicks - Prosecution Special Request for Relief to Permit the Absence of from the Arraignment Session

-- sir:

1. In accordance with your Honor's Preliminary Procedural Instructions of 9 Mar 07, particularly Part III, paragraph 3, and Part V, paragraph 2, the Prosecution submits this special request for relief to permit the absence of from the arraignment session; scheduled for 26 Mar 07.

2. The basis for this request is 's additional duties within the Office of the Chief Prosecutor (OCP), to include attending previously scheduled meetings and concluding weeks worth of coordination with representatives of multiple government agencies.

3. I note that the cited reference appears to technically pertain to defense (military and civilian) counsel, and that pursuant to past procedural rules the Chief Prosecutor had been authorized to temporarily excuse a member of the prosecution provided we had a counsel of record present. Notwithstanding, in light of the Rules of Court pending release, and the necessary travel and other logistics being arranged for counsel -- I am requesting your Honor permit the absence of .

4. If approved, the prosecution would be represented at the arraignment session by myself (lead prosecutor) and (assistant prosecutor). Please see attached prosecution detailing memorandum of 28 Feb 07. Thank you.

V/r--

LtCol, USMC
Prosecutor, Office of Military Commissions

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

February 28, 2007

MEMORANDUM FOR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Rule 501(b), Manual for Military Commissions, dated January 18, 2007, the above named counsel are detailed and designated as follows for the case of United States v. David Matthew Hicks:

Detailed Prosecutor:
Lieutenant Colonel USMC

Detailed Assistant Prosecutor:
Lieutenant USN
Lieutenant USN

Colonel, United States Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

UNITED STATES OF AMERICA	)	
	)	
	)	DEFENSE PRELIMINARY VOIR DIRE
v.	)	QUESTIONS FOR THE MILITARY
	)	JUDGE
DAVID M. HICKS	)	

12 March 2007

Mr. Hicks' counsel are under instructions to submit written voir dire questions to by 1200, 13 March 2007. The defense requests oral voir dire during an on-the-record proceeding.

This is a preliminary submission. Mr. Hicks defense reserves the right to supplement and seek clarification of any answers provided.

Personal Information

1. When was born?

2. Where was born?

3. Please state briefly what 's father did professionally?

4. Please state briefly what 's mother did professionally?

5. Please state how many siblings has.

6. Please identify the professions of 's siblings.

7. Do any of of 's relatives play any role in the so-called 'War on Terror'? If so, please describe their roles.

8. Do any of 's relatives active with respect to any political party? If so, please state the party and describe their activity.

9. Please identify any person to whom is or was married?

10. What is her profession?

11. Does she play, or has she played, any role in the 'War on Terror'?

12. Has she ever been active with respect to a political party? If so, please state the party and describe her activity.

13. What duty stations and billets was she assigned to while she was on active or reserve duty?

14. Please identify the names of any major (i.e. over 18) child of .

15. In the case of each such person, what is his / her profession?

16. Does s/he play, or has s/he played, any role in the 'War on Terror'?

17. Does s/he play, or has s/he been active with respect to any political party? If so, please state the party and describe his/her activity.

18. Do or did any of the persons discussed in paragraphs 3-14 play any role in a governmental agency? If so, what agency and what branch? What precisely is their role? Does it involve making any decision on policies or regulations that could have any affect or influence on the military commission process?

19. Do or did any of the persons discussed in paragraphs 3-14 play a role in any local, state, national political organization? If so, what organization? What was/is his/her role and extent of membership and/or involvement?

20. Has any of the persons discussed in paragraphs 3-14, of , contributed money to any political party or campaign? If so, to what party or candidate?

21. Does have any other blood relationship with any person that should, in fairness, be revealed to Mr. Hicks?

22. Does or any member of his family speak any language other than English? If so, what language(s)?

23. Has ever traveled outside the U.S.? If so, please list locations and dates.

24. Has any member of 's family traveled outside the U.S.? If so, please list locations and dates.

25. Does or any member of his family practice any particular religion? If so, please state what religion he/she practices.

26. Has ever studied Islam?

27. Has ever read any books or seen any reports on Islam?

28. Does have any close social or professional contacts with people who practice Islam?

29. What is 's attitude with respect to Muslims in general?

30. Has or any member of his family ever traveled to Australia?

31. What is 's attitude with respect to Australians in general?

32. Please describe what, if any, personal impact that acts of terrorism, the war in Afghanistan, or the war in Iraq, has had on , his family, relatives and friends.

's Education

High School

33. Where and when did attend high school?

U.S. Naval Academy B.S. (1980)

34. Mr. Hicks understands that received a Batchelor of Science from the U.S. Naval Academy, 1980. Is this correct?

35. What was the B.S. in?

36. Was at the U.S. Naval Academy from 1976-80?

37. Which congressional personnel endorsed 's application for entrance into the Naval Academy?

38. Describe the relationship had with these congressional representatives?

39. Of what clubs or organizations was a member while at the Naval Academny?

Widener University (1984-87)

40. Mr. Hicks understands that received a "Juris Doctor, Delaware Law School, Widener (1987)." Is this correct? Does this mean he attended law school from 1984-87?

41. Did the Marine Corps pay for 's law school education?

42. Please provide a list of all military courses attended including all professional military education courses.

43. Who taught constitutional law during law school?

44. Who taught professional ethics during law school?

45. Did take any courses in international law during law school? If so, what courses and who taught them?

46. Did take any courses in the law of war during law school? If so, what courses and who taught them?

47. Is there anything else about 's experience in law school that he should, in fairness, reveal to Mr. Hicks?

Judge Advocate General School (1994)

48. Mr. Hicks understands that received his Master of Law (Military Law), from the U.S. Army Judge Advocate General's School in 1994. Is this correct?

49. What years did he study there?

50. Please name all the professors who taught military law there.

51. During his education at the Judge Advocate General's School, was there any formal educational component where the issue of torturing prisoners ever arose? If so, please elaborate.

52. During his education at the Judge Advocate General's School, was there any informal occasion where the issue of torturing prisoners ever arose? If so, please elaborate.

U.S. Naval War College

53. Mr. Hicks understands that received his "Master of Arts (National Security and Strategic Studies) U.S. Naval War College (2002)." Is this correct?

54. During his education at the U.S. Naval War College, was there any formal educational component where the issue of torturing prisoners ever arose? If so, please elaborate.

55. During his education at the U.S. Naval War College, was there any informal meeting where the issue of torturing prisoners ever arose? If so, please elaborate.

56. During his education at the U.S. Naval War College, was there any formal educational component concerning how to secure reliable intelligence? If so, please elaborate.

57. During his education at the U.S. Naval War College, was there any informal educational component concerning how to secure reliable intelligence? If so, please elaborate.

's Membership in Organizations

58. Has been a member of any organizations, clubs or committees (including, e.g., the Federalist Society or the White Paper Society) at any time since the age of 18? If so, when and where?

59. Has ever worked with non-government organizations (NGOs) at any time since the age of 18? If so, which ones and what was his experience in working with such organizations.

60. Has ever worked with private volunteer organizations (PVOs) at any time since the age of 18? If so, which ones, what were the dates of his involvement, and what was his experience in working with such organizations?

61. Has ever worked with international/national organizations (e.g. International Red Cross, UN, NATO) at any time since the age of 18? If so which ones, what were the dates of his involvement, and what was his experience in working with such organizations?

and Politics

62. Does have now, or have he ever had, any political affiliation? Please provide details.

63. Is now, or has he ever been, a member of any political party? Please provide details.

64. Does have now, or have he ever had, any connection of any kind with President George W. Bush or members of his administration?

65. Does have now, or have he ever had, any connection of any kind with former Secretary of Defense Donald Rumsfeld or current Secretary of Defense Robert M. Gates as well as any member of their office?

Military Service

66. It is Mr. Hicks' understanding that served as a Combat Engineer Officer. Was this ever in combat?

67. Please list 's experiences in combat.

68. It is Mr. Hicks' understanding that served as Platoon and detachment commander and Company Executive Officer, 7th Engineer Support Battalion, 1st Force Service Support Group; Company executive Officer and Company Commander, 3rd Combat Engineer Battalion, 3d Marine Division. Is there anything relevant in this experience to the task at hand? (This should include, but not be limited to, whether was ever involved in any court-martial as a member, witness or suspect and whether he ever charged, formally or informally, or investigated for any offense himself.)

69. It is Mr. Hicks' understanding that was awarded the Legion of Merit. When did he receive Legion of Merit and what was it for?

70. It is Mr. Hicks' understanding that was awarded the Meritorious Service Medal with 3 Stars. When did he receive the Meritorious Service Medal and each star and what was it and each star for?

71. It is Mr. Hicks' understanding that was awarded the Joint Service Commendation Medal. When did he receive the Joint Service Commendation Medal and what was it for?

72. It is Mr. Hicks' understanding that was awarded the Navy-Marine Corps Commendation Medal. When did he receive the Navy-Marine Corps Commendation Medal and what was it for?

73. Please provide a copy of all 's officer evaluation reports.

74. Please provide a copy of all 's awards, merits, and citations.

75. Please provide a copy of all 's criminal or disciplinary investigations, if any.

76. Please provide a copy of all complaints that have been filed against that resulted in any formal or informal administrative investigations.

77. Please provide a copy of all 's letters of reprimand, letters of counseling or any other administrative action, if any.

78. Please list any and all administrative actions, even if such administrative paperwork has been removed from 's records or never recorded in his files.

79. Has received any military or disciplinary action, such as non-judicial punishment (NJP)? If so, what were the charges and what was the result of such action?

80. Does anticipate or hope for any promotion in the next five years, or does he plan to retire? Please elaborate.

81. Does believe that his participation in these proceedings could have an impact on his personal or professional life? If so, please elaborate.

82. Does believe that the outcome of these proceedings could have an impact on his personal or professional life? If so, please elaborate.

's Knowledge of the 'War on Terrorism'

83. Has played any role whatsoever, including a consultation role, in the development of any aspect of the preparations for any combat military operation during his military career that involved al Qaeda or the 'War on Terror' (including but not limited to, Operation Enduring Freedom, the USS Cole, Somalia, or any military operation since September 11, 2001)? (This

should include, but not be limited to, preparation and planning for a military operation.) If so, please provide details below.

84. Has read any publications regarding Afghanistan? If so, which publications.

85. Has read any publications regarding terrorism? If so, which publications.

86. Has read any publications regarding al Qaeda? If so, which publications.

87. Has read any publications regarding the Taliban? If so, which publications.

88. Has read any publications regarding military operations conducted in the past six years? If so, which publications.

89. What is 's knowledge about United States or Pakistani support for the Mujahideen's jihad against the Russian occupation of Afghanistan?

90. Does have any knowledge of the wars that occurred in the former Yugoslavia and Kosovo? If so, please describe his knowledge.

91. What, if anything, does understand to have been the United States' support for the Kosovo Liberation Army?

92. What, if anything, does understand about U.S. citizens joining Kosovo Liberation Army?

93. What, if any, is 's knowledge of Pakistan's involvement with the creation and support of the Taliban?

94. Please list and describe any meetings, conversations, or discussions, formal or informal, personal or professional, that has had regarding the 'War on Terrorism,' al Qaeda, the detainees at Guantanamo, and the military commission process.

95. What media or public information sources have seen regarding 9/11, the Guantanamo detainees, or the military commission process?

96. Could the high level media and press interest in this case affect the functioning or participation of in this process?

97. Has seen or heard any media reports about Mr. Hicks or his case? If so, please describe them.

98. Has seen or heard any media reports citing Maj Michael Mori, USMC, as a source? If so, please describe them.

99. Has seen or heard any media reports citing , USAF, as a source? If so, please describe them.

100. Did see or listen to any media reports covering 's involvement as the presiding officer in the previous military commission proceedings? If so, please describe them.

101. Did see or listen to any media reports covering the previous military commission proceedings for which he was not detailed as the presiding officer? If so, please describe them.

102. What, if any, terrorism-related U.S. federal prosecution has followed in the media or through his own reading/writing?

103. Has familiarized himself with ongoing U.S. federal litigation of these cases, including *Hamdan*, *Rasul*, *Hamdi*, *Al Odah*, or any of the habeas cases now seeking certiorari from the Supreme Court, including amicus filings, such as the retired judges' brief on torture?

104. Has received any training or self-study on the legislative Detainee Treatment Act or Military Commission Act? If so, please describe it.

105. What is 's current understanding on the application of the U.S. Constitution, international humanitarian law and human rights law at Guantanamo Bay in relation to an individual facing a military commission?

106. Please list and describe 's knowledge of U.S. and coalition operations in Afghanistan between 2001 and 2003.

107. Please list and describe the sources of this knowledge in detail, including knowledge gained from 's service as a military officer and from other sources including media outlets, friends, relatives, etc.

108. Has ever done any independent research or inquiries into or about U.S. and coalition operations in Afghanistan, terrorism, al Qaeda, alleged terrorist organizations, the Taliban, the detainees held at Guantanamo Bay, military commission procedures, and other related topics? If so, please describe it.

109. Please list all references, materials, websites, television programming, articles or information sources consulted in performing such independent research or inquiries.

110. Who does believe was responsible for the attacks on the World Trade Center and the Pentagon on 11 September 2001?

's Legal Training & Experience

111. Has taken any courses or attended any lectures in constitutional law not previously described? If so, please identify the date, the topic and the speaker.

112. What, if any, legal training or experience has had with respect to International Human Rights law? Please provide details, including the names of any courses and speakers.

113. What legal training or experience has had with respect to the Law of War, International Humanitarian Law? Please provide details, including the names of any courses and speakers.

114. What legal training or experience has had with respect to International Law or war crimes not previously described? Please provide details, including the names of any courses and speakers.

115. In which state(s) is licensed to practice law?

116. What has been 's membership status in his bar since membership?

117. Does follow the development of international law?

118. Has read the four Geneva Conventions and their Additional Protocols?

119. What other international conventions or instruments has read in the past 6 years?

120. Has received any training or self-study on the jurisprudence of international tribunals such as Nuremberg, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or the International Criminal Court? If so, please identify when it occurred and describe it.

121. Has ever been involved in a court-martial, in any capacity, that involved classified material in the discovery process or as an exhibit for a case?

122. Has ever been involved with cases where an accused was being prosecuted for a Title 18 federal crime (such as an assimilated crime under the U.C.M.J.)?

123. Has ever performed the duties of a Special Assistant United States Attorney?

124. How many months has been assigned to a billet which involved him litigating in a court-martial? (Not as a military judge.) Please delineate between prosecution and defense billets.

125. Has ever been involved with a court-martial, in any role, that involved a violation of the Geneva Conventions?

126. Has ever been involved with a court-martial, in any role, that involved, some aspect of international law?

127. Has ever been involved with a court-martial, in any role, that involved, some aspect of a foreign domestic law?

128. Has ever been involved with a court-martial where a translator was required for a witness or accused? If so, please provide details.

's Involvement with Military Commissions

129. What legal training has had with respect to the Military Commissions? Please provide details, including the names and addresses of all those who presented on the commissions, and a synopsis of what they said.

130. What opinions has expressed outside the forum of the military commissions concerning the legitimacy of the commissions and their rules? Please identify each occasion that such a comment has been made, as precise a rendition of what he said as possible, and the name and address of all those present when the comment was made.

131. What was 's professional opinion of the structure of the previous military commission?

132. What is 's professional opinion of the structure of the current military commission?

133. Has done any research or made any inquiries into how the military commission should be conducted? If so, please describe the research/inquiries.

134. Has read any publications regarding military commissions?

135. Please list and describe 's interactions with the appointing authority, and/or his own service chain of command leading to him being appointed as presiding officer in the previous military commission system, including but not limited to conversations, e-mails, and other communications that led to or provided him with information regarding his service as presiding officer?

136. What contact has 's had with , USA (Ret.)?

137. What contact has 's had with , USA?

138. Has had any communications with regarding Mr. Hicks or his prior or current military commission? If so, please describe the communications in detail.

139. Please describe 's interactions with Mr. , and what Mr. 's role was in the previous military commission process.

140. Since participated in the previous military commission that violated the Geneva Conventions, does he have any concern that his involvement may subject him to any criminal liability?

141. Please describe 's interactions with the Convening Authority's office, and/or his own service chain of command leading to him being appointed as a military judge and designated chief military judge for the military commissions, including but not limited to conversations, e-mails, and other communications that led to or provided him with information regarding his selection.

142. If supported by the law and facts, does believe he could make a ruling that would result, in the perception, that members of the executive branch or legislative branch of the U.S. government had intentionally violated U.S. or international law?

143. If supported by the law and facts, does believe he could make a ruling that would result, in the perception, that members of the old military commission system had intentionally violated U.S. or international law?

144. Does believe he can make decisions about whether the commission has proper jurisdiction?

Military Judge's Office for Military Commissions

145. What is the structure of the Military Judge's Office?

146. Has had any communications with any member of the DOD General Counsel's Office? If so, what was the nature of those communications?

147. Who is employed in the Military Judge's Office?

148. Is Mr. employed by the Military Judge's Office? If not, are there any plans to employ Mr. ?

149. If Mr. is to be employed by the Military Judge's Office, is Col aware of any disciplinary actions, reprimands, counseling,

negative evaluations or civil actions occurring as a result of Mr. ' conduct in *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001)?

150. Was aware of any communications between Mr. and any members of the DOD General Counsel's Office, the Appointing Authority's Office and/or the Office of the Chief Prosecutor during the previous military commissions? If so, what was the nature of those communications?

151. Has any member of the Military Judge's Office been involved in creating, reviewing or approving any draft of the Manual for Military Commissions or any section of this Manual?

152. Was any member of the Military Judge's Office involved with creating, reviewing or approving any rule, regulation or Presiding Officer's Memorandum used in the previous military commission system?

153. Has been administered an oath to perform his duties as Chief Military Judge? If so, on what date? What was the exact wording of the oath? If not, is he aware of what the oath will be?

154. Generally, does have the authority as a military judge in a military commission to invalidate any provision of the Military Commissions Act?

155. Generally, does have the authority as a military judge in a military commission to invalidate any provision of the Manual for Military Commissions?

156. As a member of the U.S. Armed Forces, is bound to comply with the Geneva Conventions? If so, does 's assignment as a military judge for a military commission relieve him of any obligation to comply with any part of the Geneva Conventions?

157. Are there any sections of the Geneva Conventions that believes do not bind his conduct?

158. Does believe that failing to provide a person a fair trial as required under Common Article 3 to the Geneva Conventions is a war crime?

159. What legal standard applies in determining whether should be recused from a commission?

's View of Due Process

160. What are 's views on the role of confrontation in determining the accuracy of statements?

161. Does believe that the best way to get to the truth of a contested matter is through cross-examination? If not, please explain why not.

162. Does believe that in order to have the type of confrontation that would lead to the truth, the defense needs access to the people who observed the alleged wrongdoing, the circumstances of their questioning, the nature of any deals that were made with them, etc.? If not, please explain why not.

163. Because of their nature, translations are problematic. Does agree with this statement? Does he agree that the defense should have access to the original statements and to the person who translated them?

164. Given the Libby trial and the failure of intelligence in Iraq re: WMD, does agree that a government may fabricate or put forth information that is self-serving, potentially false, or designed for political purposes outweighing accuracy?

165. Given the question above, does agree that the CIA can be manipulated by the executive branch for its own purposes?

166. Has ever been involved with a case involving contractors as interrogators?

167. Does have any views on the application of the Constitution and the meaning of fundamental fairness and the right to a fair trial?

168. Does have any views on what makes a statement reliable?

's Publications, Speeches and Trainings

Ethics & Leadership (North Carolina, 2005)

According to published materials, took part in an Ethics & Leadership Conference in North Carolina virtually simultaneously with his application to the previous Military Commission process, and his appointment as a presiding officer. In the Ethics & Leadership Conference at the NSCCM, Col gave a talk on *Torture, Terrorism and National Security*.

169. For whom was the program intended?

170. How did come to participate in the program?

171. Who attended the program? Please provide a complete list with participants' contact details if available.

172. Please provide a list of other speakers and presenters at the course and the related topics of each speaker/presenter?

173. Was the program recorded in any way? If so, please provide a copy of the audio tape, the video tape, or whatever other recording may exist of Col 's presentation(s).

174. Were there any suggested/required reading materials? If so, please provide the location where Mr. Hicks can secure copies of all such materials.

175. Did prepare materials other than the required reading materials? If so, please provide a copy of this material or access to it.

176. Did prepare notes, a PowerPoint presentation, or any other kind of materials for his own use or for presentation to the Conference? If so, please provide a copy of this material or access to it.

177. Did make any statement regarding the circumstances under which torture might appropriately be used? If so, what were these statements?

178. Please would acknowledge that he is willing for the organizers of the Conference to discuss and share any aspect of his participation with counsel for Mr. Hicks or their agents?

Other Presentations (1987-present)

179. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism, torture, security or related areas) where has made presentations since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc.

180. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism or torture or security) wich has attended since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc.

181. Is there anything else about presentations that has made that he feels should, in good faith, be revealed to Mr. Hicks?

Publications

Mr. Hicks is aware of the following publications by (and copies of each are publicly available):

a. Major , The Army Lawyer, Department of Army Pamphlet 27-50-285 August 1996 https://134.11.61.26/CD1/Publications/JA/TAL/TAL%2027-50285%2019960801.pdf

b. Major , Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment, ARMY LAW, Mar. 1996

c. Major , *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW, May 1997, http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset

d. , "Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy", March 2002

182. Please list, and provide means of access to, any other publications by Col that he has published on any legal issue since he began law school.

<u>'s Article Entitled "Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy" (March 2002)</u>

183. Is there any opinion expressed in 's article regarding forum shopping that he now disagrees with?

184. 's article focused on the "potential defendants held by the United States forces in Guantanamo Bay, Cuba". On what factual basis did he refer to the potential defendants as "al Qaeda terrorists"?

185. In 's article, he refers to "the nature of the likely defendants' al Qaeda connections . . .". What was his factual basis for this statement?

186. In 's article, he uses the term "international terrorism". What was his source for the definition of this term? Was this being used as a legal, or merely descriptive, term?

187. In 's article at footnote 25, he states that the International Criminal Court only has jurisdiction over war crimes, not "acts classified as terrorism". What did he consider to be acts of terrorism, and what defines these acts as terrorism?

188. When wrote this article, did he believe that the people detained at Guantanamo Bay were actually involved in planning or carrying out the attacks on 11 September 2001?

's Experience as a Military Lawyer

189. It is Mr. Hicks' understanding that was designated Judge Advocate in 1987. What experience has had as a Judge Advocate that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

190. When was in the SJA role, who was/were the Deputy SJA(s) who served with him?

191. When was in the SJA role, who was/were the Military Justice Officer(s) he dealt with for courts-martial under Commanding General's cognizance?

192. When was in the SJA role, who served as his staff?

193. It is Mr. Hicks' understanding that served as a trial counsel at some point. When was this and for how long?

194. How many cases did prosecute or defend while serving as trial counsel and trial defense counsel?

195. What experience did have in his role as trial counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

196. It is Mr. Hicks' understanding that served as Senior Defense Counsel. When was this, for how long, and how many cases did he defend?

197. What experience did have in this role as a defense counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

198. It is Mr. Hicks' understanding that was designated Deputy Branch Head (Military Law Branch, Headquarter Marine Corps). When was this, for how long, and what was his function?

199. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

200. It is Mr. Hicks' understanding that was designated Executive Secretary and USMC Working Group member for Joint Service Committee on Military Justice. When was this, for how long, and what was his role?

201. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

202. It is Mr. Hicks' understanding that was designated Faculty Member (Criminal Law Department, The Judge Advocate General's School, U.S. Army). When was this, and for how long?

203. What courses did teach? Please provide all documents used in these courses.

204. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

205. It is Mr. Hicks' understanding that was designated Law Center Director. When was this, and for how long?

206. What was 's function in this Billet?

207. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

208. It is Mr. Hicks' understanding that was worked as a Staff Judge Advocate. When was this, and for how long? Which officers did he advise?

209. What was 's function as Staff Judge Advocate?

210. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

's Experience as a Military Judge

211. It is Mr. Hicks' understanding that was designated Military Judge from 1998-2001 & July 2005-present. Please provide a complete listing of all General courts-martial for which was the military judge.

212. Of the cases in which sat as military judge, how many involved an accused who was not a member of the U.S. armed services?

213. Of the cases in which sat as military judge alone, involving U.S. armed service personnel, how many, if any, resulted in a finding of not guilty?

214. Of the cases in which sat as military judge alone, involving non-U.S. armed service personnel, how many, if any, resulted in a finding of not guilty?

215. Of the cases in which presided, how many involved serious felony charges that could be considered to rise to the nature and seriousness of the current charges before the commission?

216. Of the cases over which presided, how many involved the filing of motions, in which he had to make a ruling on the admissibility of evidence and other rules of law?

217. What is 's best estimate of the proportion of motions in which he ruled favorably for the defense? Please provide the name of the case and the motion in which he ruled favorably for the defense.

218. What experience did have as a military judge that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks?

's Involvement with the Military Commission Process

219. Did play any role whatsoever, including a consultation role, in the development or criticism of any version of the military commission process? If so, please provide details.

220. How did come to be a Presiding Officer in the previous military commission process?

221. Did apply for the position of Presiding Officer in the previous military commission process? If so, please describe why, and provide a copy of the application.

222. Was solicited for the position of Presiding Officer? If so, by whom? Please provide a copy of the solicitation.

223. Did have to fill out any kind of form or questionnaire related to the position? Please provide a copy of any such document

224. Was interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever.

225. Who decided that was fit for the position?

226. What criteria were used to make this decision?

227. Did receive any training whatsoever relating to his position as Presiding Officer? If so, what did it consist of and who conducted the training.

228. Who was the Presiding Officer's superior officer?

229. How did come to be a judge for the current military commission process?

230. Did apply for the position of military judge in the current military commission process? If so, please describe why, and provide a copy of the application.

231. Was solicited for the position of military judge with the current military commission process? If so, by whom? Please provide a copy of the solicitation.

232. Did have to fill out any kind of form or questionnaire related to the position of military judge with the current military commission process? Please provide a copy of any such document

233. Was interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever.

234. Who decided that was fit for the position?

235. What criteria were used to make this decision?

236. How was selected as the Chief Military Judge?

237. Please list all people with whom communication in any manner regarding his selection or potential selection as the Chief Military Judge and describe those communications.

's Contacts with

238. Please identify any contact whatsoever of any kind between and Appointing Authority

's Contacts with any other Official of the Bush Administration

239. Please identify any contact whatsoever between and any member of the executive branch who has any role whatsoever in the military commission process.

's Contacts with those Associated with the Case

<u>The Accused and Witnesses</u>

240. Did know Mr. Hicks or anything about him prior to being assigned to this case? If so, please describe his knowledge.

241. Does know anybody who he believes may reasonably be called as a witness in these proceedings? If so, please list the potential witnesses and state how he knows them.

The Prosecution Branch

242. Does know anybody associated with the Office of Military Commissions in the prosecution branch? If so, please list the people and describe how he came to know them and his contact with them.

243. What contact has had with any current members of the prosecution branch?

244. What contact has had with any former members of the prosecution branch?

245. What does know about LtCol , USMC?

246. What does know about Maj , USMC?

247. Has , personally or through an agent, had any communications with anyone in the Prosecution Office regarding Mr. Hicks? If so, please describe the communications in detail.

248. Has personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail.

The Defense Branch

249. What contact has had with any member of the defense branch?

250. What does know about Col , USMC, Chief Defense Counsel?

251. What does know about Maj Michael Mori, USMC?

252. Does know any of the other lawyers assigned to the Office of the Chief Defense Counsel? If so, how?

253. What contact, if any, has had with any former member of the defense branch?

The Military Judges

254. Does know any of the other Military Judges associated with the Office of Military Commissions? If so, describe how he came to know them and his contact with them.

255. What, if anything, does know about any of the other military judges selected for the current military commissions?

The Convening Authority

256. What contact, if any, has ever had with the Convening Authority, Susan Crawford?

257. What contact, if any, has ever had with the Legal Advisor to the Convening Authority, ?

258. What contact, if any, has ever had with any other member of the Convening Authority's office?

259. Has , personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding Mr. Hicks? If so, please describe the communications in detail.

260. Has , personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail.

Members

261. What contact, if any, has ever had with any members detailed to the military commission for Mr. Hicks?

262. What contact, if any, have any members of the military judge's office ever had with the members detailed to the military commission for Mr. Hicks?

263. Who will contact the members detailed to the military commission for Mr. Hicks to coordinate any military commission proceedings?

's Training for Military Commissions

264. What, if any, training has had or does he expect to have relating in any way to his role as Military Judge in the military commissions? Who conducted or will conduct the training?

265. Has sought any opinion, advice or guidance on the law of war from any individual or expert after considering becoming a Military Judge for the military commission, applying for the role, or assuming the position? What was the opinion, advice or guidance sought and received?

266. Has attended any conferences or meetings addressing policy and/or procedures with regard to the conduct of the military commissions? If so, provide details of any such meeting, and provide all the written materials that were distributed at such a meeting.

267. What independent research (including any internet research), if any, has Col conducted concerning the general facts of this case, specific to Mr. Hicks?

268. What independent research (including any internet research), if any, has Col conducted concerning the general facts of this case and any of the other prisoners currently charged in the military commission process?

269. What independent research (including any internet research) has Col conducted concerning the general facts of this case and the broader 'Al Qaeda' conspiracy alleged in the "charge sheet"?

270. What books has chosen to read since September 11, 2001, concerning terrorism and/or Al Qaeda?

271. Has written any policy, guidelines, material, rules, regulations, or instructions outlining the role, responsibilities, duties of the Presiding Officer and/or the military commission? If so, precisely what has he written and has any of the material been used as a Presiding Officer's Memorandum, Military Commission Instruction or any other military commission document?

's Contacts with the Victims of the 'War on Terror' Charged in this Case

272. Who, if anyone, does know who was killed or injured in the September 11, 2001, attacks?

273. What opinions has expressed publicly (i.e., not in the privacy of his own home) concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators?

274. What opinions have expressed privately concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators?

275. Who does know in the military services who was killed or injured in a 'terrorist' attack prior to September 11, 2001? (This should include, but not be limited to, the Beirut bombing, the first World Trade Center attack in 1993, the USS Cole, the Embassy attacks and their fall-out, Somalia, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on him in each case.

276. What civilians does know who have been killed or received any injuries associated with a 'terrorist' attack prior to September 11, 2001? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case.

277. Who does know who has been killed or injured in military service during or since the September 11, 2001 attacks? (This should include, but not be limited to, the 9/11 attacks, Afghanistan, Iraq, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case.

278. What civilians does know who have been killed or injured in any way associated with the 'War on Terror' during or since the September 11, 2001, attacks? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case

279. What role has played in the Afghanistan war? Please provide details of his involvement.

280. Was deployed to Afghanistan? If so, please provide the dates and his duties.

281. What role has played in the Iraq (II) war? Please provide details.

282. Was deployed to Iraq (II)? If so, please provide the dates and his duties.

283. Does know any person who was deployed to Afghanistan closely enough for him to have significant emotional concern for that person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Afghanistan? If so, please provide details.

284. Does know any person who was deployed to Iraq (II) closely enough for him to have significant emotional concern for person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Iraq? If so, please provide details.

's knowledge of the prosecutors who quit the military commission system.

285. In publicized reports about the previous military commission, it was disclosed that three prosecutors resigned from the process because they viewed the process as "rigged" to convict.[1] Does have any knowledge regarding the prosecutors who quit the prosecutors office

's Contact with Other Individuals

[1] *See, e.g.*, Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, New York Times (August 1, 2005); Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, Australian Broadcasting Corporation (Aug. 3, 2005), available at: http://www.abc.net.au/news/newsitems/200508/s1428749.htm.

286. Has , personally or through an agent, had any communications with anyone regarding Mr. Hicks, his prior military commission or his current military commission other than of an administrative nature? If so, please describe the communications in detail.

287. Has , personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail.

288. Is there anything else that, in fairness to Mr. Hicks, should reveal on the subject of other personnel involved in the military commission process?

289. Please provide details of any relationship (of any kind) that has ever had with , USA.

290. Please provide details of any relationship (of any kind) that has ever had with Major , USA.

291. In particular, has sought any advice, guidance on the law of war and/or the military commissions process from a Major ? If so, please provide details.

292. Is there anything else that, in fairness to Mr. Hicks, should reveal on the subject of commissions for other detainees in the current military commission process or in previous military commission processes?

293. Please identify any relationship (of any kind) that has with any member of the Court of Military Commission Review.

Respectfully submitted this the 12th Day of March, 2007, subject to Mr. Hicks' request for on-the-record oral voir dire and the reservation ot submit supplemental questions or seek clarification of any answers provided. Counsel hereby certifies that the foregoing motion has been served, by electronic mail, upon counsel for the prosecution.

/s/
M.D. MORI
Major USMC
Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

February 28, 2007

MEMORANDUM FOR LIEUTENANT COLONEL USMC
LIEUTENANT USN
LIEUTENANT USN

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Rule 501(b), Manual for Military Commissions, dated January 18, 2007, the above named counsel are detailed and designated as follows for the case of United States v. David Matthew Hicks:

Detailed Prosecutor:
Lieutenant Colonel , USMC

Detailed Assistant Prosecutor:
Lieutenant USN
Lieutenant USN

Colonel, United States Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

DoD OGC

From: LtCol, DoD OGC
Sent: Tuesday, March 13, 2007 11:54 AM
To:

Cc:

Subject: U.S. V. HICKS - MILITARY JUDGE VOIR DIRE - PROSECUTION
Attachments: Hicks - Pros - MJ Voir Dire.doc; Hicks - Pros - Detailing Letter - 070228.pdf

-- sir:

1. Attached is the Prosecution voir dire of 13 Mar 07.

2. Also attached is the Prosecution detailing memorandum of 28 Feb 07.

V/r--

, LtCol, USMC
Prosecutor, Office of Military Commissions

UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a/ "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

Prosecution
Voir Dire of the Military Judge

13 March 2007

1. Timeliness. The Prosecution voir dire of the Military Judge is submitted within the time frame and other directions by the military judge.

2. Questions.

a. The Prosecution requests the following voir dire of the Military Judge:

(1). What is the general nature and extent of your Honor's knowledge of the *United States v. Hicks* military commission?

(2). Does your Honor have personal knowledge of any alleged facts in the *Hicks* case?

(3). What role, if any, did your Honor have in the Hicks case, under the previous military commission proceedings pursuant to the Presidential Military Order of November 13, 2001; 66 Fed. Reg. 57833?

(4). Does your Honor have any personal bias or prejudice concerning an outcome in the *Hicks* case; or, personal bias or prejudice towards a party in the proceedings?

(5). Does your Honor have any reason to believe whether his impartiality might reasonably be questioned in the *Hicks* case?

(6). Does your Honor know of any additional matters that might reasonably lead to a judicial challenge in the *Hicks* case?

b. The Prosecution requests the opportunity to supplement its voir dire in the event Defense is granted oral, or additional, voir dire.

3. Submitted by:

/s/

Lieutenant Colonel, U.S. Marine Corps
Prosecutor, Office of Military Commissions

Assistant Prosecutors:
LT JAGC, USN
LT JAGC, USN

UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a/ "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

Prosecution
Voir Dire of the Military Judge

13 March 2007

1. Timeliness. The Prosecution voir dire of the Military Judge is submitted within the time frame and other directions by the military judge.

2. Questions.

In the interest of efficiency and not having duplicate documents in the record, the original document sent by prosecution will not be made a filing. That complete document, along with my answers typed therein, have been converted to a PDF document and will be made part of the filings.

Answers by are underlined.

a. The Prosecution requests the following voir dire of the Military Judge:

What is the general nature and extent of your Honor's knowledge of the *United States v. Hicks* military commission? I am aware that this case has been the subject of litigation in various forums for several years. I have not followed the particulars of that litigation.

(1). Does your Honor have personal knowledge of any alleged facts in the *Hicks* case? No.

(2). What role, if any, did your Honor have in the Hicks case, under the previous military commission proceedings pursuant to the Presidential Military Order of November 13, 2001; 66 Fed. Reg. 57833? None.

(3). Does your Honor have any personal bias or prejudice concerning an outcome in the *Hicks* case; or, personal bias or prejudice towards a party in the proceedings? No.

(4). Does your Honor have any reason to believe whether his impartiality might reasonably be questioned in the *Hicks* case? No.

(5). Does your Honor know of any additional matters that might reasonably lead to a judicial challenge in the *Hicks* case? No.

Assistant Prosecutors:
LT JAGC, USN
LT , JAGC, USN

b. The Prosecution requests the opportunity to supplement its voir dire in the event Defense is granted oral, or additional, voir dire.

3. Submitted by:

/s/

Lieutenant Colonel, U.S. Marine Corps
Prosecutor, Office of Military Commissions

UNITED STATES OF AMERICA	)	
	)	DEFENSE PRELIMINARY VOIR DIRE QUESTIONS FOR THE MILITARY JUDGE
v.	)	
	)	
DAVID M. HICKS	)	12 March 2007

Mr. Hicks' counsel are under instructions to submit written voir dire questions to by 1200, 13 March 2007. The defense requests oral voir dire during an on-the-record proceeding.

This is a preliminary submission. Mr. Hicks defense reserves the right to supplement and seek clarification of any answers provided.

Personal Information

In the interest of efficiency and not having duplicate documents in the record, the original document sent by defense will not be made a filing. That complete document, along with my answers typed therein, have been converted to a PDF document and will be made part of the filings.

Answers by are underlined. In some instances, only N/A (not applicable) is used.

There are numerous assertions, observations, or statements by counsel preceding or setting up the questions. I do not agree with many of these, I have not addressed or responded to them. Silence may not be interpreted as agreement.

1. When was born? See Bio.
2. Where was born? See Bio.
3. Please state briefly what 's father did professionally? Owned and operated delicatessen.
4. Please state briefly what 's mother did professionally? N/A.
5. Please state how many siblings has. 2.
6. Please identify the professions of 's siblings. One owns and operates an insurance agency. One is a veterinarian.
7. Do any of of 's relatives play any role in the so-called 'War on Terror'? No.
8. Do any of 's relatives active with respect to any political party? No.
9. Please identify any person to whom is or was married?

10. What is her profession? is a bar certified attorney and former Navy JAG officer. She has not worked outside the home in over 15 years.

11. Does she play, or has she played, any role in the 'War on Terror'? No.

12. Has she ever been active with respect to a political party? If so, please state the party and describe her activity. No.

13. What duty stations and billets was she assigned to while she was on active or reserve duty? NLSO, San Diego.

14. Please identify the names of any major (i.e. over 18) child of

15. In the case of each such person, what is his / her profession? Student.

16. Does s/he play, or has s/he played, any role in the 'War on Terror'? No.

17. Does s/he play, or has s/he been active with respect to any political party? No.

18. Do or did any of the persons discussed in paragraphs 3-14 play any role in a governmental agency? No.

19. Do or did any of the persons discussed in paragraphs 3-14 play a role in any local, state, national political organization? No.

20. Has any of the persons discussed in paragraphs 3-14, of contributed money to any political party or campaign? Not that I am aware of.

21. Does have any other blood relationship with any person that should, in fairness, be revealed to Mr. Hicks? No.

22. Does or any member of his family speak any language other than English? I speak some German. My wife and two of our children speak some Spanish.

23. Has ever traveled outside the U.S.? If so, please list locations and dates. (Approximate dates) Germany in 1963, 1975, 1979, 1995; Canada sometime in the 1960s; Norway in 1975 and 1979; Mexico in 1982; Philippines, Thailand and China in 1983-84; Okinawa and Korea in 1984-84 and 1997-98; England in 2001; Cuba in 2006.

24. Has any member of 's family traveled outside the U.S.? If so, please list locations and dates. (Approximate dates) Wife: Canada and Mexico in the 1960s; England in 2001. Daughter: Germany in 2002; Ireland in 2006.

25. Does or any member of his family practice any particular religion? If so, please state what religion he/she practices. Christian.

26. Has ever studied Islam? No.

27. Has ever read any books or seen any reports on Islam? Yes.

28. Does have any close social or professional contacts with people who practice Islam? Not that I know of.

29. What is 's attitude with respect to Muslims in general? Neutral.

30. Has or any member of his family ever traveled to Australia? No.

31. What is 's attitude with respect to Australians in general? Neutral.

32. Please describe what, if any, personal impact that acts of terrorism, the war in Afghanistan, or the war in Iraq, has had on , his family, relatives and friends. I have several friends who have served in the U.S. Armed Forces in Afghanistan and Iraq.

's Education

High School

33. Where and when did attend high school? Franklin Lakes, NJ; 1972-1976.

U.S. Naval Academy B.S. (1980)

34. Mr. Hicks understands that received a Batchelor of Science from the U.S. Naval Academy, 1980. Is this correct? Yes.

35. What was the B.S. in? Economics.

36. Was at the U.S. Naval Academy from 1976-80? Yes.

37. Which congressional personnel endorsed 's application for entrance into the Naval Academy?

38. Describe the relationship had with these congressional representatives? None.

39. Of what clubs or organizations was a member while at the Naval Academy? Varsity Fencing Team.

Widener University (1984-87)

40. Mr. Hicks understands that received a "Juris Doctor, Delaware Law School, Widener (1987)." Is this correct? Does this mean he attended law school from 1984-87? Yes.

41. Did the Marine Corps pay for 's law school education? Yes.

42. Please provide a list of all military courses attended including all professional military education courses. None at law school.

43. Who taught constitutional law during law school? Professor

44. Who taught professional ethics during law school? Chief Justice (Delaware Supreme Court).

45. Did take any courses in international law during law school? If so, what courses and who taught them? No.

46. Did take any courses in the law of war during law school? If so, what courses and who taught them? No.

47. Is there anything else about 's experience in law school that he should, in fairness, reveal to Mr. Hicks? No.

Judge Advocate General School (1994)

48. Mr. Hicks understands that received his Master of Law (Military Law), from the U.S. Army Judge Advocate General's School in 1994. Is this correct? Yes.

49. What years did he study there? 1993-94.

50. Please name all the professors who taught military law there. LtCol , Major , Major , Major , Major , plus one or two others whose name I do not recall.

51. During his education at the Judge Advocate General's School, was there any formal educational component where the issue of torturing prisoners ever arose? If so, please elaborate. Although I have no specific recollection, I would imagine this topic was addressed during a Law of War Class.

52. During his education at the Judge Advocate General's School, was there any informal occasion where the issue of torturing prisoners ever arose? If so, please elaborate. Not that I recall.

U.S. Naval War College

53. Mr. Hicks understands that received his "Master of Arts (National Security and Strategic Studies) U.S. Naval War College (2002)." Is this correct? Yes.

54. During his education at the U.S. Naval War College, was there any formal educational component where the issue of torturing prisoners ever arose? If so, please elaborate. Not that I recall.

55. During his education at the U.S. Naval War College, was there any informal meeting where the issue of torturing prisoners ever arose? If so, please elaborate. Not that I recall.

56. During his education at the U.S. Naval War College, was there any formal educational component concerning how to secure reliable intelligence? If so, please elaborate. Not that I recall.

57. During his education at the U.S. Naval War College, was there any informal educational component concerning how to secure reliable intelligence? If so, please elaborate. Not that I recall.

's Membership in Organizations

58. Has been a member of any organizations, clubs or committees (including, e.g., the Federalist Society or the White Paper Society) at any time since the age of 18? If so, when and where? Naval Academy Alumni Association, 1980-present.

59. Has ever worked with non-government organizations (NGOs) at any time since the age of 18? If so, which ones and what was his experience in working with such organizations. No.

60. Has ever worked with private volunteer organizations (PVOs) at any time since the age of 18? If so, which ones, what were the dates of his involvement, and what was his experience in working with such organizations? No.

61. Has ever worked with international/national organizations (e.g. International Red Cross, UN, NATO) at any time since the age of 18? If so which ones, what were the dates of his involvement, and what was his experience in working with such organizations? No.

and Politics

62. Does have now, or have he ever had, any political affiliation? Please provide details. No.

63. Is now, or has he ever been, a member of any political party? Please provide details. No.

64. Does have now, or have he ever had, any connection of any kind with President George W. Bush or members of his administration? No.

65. Does have now, or have he ever had, any connection of any kind with former Secretary of Defense Donald Rumsfeld or current Secretary of Defense Robert M. Gates as well as any member of their office? No.

Military Service

66. It is Mr. Hicks' understanding that served as a Combat Engineer Officer. Was this ever in combat? No.

67. Please list 's experiences in combat. N/A.

68. It is Mr. Hicks' understanding that served as Platoon and detachment commander and Company Executive Officer, 7th Engineer Support Battalion, 1st Force Service Support Group; Company executive Officer and Company Commander, 3rd Combat Engineer Battalion, 3d Marine Division. Is there anything relevant in this experience to the task at hand? (This should include, but not be limited to, whether was ever involved in any court-martial as a member, witness or suspect and whether he ever charged, formally or informally, or investigated for any offense himself.) No (with the exception of one time service as a character witness for one of my Marines).

69. It is Mr. Hicks' understanding that was awarded the Legion of Merit. When did he receive Legion of Merit and what was it for? For service as SJA, 2d MAW 2002-2005.

70. It is Mr. Hicks' understanding that was awarded the Meritorious Service Medal with 3 Stars. When did he receive the Meritorious Service Medal and each star and what was it and each star for? 1st Award for service as Action Officer and Deputy Branch head at HQMC from 1990-1993; 2d Award for service on faculty of Army JAG School from 1994-1997; 3d Award for service as Deputy SJA for 3d MarDiv/II MEF from 1997-1998; 4th Award for service as a military judge from 1998-2001.

71. It is Mr. Hicks' understanding that was awarded the Joint Service Commendation Medal. When did he receive the Joint Service Commendation Medal and what was it for? Service as USMC Working Group member and Executive Secretary for Joint Service Committee on Military Justice from 1990-1993.

72. It is Mr. Hicks' understanding that was awarded the Navy-Marine Corps Commendation Medal. When did he receive the Navy-Marine Corps Commendation Medal and what was it for? Service as a Trial Counsel and Senior Defense Counsel at MCRD San Diego from 1987-1990.

73. Please provide a copy of all 's officer evaluation reports. General

production of matters from my Official Military Personnel File (OMPF) is not warranted.

74. Please provide a copy of all 's awards, merits, and citations. General production of matters from my Official Military Personnel File (OMPF) is not warranted.

75. Please provide a copy of all 's criminal or disciplinary investigations, if any. There are none.

76. Please provide a copy of all complaints that have been filed against Col that resulted in any formal or informal administrative investigations. There are none.

77. Please provide a copy of all 's letters of reprimand, letters of counseling or any other administrative action, if any. There are none.

78. Please list any and all administrative actions, even if such administrative paperwork has been removed from 's records or never recorded in his files. N/A.

79. Has received any military or disciplinary action, such as non-judicial punishment (NJP)? If so, what were the charges and what was the result of such action? No.

80. Does anticipate or hope for any promotion in the next five years, or does he plan to retire? Please elaborate. I do not anticipate any further military promotion. I expect to retire in my current rank within the next four years.

81. Does believe that his participation in these proceedings could have an impact on his personal or professional life? If so, please elaborate. Unknown.

82. Does believe that the outcome of these proceedings could have an impact on his personal or professional life? If so, please elaborate. No.

's Knowledge of the 'War on Terrorism'

83. Has played any role whatsoever, including a consultation role, in the development of any aspect of the preparations for any combat military operation during his military career that involved al Qaeda or the 'War on Terror' (including but not limited to, Operation Enduring Freedom, the USS Cole, Somalia, or any military operation since September 11, 2001)? (This should include, but not be limited to, preparation and planning for a military operation.) If so, please provide details below. No.

84. Has read any publications regarding Afghanistan? If so, which publications. I have read some things over the years that made reference to this topic, however, none that stand out in my mind.

85. Has read any publications regarding terrorism? If so, which publications. I have read some things over the years that made reference to this topic, however, none that stand out in my mind.

86. Has read any publications regarding al Qaeda? If so, which publications. I have read some things over the years that made reference to this topic, however, none that stand out in my mind.

87. Has read any publications regarding the Taliban? If so, which publications. I have read some things over the years that made reference to this topic, however, none that stand out in my mind.

88. Has read any publications regarding military operations conducted in the past six years? If so, which publications. I have read some things over the years that made reference to this topic, however, none that stand out in my mind.

89. What is 's knowledge about United States or Pakistani support for the Mujahideen's jihad against the Russian occupation of Afghanistan? I do not have in depth knowledge or preconceived notions regarding this topic.

90. Does have any knowledge of the wars that occurred in the former Yugoslavia and Kosovo? If so, please describe his knowledge. I do not have in-depth knowledge or preconceived notions regarding this topic.

91. What, if anything, does understand to have been the United States' support for the Kosovo Liberation Army? I do not have in-depth knowledge or preconceived notions regarding this topic.

92. What, if anything, does understand about U.S. citizens joining Kosovo Liberation Army? I do not have in-depth knowledge or preconceived notions regarding this topic.

93. What, if any, is 's knowledge of Pakistan's involvement with the creation and support of the Taliban? I do not have in-depth knowledge or preconceived regarding this topic.

94. Please list and describe any meetings, conversations, or discussions, formal or informal, personal or professional, that has had regarding the 'War on Terrorism,' al Qaeda, the detainees at Guantanamo, and the military commission process. This is an overly broad and unreasonable question.

95. What media or public information sources have seen regarding 9/11, the Guantanamo detainees, or the military commission process? This is an overly broad and unreasonable question.

96. Could the high level media and press interest in this case affect the functioning or participation of in this process? No.

97. Has seen or heard any media reports about Mr. Hicks or his case? If so, please describe them. I am aware that this case has been the subject of litigation in various forums for several years. I have not followed the particulars of that litigation.

98. Has seen or heard any media reports citing Maj Michael Mori, USMC, as a source? If so, please describe them. I have seen some media coverage regarding Maj Mori's representation of Mr. Hicks. I have not followed the particulars of his service in this regard.

99. Has seen or heard any media reports citing Col , USAF, as a source? If so, please describe them. I have seen some media coverage regarding Col service in the OMC. I have not followed the particulars of his service in this regard.

100. Did see or listen to any media reports covering Col 's involvement as the presiding officer in the previous military commission proceedings? If so, please describe them. I saw some of the articles regarding the proceedings in US v Mohammed. They were routine in nature.

101. Did see or listen to any media reports covering the previous military commission proceedings for which he was not detailed as the presiding officer? If so, please describe them. None that I recall.

102. What, if any, terrorism-related U.S. federal prosecution has followed in the media or through his own reading/writing? None.

103. Has familiarized himself with ongoing U.S. federal litigation of these cases, including *Hamdan*, *Rasul*, *Hamdi*, *Al Odah*, or any of the habeas cases now seeking certiorari from the Supreme Court, including amicus filings, such as the retired judges' brief on torture? I read a summary of the Supreme Court Opinion in *Hamdan*.

104. Has received any training or self-study on the legislative Detainee Treatment Act or Military Commission Act? If so, please describe it. Self-study.

105. What is 's current understanding on the application of the U.S. Constitution, international humanitarian law and human rights law at Guantanamo Bay in relation to an individual facing a military commission? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

106. Please list and describe 's knowledge of U.S. and coalition operations in Afghanistan between 2001 and 2003. I do not have in-depth knowledge or preconceived notions regarding this topic.

107. Please list and describe the sources of this knowledge in detail, including knowledge gained from 's service as a military officer and from other sources including media outlets, friends, relatives, etc. See Q. 106.

108. Has ever done any independent research or inquiries into or about U.S. and coalition operations in Afghanistan, terrorism, al Qaeda, alleged terrorist organizations, the Taliban, the detainees held at Guantanamo Bay, military commission procedures, and other related topics? If so, please describe it. I have done normal work with regard to military commission procedures in connection with my service as a Presiding Officer and Military Judge.

109. Please list all references, materials, websites, television programming, articles or information sources consulted in performing such independent research or inquiries. See Q.108.

110. Who does believe was responsible for the attacks on the World Trade Center and the Pentagon on 11 September 2001? I do not have in-depth knowledge or preconceived notions regarding this topic.

's Legal Training & Experience

111. Has taken any courses or attended any lectures in constitutional law not previously described? If so, please identify the date, the topic and the speaker. This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

112. What, if any, legal training or experience has had with respect to International Human Rights law? Please provide details, including the names of any courses and speakers. The International/Operational Law portions of the Naval Justice School program in 1987 and the Army JAG school program from 1993-1994 provided basic instruction with regard to Law of War topics associated with Human Rights issues.

113. What legal training or experience has had with respect to the Law of War, International Humanitarian Law? Please provide details, including the names of any courses and speakers. The International/Operational Law portions of the Naval Justice School program in 1987 and the Army JAG school program from 1993-1994 provided basic

instruction with regard to Law of War topics associated with Human Rights issues.

114. What legal training or experience has had with respect to International Law or war crimes not previously described? Please provide details, including the names of any courses and speakers. The International/Operational Law portions of the Naval Justice School program in 1987 and the Army JAG school program from 1993-1994 provided basic instruction with regard to Law of War topics associated with Human Rights issues.

115. In which state(s) is licensed to practice law? Pennsylvania.

116. What has been 's membership status in his bar since membership? A member in good standing.

117. Does follow the development of international law? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

118. Has read the four Geneva Conventions and their Additional Protocols? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

119. What other international conventions or instruments has read in the past 6 years? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

120. Has received any training or self-study on the jurisprudence of international tribunals such as Nuremberg, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or the International Criminal Court? If so, please identify when it occurred and describe it. This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

121. Has ever been involved in a court-martial, in any capacity, that involved classified material in the discovery process or as an exhibit for a case? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

122. Has ever been involved with cases where an accused was being prosecuted for a Title 18 federal crime (such as an assimilated crime under the U.C.M.J.)? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

123. Has ever performed the duties of a Special Assistant United States Attorney? No.

124. How many months has been assigned to a billet which involved him litigating in a court-martial? (Not as a military judge.) Please delineate between prosecution and defense billets. 15 months as prosecutor; 18 months as a defense counsel.

125. Has ever been involved with a court-martial, in any role, that involved a violation of the Geneva Conventions? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

126. Has ever been involved with a court-martial, in any role, that involved, some aspect of international law? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

127. Has ever been involved with a court-martial, in any role, that involved, some aspect of a foreign domestic law? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

128. Has ever been involved with a court-martial where a translator was required for a witness or accused? If so, please provide details. This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

's Involvement with Military Commissions

129. What legal training has had with respect to the Military Commissions? Please provide details, including the names and addresses of all those who presented on the commissions, and a synopsis of what they said. No special training received.

130. What opinions has expressed outside the forum of the military commissions concerning the legitimacy of the commissions and their rules? Please identify each occasion that such a comment has been made, as precise a rendition of what he said as possible, and the name and address of all those present when the comment was made. None.

131. What was 's professional opinion of the structure of the previous military commission? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

132. What is 's professional opinion of the structure of the current military commission? This question does not address matters reasonably

concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

133. Has done any research or made any inquiries into how the military commission should be conducted? If so, please describe the research/inquiries. This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

134. Has read any publications regarding military commissions? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

135. Please list and describe 's interactions with the appointing authority, and/or his own service chain of command leading to him being appointed as presiding officer in the previous military commission system, including but not limited to conversations, e-mails, and other communications that led to or provided him with information regarding his service as presiding officer? At some point several years ago, the USMC was apparently tasked with providing nominations for possible service for various billets in the Military Commissions process. The Deputy SJA to CMC asked whether I was available for possible service as a presiding officer. I responded that I was available to serve as directed. On/about 1 December 2005 I received a telephone call from the OMC advising me that I had been appointed as a presiding officer for a case.

136. What contact has 's had with Col , USA (Ret.)?

While I was a student at the Naval War College, I completed an independent study elective wherein I wrote a paper entitled: "*Forum Shoppers Beware: The Mismatch Between the Military Tribunal option and United States National Security Policy.*" Colonel was my academic advisor for this elective. I had previously met Col sometime between 1994 and 1997 when I was on the faculty at the U.S. Army JAG School. During that time, then Major stopped in the Criminal Law Department office spaces and I was introduced as the Marine Corps officer on the staff. While I was a student at the Naval War College, Colonel was assigned as the head of the International Law Department of the Naval War College. I asked Colonel to be my advisor for this independent study elective because he was the senior judge advocate on the Naval War College Faculty. I chose the topic because it was in the news at the time. I wrote the paper during the second trimester of the school year. The elective was of a pass/fail nature. Although there were no class sessions for this elective, I had two or three short meetings with Colonel times to discuss the progress of my paper. Although I received a passing mark for the elective, I do not recall receiving a graded paper back at the end of the process.

I do not recall having contact with Colonel since my leaving the Naval War College. I was aware of his later being assigned to the Office of Military Commissions. I am not aware of the specifics concerning his departure from the Office of Military Commissions. I do not believe that my writing of this paper played any role in my appointment as a Presiding Officer or a Military Judge.

The paper (attached) discusses several potential forum options for the prosecution of persons alleged to have engaged in criminal conduct associated with terrorism. The thesis of the paper was that while the Military Tribunal Option was within the range of available options for such prosecutions, it was not the best choice available in light of what I perceived to be a de facto national security strategy of cooperative selective engagement. The Naval War College is an academic institution, and its curriculum is targeted at the role of senior military officers in strategic planning and policy. Accordingly, although the paper deals with a legal topic, the paper was neither supposed to be, nor intended as, a legal analysis of the Military Commission process. For the most part, the paper deals with national policy issues not relevant to my current role as a Military Judge. I did make a statement in the paper, however, that I now believe to be incorrect, concerning the Presidential Military Order (PMO) governing the Military Commissions. In the paper I stated that: "[T]he order essentially states that even basic notions of due process (the legal word for fundamental fairness) will not be a required element in the tribunal process." This statement was incorrect in that it failed to appreciate the significance of the touch-stone of the PMO, as stated in Section 4c(2), that orders and regulations that were yet to be developed governing the conduct of the proceedings "shall at a minimum provide for . . . (2) a full and fair trial[.]" Accordingly, although the PMO indicated that certain aspects of procedural due process recognized in criminal cases in United Stated district courts would have been inapplicable in the particular context of the Military Commissions, the PMO also dictated that the trials be "full and fair."

137. What contact has 's had with Col , USA? I met Col sometime between 1994 and 1997 when I was on the faculty at the U.S. Army JAG School. He stopped in the Criminal Law Department office spaces and I believe I was introduced as the Marine Corps officer on the staff. We had no conversation beyond a basic introduction. I may also have met Col on a number of occasions at annual interservice military judges conferences between 1998 and 2001. Col also made a presentation to the military judges course I attended in April 2005. Col and I both served as presiding officers from December 2005 – June 2006.

138. Has had any communications with Col regarding Mr. Hicks or his prior or current military commission? If so, please describe the communications in detail. We have not discussed any particulars concerning Mr. Hicks or his prior military commission proceedings. Any

discussion that Col and I may have with regard to this current proceeding are not subject to disclosure.

139. Please describe 's interactions with Mr. , and what Mr. 's role was in the previous military commission process. I met Col sometime between 1994 and 1997 when I was on the faculty at the U.S. Army JAG School. He stopped in the Criminal Law Department office spaces and I believe I was introduced as the Marine Corps officer on the staff. We had no conversation beyond a basic introduction. I may also have met Col on a number of occasions at annual interservice military judges conferences between 1998 and 2001. Col served as the Assistant to the presiding officers while I was a presiding officer from December 2005 – June 2006.

140. Since participated in the previous military commission that violated the Geneva Conventions, does he have any concern that his involvement may subject him to any criminal liability? No.

141. Please describe 's interactions with the Convening Authority's office, and/or his own service chain of command leading to him being appointed as a military judge and designated chief military judge for the military commissions, including but not limited to conversations, e-mails, and other communications that led to or provided him with information regarding his selection. At some point, the Judge Advocate General of the Navy was apparently tasked with providing nominations for possible service in the Military Commission Trial Judiciary. The Chief Judge, Navy-Marine Corps Trial Judiciary asked whether I was available for possible service as a military judge at these commissions. I responded that I was available to serve as directed. On 1 March 2007, I received a telephone call from Ms. of the Military Commissions Trial Judiciary staff advising me that I had been appointed as the Chief Judge.

142. If supported by the law and facts, does believe he could make a ruling that would result, in the perception, that members of the executive branch or legislative branch of the U.S. government had intentionally violated U.S. or international law? Yes.

143. If supported by the law and facts, does believe he could make a ruling that would result, in the perception, that members of the old military commission system had intentionally violated U.S. or international law? Yes.

144. Does believe he can make decisions about whether the commission has proper jurisdiction? Yes.

Military Judge's Office for Military Commissions

145. What is the structure of the Military Judge's Office? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

146. Has had any communications with any member of the DOD General Counsel's Office? If so, what was the nature of those communications? No.

147. Who is employed in the Military Judge's Office? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

148. Is Mr. employed by the Military Judge's Office? If not, are there any plans to employ Mr. ? No.

149. If Mr. is to be employed by the Military Judge's Office, is Col aware of any disciplinary actions, reprimands, counseling, negative evaluations or civil actions occurring as a result of Mr. Hodges' conduct in *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001)? N/A.

150. Was aware of any communications between Mr. and any members of the DOD General Counsel's Office, the Appointing Authority's Office and/or the Office of the Chief Prosecutor during the previous military commissions? If so, what was the nature of those communications? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

151. Has any member of the Military Judge's Office been involved in creating, reviewing or approving any draft of the Manual for Military Commissions or any section of this Manual? Not that I am aware of.

152. Was any member of the Military Judge's Office involved with creating, reviewing or approving any rule, regulation or Presiding Officer's Memorandum used in the previous military commission system? Yes.

153. Has been administered an oath to perform his duties as Chief Military Judge? If so, on what date? There is no oath specific to my service as Chief Judge. I took an oath regarding service as a military judge for the Commissions in accordance with R.M.C. 807 on 15 March 2007. I took essentially the same oath for service as military judge in May 1998 and May 2005 and as a Presiding Officer in approximately February 2006.

154. Generally, does have the authority as a military judge in a military commission to invalidate any provision of the Military Commissions Act? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

155. Generally, does have the authority as a military judge in a military commission to invalidate any provision of the Manual for Military Commissions? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

156. As a member of the U.S. Armed Forces, is bound to comply with the Geneva Conventions? If so, does 's assignment as a military judge for a military commission relieve him of any obligation to comply with any part of the Geneva Conventions? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

157. Are there any sections of the Geneva Conventions that believes do not bind his conduct? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

158. Does believe that failing to provide a person a fair trial as required under Common Article 3 to the Geneva Conventions is a war crime? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

159. What legal standard applies in determining whether should be recused from a commission? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

's View of Due Process

160. What are 's views on the role of confrontation in determining the accuracy of statements? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

161. Does believe that the best way to get to the truth of a contested matter is through cross-examination? If not, please explain why not. This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

162. Does believe that in order to have the type of confrontation that would lead to the truth, the defense needs access to the people who observed the alleged wrongdoing, the circumstances of their questioning, the nature of any deals that were made with them, etc.? If not, please explain why not. This question does not address matters reasonably concerning

impartiality or bias relevant to a possible challenge for cause of the military judge.

163. Because of their nature, translations are problematic. Does agree with this statement? Does he agree that the defense should have access to the original statements and to the person who translated them? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

164. Given the Libby trial and the failure of intelligence in Iraq re: WMD, does agree that a government may fabricate or put forth information that is self-serving, potentially false, or designed for political purposes outweighing accuracy? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

165. Given the question above, does agree that the CIA can be manipulated by the executive branch for its own purposes? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

166. Has ever been involved with a case involving contractors as interrogators? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

167. Does have any views on the application of the Constitution and the meaning of fundamental fairness and the right to a fair trial? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

168. Does have any views on what makes a statement reliable? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge

's Publications, Speeches and Trainings

Ethics & Leadership (North Carolina, 2005)

According to published materials, took part in an Ethics & Leadership Conference in North Carolina virtually simultaneously with his application to the previous Military Commission process, and his appointment as a presiding officer. In the Ethics & Leadership Conference at the NSCCM, Col gave a talk on *Torture, Terrorism and National Security*.

169. For whom was the program intended?

A high school student-relative of mine attends the North Carolina School of Science and Math (NCSSM). I met the Director of Academic Programs (NCSSM). During the course of our conversation, the Director learned I was a Military Judge. He asked if I would be able to take part in an ethics program that the school puts on each year. I agreed to participate, as a facilitator.

The portion of the program I was asked to assist with was conducted in a seminar format. I did not make a structured presentation or speech, but rather guided a discussion by the students on the titled topic. The intended and stated goal was to raise the students' awareness of the dynamics of discussions concerning the titled topic. I specifically resisted students' efforts to seek out my opinion concerning the best definition for words used in these discussions or best lines of demarcation for standards, rules or laws in this area.

170. How did come to participate in the program? See Q. 169.

171. Who attended the program? Please provide a complete list with participants' contact details if available. My session was attended by approximately 25 high school students. I do not recall whether or not there was a roster maintained for the students. I believe the students were free to go to any sessions which drew their interest. I do not have a list of their names.

172. Please provide a list of other speakers and presenters at the course and the related topics of each speaker/presenter? There were no speakers or presenters at my session. I do not have a list of the facilitators of other seminar sessions. This information may be available through the NCSSM.

173. Was the program recorded in any way? If so, please provide a copy of the audio tape, the video tape, or whatever other recording may exist of Col 's presentation(s). No.

174. Were there any suggested/required reading materials? If so, please provide the location where Mr. Hicks can secure copies of all such materials. There was no "required reading" for this session. Per the request of the Conference Director, posted readings were made available for each session offered in order to provide an insight into the general nature of the discussion and to serve as a prompt for a discussion between the students. In the case of my session, the readings were chosen based on their brevity and provocative nature. Given the target audience, I felt these readings had a fair chance of actually being read by the students prior to the session. The session did not include an evaluation of the students' participation. I did not then, and do not now, endorse any of the views expressed by the authors of these articles. I do not know if the students read them. I do not have a copy of the recommended reading in hand.

It may also be helpful to note that I pointed out to the students that discussion of this topic is often cast in terms of simplex statements or hypothetical questions with seemingly simple fact patterns. One point I made was that the issues surrounding this topic are normally more complex than the hypothetical questions suggest, and that many statements regarding these matters will be subject to debate.

175. Did prepare materials other than the required reading materials? If so, please provide a copy of this material or access to it. No.

176. Did prepare notes, a PowerPoint presentation, or any other kind of materials for his own use or for presentation to the Conference? If so, please provide a copy of this material or access to it. Attached.

177. Did make any statement regarding the circumstances under which torture might appropriately be used? If so, what were these statements? No.

178. Please would acknowledge that he is willing for the organizers of the Conference to discuss and share any aspect of his participation with counsel for Mr. Hicks or their agents? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

Other Presentations (1987-present)

179. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism, torture, security or related areas) where has made presentations since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc. N/A.

180. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism or torture or security) wich has attended since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc. N/A.

181. Is there anything else about presentations that has made that he feels should, in good faith, be revealed to Mr. Hicks? No.

Publications

Mr. Hicks is aware of the following publications by (and copies of each are publicly available):

a. Major , The Army Lawyer, Department of Army Pamphlet 27-50-285 August 1996 https://134.11.61.26/CD1/Publications/JA/TAL/TAL%2027-50285%2019960801.pdf

b. Major , Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment, ARMY LAW, Mar. 1996

c. Major , *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW, May 1997, http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset

d. Col , "Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy", March 2002

182. Please list, and provide means of access to, any other publications by Col that he has published on any legal issue since he began law school.

Item "d" listed above is not a published article.

Other publications:

The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig, 27 ST. MARY'S LAW JOURNAL 389 (1996)

Davis v. United States: *Clarification Regarding Ambiguous Counsel Requests, and an Invitation to Revisit Miranda!* ARMY LAW., March 1995

Practice Note, United States v. McLaren, *Reinitiation of Conversation by Accused May Constitute Implied Waiver of Previously Asserted Counsel Right,* ARMY LAW., August 1994

's Article Entitled "Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy" (March 2002)

183. Is there any opinion expressed in 's article regarding forum shopping that he now disagrees with? See Q.136.

184. 's article focused on the "potential defendants held by the United States forces in Guantanamo Bay, Cuba". On what factual basis did he refer to the potential defendants as "al Qaeda terrorists"? See Q.136.

185. In 's article, he refers to "the nature of the likely defendants' al Qaeda connections . . .". What was his factual basis for this statement? See Q.136.

186. In 's article, he uses the term "international terrorism". What was his source for the definition of this term? Was this being used as a legal, or merely descriptive, term? The paper does not deal with a precise definition of the term "international terrorism".

187. In 's article at footnote 25, he states that the International Criminal Court only has jurisdiction over war crimes, not "acts classified as terrorism". What did he consider to be acts of terrorism, and what defines these acts as terrorism? The paper does not deal with a precise definition of the term "acts of terrorism".

188. When wrote this article, did he believe that the people detained at Guantanamo Bay were actually involved in planning or carrying out the attacks on 11 September 2001? I did not have any knowledge or preconceived notions regarding this topic.

's Experience as a Military Lawyer

189. It is Mr. Hicks' understanding that was designated Judge Advocate in 1987. What experience has had as a Judge Advocate that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

190. When was in the SJA role, who was/were the Deputy SJA(s) who served with him? I did not use a deputy SJA.

191. When was in the SJA role, who was/were the Military Justice Officer(s) he dealt with for courts-martial under Commanding General's cognizance? Maj Brubaker, Capt Jordan, Major Hunting Horse, Capt Palmer, Maj Hennessy.

192. When was in the SJA role, who served as his staff? Personnel assigned to the Joint Law Center, MCAS Cherry Point.

193. It is Mr. Hicks' understanding that served as a trial counsel at some point. When was this and for how long? See Q.124.

194. How many cases did prosecute or defend while serving as trial counsel and trial defense counsel? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

195. What experience did have in his role as trial counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

196. It is Mr. Hicks' understanding that served as Senior Defense Counsel. When was this, for how long, and how many cases did he defend? See Qs.124 and 195.

197. What experience did have in this role as a defense counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

198. It is Mr. Hicks' understanding that was designated Deputy Branch Head (Military Law Branch, Headquarter Marine Corps). When was this, for how long, and what was his function? June 1990 – June 1993. Worked as a staff attorney on military justice matters to include congressional inquiries, special interest inquiries, Board for Correction of Naval Records petitions and tracking of officer misconduct and high visibility cases.

199. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

200. It is Mr. Hicks' understanding that was designated Executive Secretary and USMC Working Group member for Joint Service Committee on Military Justice. When was this, for how long, and what was his role? June 1990 – June 1993. Review, development and coordination of proposals for change to the UCMJ and Manual for Courts-Marital.

201. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

202. It is Mr. Hicks' understanding that was designated Faculty Member (Criminal Law Department, The Judge Advocate General's School, U.S. Army). When was this, and for how long? June 1994 – June 1997.

203. What courses did teach? Please provide all documents used in these courses. Fifth Amendment and Article 31 Issues; Trial Advocacy; Analysis of the Military Justice System; Sentencing in the Military Justice System. I no longer have the requested documents.

204. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

205. It is Mr. Hicks' understanding that was designated Law Center Director. When was this, and for how long? July 2002 – June 2005.

206. What was 's function in this Billet? Lead and manage Joint Law Center (JLC) at MCAS Cherry Point. The JLC was staffed by approximately 17 attorneys and 35 support personnel who provided prosecution, defense, legal assistance, and civil and operational law support to the 2d MAW and MCAS Cherry Point community.

207. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

208. It is Mr. Hicks' understanding that was worked as a Staff Judge Advocate. When was this, and for how long? Which officers did he advise? July 1997 - July 1998 (CG, 3rd MarDiv & CG, III MEF); July 2002 - June 2005 (CG, 2d MAW).

209. What was 's function as Staff Judge Advocate? Legal Advisor to the Commanders and their staffs.

210. What experience did have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

's Experience as a Military Judge

211. It is Mr. Hicks' understanding that was designated Military Judge from 1998-2001 & July 2005-present. Please provide a complete listing of all General courts-martial for which was the military judge. To date, I have presided over in excess of 405 completed special and general courts-martial. Further information regarding these cases may be available through the Navy-Marine Corps Appellate Review Division.

212. Of the cases in which sat as military judge, how many involved an accused who was not a member of the U.S. armed services? None.

213. Of the cases in which sat as military judge alone, involving U.S. armed service personnel, how many, if any, resulted in a finding of not guilty? See Q. 211.

214. Of the cases in which sat as military judge alone, involving non-U.S. armed service personnel, how many, if any, resulted in a finding of not guilty? N/A.

215. Of the cases in which presided, how many involved serious felony charges that could be considered to rise to the nature and seriousness of the current charges before the commission? See Q. 211.

216. Of the cases over which presided, how many involved the filing of motions, in which he had to make a ruling on the admissibility of evidence and other rules of law? See Q. 211.

217. What is 's best estimate of the proportion of motions in which he ruled favorably for the defense? Please provide the name of the case and the motion in which he ruled favorably for the defense. See Q. 211.

218. What experience did have as a military judge that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? See Q. 211.

's Involvement with the Military Commission Process

219. Did play any role whatsoever, including a consultation role, in the development or criticism of any version of the military commission process? If so, please provide details. None.

220. How did come to be a Presiding Officer in the previous military commission process? See Q. 135.

221. Did apply for the position of Presiding Officer in the previous military commission process? If so, please describe why, and provide a copy of the application. See Q.135.

222. Was solicited for the position of Presiding Officer? If so, by whom? Please provide a copy of the solicitation. See Q. 135.

223. Did have to fill out any kind of form or questionnaire related to the position? Please provide a copy of any such document. See Q. 135.

224. Was interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever. No.

225. Who decided that was fit for the position? See Q. 135.

226. What criteria were used to make this decision? Unknown.

227. Did receive any training whatsoever relating to his position as Presiding Officer? If so, what did it consist of and who conducted the training. No specific training.

228. Who was the Presiding Officer's superior officer? N/A. I remained assigned to the Navy-Marine Corps Trial Judiciary. The Chief Judge of the Navy-Marine Corps Trial Judiciary was and is my reporting senior.

229. How did come to be a judge for the current military commission process? See Q. 141.

230. Did apply for the position of military judge in the current military commission process? If so, please describe why, and provide a copy of the application. See Q. 141.

231. Was solicited for the position of military judge with the current military commission process? If so, by whom? Please provide a copy of the solicitation. See Q. 141.

232. Did have to fill out any kind of form or questionnaire related to the position of military judge with the current military commission process? Please provide a copy of any such document See Q. 141.

233. Was interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever. No.

234. Who decided that was fit for the position? See R.M.C. 503.

235. What criteria were used to make this decision? See R.M.C. 503.

236. How was selected as the Chief Military Judge? See R.M.C. 503.

237. Please list all people with whom communication in any manner regarding his selection or potential selection as the Chief Military Judge and describe those communications. See Q. 141.

's Contacts with

238. Please identify any contact whatsoever of any kind between and Appointing Authority I met then sometime between 1994 and 1997 when I was a faculty member at the U.S. Army JAG School. He stopped in the Criminal Law Department office spaces and I believe I was introduced as the Marine Corps officer on the staff. We had no conversation beyond a basic introduction. I also met and shook hands with then U.S.A. (ret) when he was a guest at the Eastern Area Counsel Office Mess Night at Camp Lejeune in March of 2005 and March of 2007. We had no conversation beyond cordial small talk.

's Contacts with any other Official of the Bush Administration

239. Please identify any contact whatsoever between and any member of the executive branch who has any role whatsoever in the military commission process. None.

's Contacts with those Associated with the Case

The Accused and Witnesses

240. Did know Mr. Hicks or anything about him prior to being assigned to this case? If so, please describe his knowledge. I am aware that this case has been the subject of litigation in various forums for several years. I have not followed the particulars of that litigation.

241. Does know anybody who he believes may reasonably be called as a witness in these proceedings? If so, please list the potential witnesses and state how he knows them. No.

The Prosecution Branch

242. Does know anybody associated with the Office of Military Commissions in the prosecution branch? If so, please list the people and describe how he came to know them and his contact with them. Not that I know of.

243. What contact has had with any current members of the prosecution branch? Official contact in conjunction with U.S. v Mohammed and this case.

244. What contact has had with any former members of the prosecution branch? See Q. 136 re Col . LtCol was serving as a trial counsel at MCAS Cherry Point when I was a military judge between 1998 and 2001. I met him several times in the course of traveling to MCAS Cherry Point. I don't recall his involvement in any cases.

245. What does know about LtCol , USMC? He is a USMC judge advocate.

246. What does know about Maj , USMC? He is a USMC judge advocate.

247. Has , personally or through an agent, had any communications with anyone in the Prosecution Office regarding Mr. Hicks? If so, please describe the communications in detail. Official e-mail contact regarding this case. Defense was CC'd on all email.

248. Has , personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. No.

The Defense Branch

249. What contact has had with any member of the defense

branch? Official contact in U.S. v Mohammed and this case. Col and I were classmates at the Naval Justice School from August – October in 1987 and again at the Army JAG School from 1993 – 1994. I have had sporadic contact with him over the years in the course of our military service.

250. What does know about Col , USMC, Chief Defense Counsel? See Q. 249.

251. What does know about Maj Michael Mori, USMC? He is a USMC judge advocate.

252. Does know any of the other lawyers assigned to the Office of the Chief Defense Counsel? If so, how? See Q. 249.

253. What contact, if any, has had with any former member of the defense branch? See Q. 249.

The Military Judges

254. Does know any of the other Military Judges associated with the Office of Military Commissions? If so, describe how he came to know them and his contact with them. I have had various levels of contact with other nominated judges over the years in various professional capacities.

255. What, if anything, does know about any of the other military judges selected for the current military commissions? I assume they were nominated for service by their respective Judge Advocates General.

The Convening Authority

256. What contact, if any, has ever had with the Convening Authority, Susan Crawford? None.

257. What contact, if any, has ever had with the Legal Advisor to the Convening Authority, ? We spoke briefly on the telephone once in mid-March 2007. called me to confirm a report he had heard that I had ordered a hearing in this case for 20 March 2007. I confirmed that information as being correct.

258. What contact, if any, has ever had with any other member of the Convening Authority's office? See Q. 135. I have also communicated with Col on a number of occasions concerning administrative matters unrelated to any particular case.

259. Has , personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding Mr. Hicks? If so, please describe the communications in detail. No.

260. Has , personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. In mid-March 2007, LTC inquired about whether publication of any regulation was imminent such that it might be taken into account with regard to my preliminary instructions to counsel in this case. We were advised that publication was not imminent at that time.

Members

261. What contact, if any, has ever had with any members detailed to the military commission for Mr. Hicks? None.

262. What contact, if any, have any members of the military judge's office ever had with the members detailed to the military commission for Mr. Hicks? None that I know of.

263. Who will contact the members detailed to the military commission for Mr. Hicks to coordinate any military commission proceedings? We have not yet addressed that issue.

's Training for Military Commissions

264. What, if any, training has had or does he expect to have relating in any way to his role as Military Judge in the military commissions? Who conducted or will conduct the training? I do not anticipate any commission specific training with the exception of that having to do with equipment and systems in use in the courtroom.

265. Has sought any opinion, advice or guidance on the law of war from any individual or expert after considering becoming a Military Judge for the military commission, applying for the role, or assuming the position? What was the opinion, advice or guidance sought and received? No.

266. Has attended any conferences or meetings addressing policy and/or procedures with regard to the conduct of the military commissions? If so, provide details of any such meeting, and provide all the written materials that were distributed at such a meeting. No.

267. What independent research (including any internet research), if any, has Col conducted concerning the general facts of this case, specific to Mr. Hicks? None.

268. What independent research (including any internet research), if any, has Col conducted concerning the general facts of this case and any of the other prisoners currently charged in the military commission process? None.

269. What independent research (including any internet research) has Col conducted concerning the general facts of this case and the broader 'Al Qaeda' conspiracy alleged in the "charge sheet"? None.

270. What books has chosen to read since September 11, 2001, concerning terrorism and/or Al Qaeda? None.

271. Has written any policy, guidelines, material, rules, regulations, or instructions outlining the role, responsibilities, duties of the Presiding Officer and/or the military commission? If so, precisely what has he written and has any of the material been used as a Presiding Officer's Memorandum, Military Commission Instruction or any other military commission document? In my capacity as a Presiding Officer, I participated in the development of a number of the POMs used in some of the cases initiated under the PMO of November 2001.

's Contacts with the Victims of the 'War on Terror' Charged in this Case

272. Who, if anyone, does know who was killed or injured in the September 11, 2001, attacks? N/A.

273. What opinions has expressed publicly (i.e., not in the privacy of his own home) concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators? None.

274. What opinions have expressed privately concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators? I have developed or expressed no opinions regarding those associated with the perpetrators.

275. Who does know in the military services who was killed or injured in a 'terrorist' attack prior to September 11, 2001? (This should include, but not be limited to, the Beirut bombing, the first World Trade Center attack in 1993, the USS Cole, the Embassy attacks and their fall-out, Somalia, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on him in each case. A Naval Academy Classmate of mine named was killed in the Beruit bombing. Although I did not know him well, I was saddened by his death. I cannot say whether the bombing was a "terrorist attack."

276. What civilians does know who have been killed or received any injuries associated with a 'terrorist' attack prior to September 11, 2001? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case. None.

277. Who does know who has been killed or injured in military service during or since the September 11, 2001 attacks? (This should

include, but not be limited to, the 9/11 attacks, Afghanistan, Iraq, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case. A Naval War College Classmate named Colonel was killed in a training accident in Texas in November 2004. I was saddened by his death. A Marine Corps Judge Advocate contemporary named Colonel was injured during an ambush in Iraq during Operation Iraqi Freedom. I was glad he survived and recovered. A parent of one of my son's classmates was injured by an IED in November 2005. I was glad he survived with a good prognosis for full recovery.

278. What civilians does know who have been killed or injured in any way associated with the 'War on Terror' during or since the September 11, 2001, attacks? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case. None.

279. What role has played in the Afghanistan war? Please provide details of his involvement. One Marine assigned to the Cherry Point Law Center deployed to Afghanistan as an individual augmentee of the US forces in that region. My role was limited to identifying an available member of my staff.

280. Was deployed to Afghanistan? If so, please provide the dates and his duties. No.

281. What role has played in the Iraq (II) war? Please provide details. As SJA for 2d MAW and Director of the Cherry point JLC I supervised and directed legal support associated with the pre-deployment phase of 2d MAW units deploying to Iraq. This support entailed ensuring deploying service members had completed necessary documents concerning wills and powers of attorney, and providing basic law of war and rules of engagement training to deploying service members. I did not participate in any actual operational planning beyond ensuring that sufficient legal support was provided to the deploying units. Additionally, one of the military judges I now supervise in my capacity as Circuit Military Judge, is pending deployment to Iraq to provide judicial support to II MEF.

282. Was deployed to Iraq (II)? If so, please provide the dates and his duties. No.

283. Does know any person who was deployed to Afghanistan closely enough for him to have significant emotional concern for that person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Afghanistan? If so, please provide details. No.

284. Does know any person who was deployed to Iraq (II) closely enough for him to have significant emotional concern for person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Iraq? If so, please provide details. No.

's knowledge of the prosecutors who quit the military commission system.

285. In publicized reports about the previous military commission, it was disclosed that three prosecutors resigned from the process because they viewed the process as "rigged" to convict.[1] Does have any knowledge regarding the prosecutors who quit the prosecutors office No.

's Contact with Other Individuals

286. Has , personally or through an agent, had any communications with anyone regarding Mr. Hicks, his prior military commission or his current military commission other than of an administrative nature? If so, please describe the communications in detail. No.

287. Has , personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. No.

288. Is there anything else that, in fairness to Mr. Hicks, should reveal on the subject of other personnel involved in the military commission process? No.

289. Please provide details of any relationship (of any kind) that has ever had with Colonel , USA. See Q. 137.

290. Please provide details of any relationship (of any kind) that has ever had with Major , USA. I do not recognize the name.

291. In particular, has sought any advice, guidance on the law of war and/or the military commissions process from a Major ? If so, please provide details. See Q. 290.

292. Is there anything else that, in fairness to Mr. Hicks, should reveal on the subject of commissions for other detainees in the current

[1] *See, e.g.*, Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, New York Times (August 1, 2005); Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, Australian Broadcasting Corporation (Aug. 3, 2005), available at: http://www.abc.net.au/news/newsitems/200508/s1428749.htm.

military commission process or in previous military commission processes? No.

293. Please identify any relationship (of any kind) that has with any member of the Court of Military Commission Review. I do not know who is in that group.

Respectfully submitted this the 12th Day of March, 2007, subject to Mr. Hicks' request for on-the-record oral voir dire and the reservation ot submit supplemental questions or seek clarification of any answers provided. Counsel hereby certifies that the foregoing motion has been served, by electronic mail, upon counsel for the prosecution.

/s/
M.D. MORI
Major USMC
Detailed Defense Counsel

Torture/Ethics Seminar

Welcome and thanks for joining todays discussion on torture and national security. Hopefully you won't leave saying things like man that class really lived up to it's billing ,,,

For those of you that were hoping for pictures, I am afraid you will be disappointed.

I do hope, however, is Shepard us through a discussion that will provide you with a frame work with which you can properly assess the several conflicting viewpoints that exist regarding the use of what I will initially call aggressive interrogation techniques in the pursuit of intelligence from suspected terrorists. Additionally I hope we will have a lively discussion to bat around some of the ethical dilemmas presented by this issue and let the group be enlightened by the awesome power of your collective intellect.

In the way of background…

Annapolis … combat engineer…. Lawyer

Prosecutor… defense ,,,,,, worked in DC on legislation re military law,,,, done a few other things that would take too long to explain and am currently serving as a judge for courts-martials prosecuted at the several USMC bases and stations in NC and SC.

In case you are interested, although I have participated in a fair number of investigations, I have never conducted or witnessed what any acts that anyone would describe as torture.

In dealing w/ litigation concerning police interrogations, however, I have had the opportunity to deal with a number of the concepts that come into play in assessing the possible usefulness and pitfalls of aggressive interrogation techniques.

Alright, let's get started with basic concepts.

What is torture?

What besides things like listening to your parents tell stories about the good old days is torture?

Definition?

Rack,
Whipping
Beating
Cigarrette burns
Hanging from ceiling

Threats (of harm)(against family)(prosecution)(turnover to ?)
Yelling
Scaring (how far) (waterboarding) (dogs)

Humilation (Forced nakedness)

Sleep deprivation
Bright lights
Isolation

Yelling?
Insulting?
Lying about harm to family?

White House Memo: Infliction of pain akin to that accompanying death or organ failure or serious impairment of bodily functions

Psychological Pain only if it causes lasting damage.

UN CAT: Extreme Form of cruelty and unusual punishment committed under the color of law.

CAT also seeks to prevent " other acts of cruel, inhumane or degrading punishment which do not amount to torture.

Why do people torture?

Five general categories under where torture occurs under the color of law:

Just talk about under color of law and not get into the purely criminal scenarios or the sado masochistic pain for pleasure scene

Victors Pleasure: Celebrate win (very close to the criminal)

Terror (To subjugate) (Fate worse than death or jail) (Gengas Khan/Saddam Hussain)

Punishment _future deterrence (specific/general) **(8th Amendment – but death OK??)**

How many people think torture for these purposes are always bad? Most will agree these are bad,,,, on basis of cruelty.

Extracting Confessions – we prohibit re 5th Amendment/14th Amendment w/ cconcepts re PASI/ Due Process and lack of reliability

Intelligence Gathering

How many people think torture for these purposes are always bad?

Why?

Some might suggest that torture,,,, intentional cruelty is always wrong, because it is unethical or morally wrong:

What do we mean by Morally wrong or unethical?

Ethics: -Of or relating to moral action, conduct, motive, or character; also pertaining to moral feelings, duties or conduct.

Moral Law: The law of conscience, the aggregate of those rules which relate to right and wrong conduct. The prescription of the standards to which the actions of men should conform in their dealings w/ each other.

Based on these definitions it would seem that extreme physical or mental cruelty should always be wrong.

But

Can't the ends sometimes justify the means?

Consequentialist rationality.

Is it always wrong to bash someone in the head w/ a baseball bat? Self defense example

WRT Intell gathering, can't the use of aggressive interrogation techniques be compared to self-defense?

Dirty Harry shooting scenario.

Ticking Bomb Scenario from reading.

This sort of scenarion places torture in almost a heroic light,,,, we saved the little girt,,, or saved metropolis.

If accepted, we have cut through the absolute prohibitionist position,,, and are merely haggling over the limits

Problems w/ Ticking Bomb scenario:

What if you are not sure the suspect really knows anything? How much do we torture him? Water board? Beat? Electric shocks? Threat to kill? Family? Torture his family in front of him? How long do we do this?

W/ or W/out torture, This is a real concern in Gitmo,,,, who do we keep? For how long?

What amounts to an emergency for which torture is justified?

Destruction of NY?/ Durham? Vanceboro? Location of a valuable target in Iraq?

Who decides when and how much torture?

President? (Is that reasonable of appropriate?)

If not the pres,,, then who? Congress make law?

Authorization from a Fed judge? Alan Dershowitz advocates this position,,, based on necessity.
Problem that in all likihood any policy will lead to stretches in application.

Problem w/ mistaken torture of innocents.

Would Japanese be justified in torturing American captive to find out about the enola Gay plans?

Arguments against Torture for intelligence gathering:

Cruelty is wrong under any circumstance
Long term Political cost outweighs most situational benefits
Unreliable info
Hardens enemy's will to fight
Worse treatment for our captives (could it be any worse?)

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NAVAL WAR COLLEGE
Newport, R.I.

FORUM SHOPPERS BEWARE: THE MISMATCH BETWEEN THE MILITARY TRIBUNAL OPTION AND UNITED STATES NATIONAL SECURITY STRATEGY

by

Lieutenant Colonel, United States Marine Corps

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

1 March 2002

Feb. 21. 2006 10:53AM No. 6462 P. 2

Introduction

Americans reacted to the events of September 11, 2001 in true American fashion. First, individuals on the scenes of the attacks at the World Trade Center and the Pentagon engaged in heroic and selfless rescue efforts on behalf of those injured or in harm's way. Next, as the dust settled, and as lifetimes of mourning began, we started planning and acting to prevent further acts of international terrorism, to identify the wrongdoers and administer justice. On November 13, 2001 President Bush surprised most observers by announcing the authorization of military tribunals for the trial of crimes associated with terrorism against the United States by members, aiders or abettors, or coconspirators of the organization known as al Qaeda.[1] Support for the president's overall handling of the terrorist crisis has been extremely high. The executive order regarding the tribunal option, however, has engendered ongoing criticism.[2] Immediate concerns were raised by domestic experts from a variety of disciplines concerning the constitutionality of the prospective tribunals and their implications with regard to civil liberties in the United States. Subsequently, the debate expanded to include international concerns about both the fairness of the prospective proceedings, and the treatment of potential defendants held by United States forces in Guantanamo Bay, Cuba.[3]

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[1] President Issues Military Order: *Detention, Treatment, and Trial of Certain Non-Citizens in War Against Terrorism*, White House News Release, (www.whitehouse.gov/news/releases/2001/11/20011113-27.html) January 17, 2002

[2] The criticism has transcended traditional party and ideological lines. *See generally*, Walter Shapiro, *Bush's Military Tribunal Order Needs More Polish*, (www. USAToday.com/news/e98/shapiro) January 17, 2002). Former President Carter also added his voice to those criticizing the executive order, stating that he was "deeply concerned" the United States could weaken its international reputation and its ability to work for peace following the Afghanistan conflict. Ben Fox, *Former President Carter Criticizes Military Tribunal Plan*, The Sacramento Bee, December 6, 2001.

[3] Mackubin Thomas Owens, *Consider the Latrunculi: Detainees or Prisoners of War?* The Providence Journal, January 25, 2002.

Since announcing the tribunal authorization, the White House has campaigned steadily on behalf of the operational necessity of the tribunal option, and the Department of Defense has described evolving tribunal rules that will provide substantially more procedural safeguards than were originally envisioned by tribunal critics. Considerable effort has also been expended to convince onlookers that the treatment of detained suspects is appropriate in light of practical security concerns. Unfortunately, the procedural fairness of the prospective tribunals and the precise conditions of the suspects' "pretrial confinement" are transient concerns that may be obscuring policymakers view of matters of more enduring importance. With all the fuss about matters ranging from rules of evidence to curtains for jail cells, little discussion has been afforded to the fundamental mismatch between the proposed *ad hoc* nationalistic proceedings and the United States' broader National Security Strategy.

One cause of this "non-discussion" is the fact that the Bush Administration has not clearly defined its national security strategy in classical terms. Analysis of the United States' method of operation in the international arena in the recent past, however, describes a *de facto* strategy of cooperative selective engagement. In accordance with this pattern, President Bush's call for international unity against terrorism implies an intent to both help and depend on other nations to address a long-term transnational problem. A unilateral decision to employ nationalistic military tribunals on the other hand is more reflective of a national security strategy of primacy. And while the United States can surely do as it wishes with regard to the impending prosecution of al Qaeda terrorists, American policy makers should more fully consider whether the benefits of self-interest in this case will justify jeopardizing the potential for international cooperation in the

difficult times ahead.

National Security Strategy and the War Against Terrorism

The decision concerning the proper forum for prosecuting allegations of misconduct associated with international terrorism is simultaneously driven by specific circumstances and broader questions of national security affairs. If the campaign against international terrorism is viewed as a war effort, then several fundamental concepts of military theory are relevant to the analysis. Foremost is the precept that in wartime decision making, furtherance of policy aims must dominate over expedience in the realm of operational strategy.[4] Stated differently, plans for dealing with specific situations, even extraordinary situations, must be in accord with broader concepts of war aims that transcend the factual boundaries of any single operation or campaign. This is especially true if the war aims are extensive, or if the war is expected to be lengthy in nature, or if the war involves collaboration with other nations who enter a coalition with their own varied sets of political expectations and pressures. History provides ready examples of arguably good strategic decisions that proved disastrous to war efforts because of a mismatch between the effects of situational strategic action and the broader aims of the implementing nation

[4] Carl von Clausewitz, one of the founders of modern strategic studies wrote: "Strategy is the use of the engagement for the purpose of the war. The strategist must therefore define an aim for the entire operational side of the war that will be in accordance with its purpose. In other words, he will draft the plan of the war, and the aim will determine the series of actions intended to achieve it; in fact, shape the individual campaign and, within these, decide on the individual engagements." Carl von Clausewitz, *On War*, translated and edited by Michael Howard and Peter Paret, Princeton, Princeton University Press, 1976, p.177. *See generally*, Mackubin Thomas Owens, "Thinking About Strategy," Chapter 28 of *Strategy and Force Planning*, 3d ed., Newport, Naval War College Press, 2000.

or coalition.

For example, the Japanese decision to bomb Pearl Harbor reasonably furthered Japan's strategic interest in severely damaging the American battle fleet. By late 1941, military officials in Japan had determined that war with the United States was inevitable. Japanese leaders assumed that their program of expansion in order to secure the resources of Southeast Asian territories would soon prompt a military response in defense of Anglo-American interest in that same area. Japan had previously defeated a nation of superior size and resources in the Russo-Japanese war following a surprise attack of the Russian fleet at Port Arthur. That surprise attack was followed by a relatively short war, of limited effort, that led to a negotiated peace on terms very favorable to Japan. With this blueprint for success apparently validated, the Japanese decided that a strong first strike at Pearl Harbor could lead to a similarly short war and negotiated settlement with the United States.

Unfortunately for the Japanese, they failed to recognize that several factors made a limited engagement and negotiated settlement with the United States a fanciful outcome. First, the Japanese had allied themselves with the Nazi regime that was pursuing a war of unlimited aims against the United States and its allies. Additionally, well before Pearl Harbor, the United States had agreed with the British at the ABC Conference that in the event of war with both Germany and Japan, the Anglo-American alliance would pursue complete defeat of their enemies before agreeing to termination of hostilities.[5]

The same historical setting also provides an example of how subordination of

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[5] *See generally*, Richard Overy, *Why the Allies Won*, New York, W. W. Norton & Company, 1995, pp. 248-55.

immediate strategic preferences in the name of adherence to collective war aims has redounded to the benefit of the United States. Following the bombing of Pearl Harbor there was significant interest in military, political and popular circles for an immediate and full effort against the Japanese in the Pacific theater. Despite these pressures, however, President Roosevelt abided by the agreements previously made with the British at the ABC Conference to work together to "defeat Germany first" before engaging in full scale offensive operations in the Pacific. Adherence to this larger war aim, despite the shock and resulting anger occasioned by the Pearl Harbor attack, is credited by historians as being a key factor in the Grand Alliance's ability to prevail over the combined forces and considerable momentum of the axis of evil in World War II.[6]

Regardless of the forum choice, the trial of alleged terrorists is not an end unto itself. Any prosecution of Osama Bin Laden, or any number of his associates or followers, should be considered for what is would be, that is, one small part of a larger war against the phenomena of international terrorism. In the grand scheme of things, al Qaeda is the current symptom, and international terrorism is the disease. At this point, al Qaeda may be an essentially vanquished foe. The threat to national security posed by international terrorism, however, persists.[7] As such, any decisions for dealing with the prosecution of al Qaeda members should not be dealt with as an end unto themselves, but rather as a small piece of the larger problem. Additionally, actions with regard to the terrorists as an immediate concern must be in accord with the national security strategy for dealing with

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[6] *Id* at 314-25.

[7] Although al Qaeda is not a typical participant in a classical war scenario, concern for the post war implications of the victor's actions should still exist. We should recall Carl Von Clausewitz's observation that the results of war are never final. *See* Clausewitz, *On War*, *supra* note 4 at 80.

the terror threat in the long term.

Four generally recognized grand strategies compete in the public discourse to describe the United States approach to international security issues: neo-isolationism; selective engagement; cooperative security; and primacy.[8] None of these grand strategies provide a template for determination of subsequent strategic choices in the face of unfolding world events. Identification of a national grand strategy does, however, provide a helpful compass bearing to facilitate unity of effort between military, diplomatic and economic instruments of state and prevent counterproductive action in the name of situational expedience. Without reference to an identified grand strategy, security matters are more likely to be dealt with sequentially, incrementally and, alas, inconsistently.[9]

As was the case with the Clinton administration and his father's administration, the current President Bush has avoided articulation of a national security strategy in classic grand strategy terms. Positive "spinmeisters" for the administration might argue this non-policy allows for appropriate strategic flexibility in a complex world. Unfortunately, such deliberate ambiguity provides little in the way of a guiding principle for real life matters such as military procurement decisions, or when to employ the use of military forces, or whether to conduct *ad hoc* nationalistic tribunals for alleged acts of criminal misconduct associated with international terrorism.

The words of the past several administrations do not provide a clear description of the

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[8] Barry R. Posen and Andrew L. Ross, "Competing Visions for U.S. Strategy," *International Security*, 21:3, Winter 1997, *reprinted in* Strategy and Force Planning, 3d Edition, Naval War College Press, Newport Rhode Island, 2000, p. 137. Professors Posen and Ross provide a full description of these four classic grand strategies and suggest that selective engagement is the proper choice for the United States in the post cold war era.

[9] *Id.* at 138.

United States' grand strategy. Analysis of the United States' method of operation in the international arena over the past several years, however, describes a *de facto* national security strategy of cooperative selective engagement. In cases ranging from Iraq's invasion of Kuwait to ethnic and nationalistic wars in the former Yugoslavia and Kosovo, to the current operations in Afghanistan, the United States has chosen to use military force only in cases affecting United States national interest and only within the framework of a coalition of nations. Given the vast disparity in resources between the United States and most of its coalition partners, often the United States' most significant gain in a coalition agreement comes in the form of international legitimization for its course of planned operations. For while the United States may have sufficient resources to periodically conduct a wide range of limited operations, we have apparently been unwilling to risk the cost of major regional confrontations that might result if we acted without proper political isolation of our chosen adversaries.

Selective engagement strategy is realist in nature in that it recognizes that defense resources are scarce. As a practical matter, it is not economically feasible for the United States to muster sufficient power to unilaterally maintain international stability for a sustained period of time.[10] Pursuing a selective engagement strategy in a collaborative fashion recognizes that that Americans would be unwilling to sufficiently increase contributions in terms of lives or money such that the United States could assume global police duties or single-handedly dominate the world to force acceptance of sustained

[10] *Id.* at 145.

United States primacy.[11] Accordingly, the United States has chosen to conduct military operations by coalition as a matter of routine.

By design, the modern coalition system is more responsive and flexible than earlier generations of cooperative alliance systems. And while movement away from a structured set of alliances arguably lessens the possibility of a nation being dragged into an unwanted conflict,[12] the flexibility of *ad hoc* coalition politics carries with it the need to remain sensitive to the concerns of potential coalition partners. This is especially true in the case of the looming long-term effort against international terrorism wherein the list of potential coalition partners spans a broad range of political, cultural and religious fault lines.[13]

Noted political scientist James N. Rosenau's "funnel of causality" theory described five general categories of factors that influence a nation's foreign policy decision making. They are: the external (global) environment; the societal environment of the nation; the governmental setting; the roles played by the central decision-makers; and the individual characteristics of the foreign policy making elites.[14] The external environment category draws attention to the reality that United States behavior will be viewed by other nations through different lenses than through those which it is perceived by members of the American society. This theory also recognizes, and should remind us, that policy decisions in the international realm affect a variety of stakeholders whose interests *and*

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[11] *Id.*
[12] *See generally* World War I.
[13] Samuel Huntington has argued that international politics will increasingly be dominated by conflicts between civilizations instead of between nations or political ideologies. *See generally* Samuel P. Huntington, *The Clash of Civilizations?* Foreign Affairs, Vol.72, No. 3, Summer 1993, pp. 22-49.
[14] Charles W. Kegley Jr. & Eugene R. Wittkopf, *American Foreign Policy: Pattern and Process*, St. Martin's Press, New York, 1987, pp. 11-31.

responses often extend well beyond the apparent boundaries of a current policy issue.

The foreign policy decision making process operates best when the combination of societal, governmental role and individual sources bring a full range of viewpoints into a debate that are considered along with the predicted responses of external actors. The emotionally charged events of September 11th have created an extraordinary level of political unity within the United States. Unfortunately, what may be descried as a powerful blend of domestic anger, urgency, solidarity and determination have also introduced a damaging measure of group think and narrow-sightedness into the decision making process. Reasonable concerns that should exist about international disapproval of an *ad hoc* military tribunal process have been swept aside or lost in less valid debates over the legality of such proceedings under United States law or the classification of the potential defendants during their pretrial detention in Cuba.

It Is Better to Look Good Than to Feel Good

The United States operates effective criminal and military justice systems that have been constructed and improved over the course of hundreds of years. Yet at a time when international credibility is a valuable commodity, the Bush administration has directed creation of an *ad hoc* trial process whose results will certainly be criticized regardless of their actual efficacy. Putting the relatively ancient cases of Nazi saboteurs and Lincoln assassins aside, the idea of trying alleged terrorists at military tribunals was first raised by then Attorney General William Barr following the 1988 bombing of Pan Am Flight 103

over Lockerbie, Scotland.[15] At that time, however, prospect of military tribunals was never a realistic possibility. Even when the suspects were identified as Libyan intelligence agents, they remained under Libyan protection for years until an agreement was reached that the trial be conducted by a panel of Scottish judges at a neutral national site in the Netherlands. Importantly, however, a negotiated international agreement on a trial forum was reached and ultimately a joint trial was concluded in January, 2001 with one of the suspects being found guilty of charges related to the bombing and one suspect being found not guilty.[16] The convicted terrorist received a 20-year prison sentence.

The military tribunal option was also not employed for the prosecution of the first World Trade Center bombing suspects. Following the February, 1993 truck bomb attack, six co-conspirators hailing from several middle eastern nations were prosecuted in New York's Federal District Court. All six were convicted of charges stemming from the conspiracy, and all received the same 240-year prison term and $10 million dollar fine.[17]

In the wake of the September 11th attacks, the Former Attorney General again floated the military tribunal option through his contacts in the younger President Bush's administration.[18] The tribunal option was seen as a vehicle to address several concerns associated with possible prosecution of alleged terrorists in the forthcoming campaign against international terrorism. Given the nature of the likely defendants' al Qaeda connections, it was feared that a federal district court trial would place judges and civilian

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[15] Michael Isikoff & Stuart Taylor Jr., *Justice in the Shadows*, Newsweek, November 26 2001, p. 39.
[16] Raju Chebium, *From Lockerbie to Camp Zeist: The Pan Am 103 Trial*, CNN.com (www.europe.cnn.com/LAW/trials.and.cases), 4 February 2002
[17] *Last World Trade Center Bombing Conspirator Sentenced*, CNN.com (www.europe.cnn.com/US), 4 February 2002
[18] Isikoff & Taylor, *supra* note 15.

jurors at too great a risk.[19] Concerns were also raised about the admissibility of evidence gathered by the intelligence community and the ability of Federal Prosecutors to secure convictions within the framework of the Federal Rules of Evidence.[20] Finally, there was a concern that disclosure of intelligence information in an open court would compromise the long-term anti-terrorism campaign.[21]

It is unclear what level of staffing preceded the adoption of the tribunal executive order. It is clear, however, that the administration rushed to get the initial announcement of the option in place. By the beginning of November 2001, President Bush was pressing his staff to get the tribunal process rolling "before things started going well [in Afghanistan.]"[22] Although it is reportedly the final product of 18 preliminary drafts, the tribunal authorization order displays a striking lack of concern for the appearance of propriety in the contemplated trial process. After a brief restatement of the obvious that international terrorism poses a continuing threat to the United States and its allies, the President simply states "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."[23] This is not a measured proclamation that certain rules of law and practice will have to give way to unusual concerns that may be presented in the trial of alleged terrorists. To the contrary, the order essentially states that even basic notions of due process (the legal word for fundamental fairness) will not be a required element in the tribunal process.

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[19] *Id.*
[20] Josh Tyrangiel, *And Justice For . . .*, Time, November 26, 2001
[21] Isikoff & Taylor, *supra* note 15.
[22] Tyrangiel, *supra* note 20.
[23] Presidential Order Section 1(f)

In a special report issued shortly after the announcement of the tribunal option, David Scheffer critiqued what he viewed as the eight viable options for prosecuting international terrorists.[24] The options include: U.S. Federal Court; U.S. Military Court (Courts-Martial); U.S. Military Commission (the tribunal option); Foreign National Court (like the use of the Scottish courts for the Pan Am Flight 103 cases); United Nations Security Council *Ad Hoc* International Criminal Tribunal (like the on-going proceedings arising from events in the former Yugoslavia and Rwanda); a coalition treaty-based criminal tribunal (like the Nuremberg or Tokyo tribunals following World War II); a special Islamic Court; or UN administered courts in Afghanistan.[25]

Scheffer's report describes the benefits and difficulties associated with each of the forum options. He properly points out that an analysis of a forum option includes not only an assessment of the effectiveness of a trial system, but also a determination of the political implications of its use. For example, although there is great appeal in extending the jurisdiction of the existing United Nations war crime tribunals to encompass the prosecution of alleged al Qaeda terrorists, there would be "enormous pressure from certain governments to [then] extend jurisdiction of the terrorist tribunal to all coalition

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[24] David Scheffer, *Options for Prosecuting International Terrorists*, United States Institute of Peace: Special Report, (www.usip.org) November 14, 2001. David Scheffer is a senior fellow at the United States Institute of Peace an formerly U.S. Ambassador at large for war crimes issues (1997-2001). Scheffer was deeply engaged in the negotiation and establishment of international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone. He also led the U.S. delegation to United Nations talks on the permanent International Criminal Court.

[25] It is worthy of note that what may be the ideal forum, a permanent International Criminal Court (ICC), is not a option for the near term prosecution of international terrorists. The forthcoming ICC's jurisdiction applies only with respect to crimes committed after the effective date of its treaty-based statute, which has not yet occurred. Additionally, the current provisions of the ICC statute apply only to war crimes, and not to acts classified as terrorism. *See generally* Jerry Fowler, *Not Fade Away: The International Criminal Court and the State of Sovereignty*, 2 San Diego International Law Journal, 125 (2001). *See also* Rome Statute of the International Court, Rome, 17 July 1998.

military actions in the campaign against terrorism and to the conduct of Israel in the Middle East."[26] Similarly, even if a special Islamic court could provide reliable assurances of effective prosecutions in the current situation, United States acceptance of such a forum could prove problematic if that court then sought to apply its jurisdiction to United States or Israeli citizens for alleged terrorist activities.

A full discussion of the various forum options is beyond the scope of this essay. Scheffer's report concludes that the practical and political problems associated with the United Nations, coalition and foreign court options leave the United States national court options as the most viable alternatives for potential prosecutions.[27] While that conclusion may be happily in accord with United States policy makers wishes to retain as much control over the proceedings as possible, the political implication screening discussed above should still be applied to the selection of a particular United States national trial process. In this regard, debates about the ultimate or actual fairness of these proceedings largely miss the point.[28] The current campaign against terrorism is not about any single case or set of cases that may be prosecuted in the days to come. Instead, the issue at hand is a contest between the world's civilized societies and lawless organizations who seek to disrupt the coalescence of different cultures into a peaceful and productive world community. Accordingly, it is not sufficient that the guilty are convicted in a relatively

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[26] Scheffer *supra* note 24 at 10.
[27] *Id.* at 13-14.
[28] Another less relevant point that consumes much public debate is whether the alleged terrorist "deserve" the level of procedural due process afforded defendant's in the U.S criminal justice system. Vice President Cheney has flatly stated "They don't deserve the same guarantees and safeguards that we use for an American citizen." Bryan Robinson, *Due Process or Star Chamber?* (ABCNEWS.go.com/sections/us/DailyNews/military-tribunals) January 17, 2002. In the midst of trying to develop a unified world effort against international terrorism, it seems counterproductive to declare a flat double standard for the trial of United States and foreign citizens.

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fair trial. In order for a long-term victory over terrorists to be achieved, the trial process must appear to be fair and not simply the result of the United States' obvious ability to have its way.

Even a Good Military Tribunal is a Bad Idea

Whether alleged terrorists are tried in U.S. military courts, or military commissions, or U.S. Federal District Court, claims of "hometown" or "victors" justice are sure to be attached to the proceedings. That being said, the platform of likely critics of American action in this regard can be significantly weakened by selecting the national forum least susceptible to serious jurisprudential criticism. The United States Federal District Courts are the best option emerging from this sort of analysis.

The Bush Administration argument in favor of the tribunal option appears to be most firmly rooted in an understandable desire to secure the conviction of people who really are guilty of serious crimes and a concurrent desire to safeguard classified information. Any lawyer would agree that there is a "risk of litigation" inherent in any trial process. Assuming, however, that each of the established United States justice systems conduct effective trials, the results of prosecutions in the several national forum options should be largely the same. As a practical matter, the military rules of evidence used in courts-martial practice are a near verbatim reflection of the federal rules of evidence used in federal district courts. In turn, notwithstanding the tribunal executive order's ill-advised repudiation of the applicability of principles of law and generally recognized rules of evidence, it is likely that the rules finally adopted for the conduct of any U.S. military

tribunal will be largely in accord with fundamental jurisprudential principles.[29] For example, preliminary reports about draft tribunal rules indicate that: defendant's will have the right to counsel, defendants will have the right to appeal; the presumption of innocence will apply until an accused is proven guilty beyond a reasonable doubt; and that except for portions wherein classified material will be discussed, tribunal sessions will be open to the public.[30] The "public trial" aspect of civilian proceedings also gives way in the case of classified material. Classified information is already protected from disclosure in civilian trials by the Classified Information Procedures Act.[31]

One specific concern voiced about conducting the al Qaeda prosecutions in federal district court has to do with the admissibility of evidence gathered by intelligence agencies. The argument suggests that much intelligence information is "inadmissible hearsay" and that the government might have a hard time proving its case in an established national court forum.[32] As a practical matter however, the application of the hearsay rule in United States courts has become increasingly flexible. There are numerous longstanding exceptions to the rule's general prohibition against the use of out of court statements. Additionally the now codified residual hearsay exception common to both the Federal Rules of Evidence and the Military Rules of Evidence provides for the admission of evidence that would have at one time been considered hearsay but is: (A)

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[29] *Tribunals Might Offer the Right to Appeal*, The Providence Journal, December 28, 2001. In this article, Eugene Fidell, President of the National Institute of Military Justice (and periodic critic of the United States Military Justice system) is quoted as saying that the then current drafts of tribunal procedures "go a considerable distance toward meeting the concerns that have been voiced [about the tribunal process]." The procedures are being developed by the Defense Department's General Counsel's office, in consultation with the White House, the State Department, the Justice Department and outside experts.
[30] *Id.*
[31] Title 18 U.S. Code, section 798.
[32] Isikoff and Taylor, *supra* note 15.

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offered as evidence of a material fact; (B) more probative on point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (C) the interests of justice will be best served by admission of the statement into evidence.[33] Given the increasingly open nature of United States trial practice in this regard, one former federal prosecutor has commented: "It's almost inconceivable that a military tribunal could allow evidence to be admitted more easily and still claim to be fair."[34]

Beyond the rules issue, tribunal advocates also suggest that civilian judges and juries should not be endangered by participation in a trial process involving international terrorists. This sort of argument cannot survive even superficial scrutiny. The successful use of civilian judges and juries in years of organized crimes prosecutions, not to mention the first World Trade Center bombing case, suggests that the existing United States criminal justice system does not have to be put aside simply because the potential defendants have scary friends. For when the Executive Branch substitutes a panel of military officers in the civilian judge or jury's role as trier of fact, a number of irrefutable appearance issues are created.

If one is unsure about whether military tribunals will have credibility problems in the international community, one need only consider the plight of traditional military justice practice in our own country. The United States court martial system is a virtual mirror of federal district court in terms of its rules of evidence and burden of proof. The rules of

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[33] Federal Rule of Evidence 807. Residual Exception.
[34] James Orenstein, *Rooting Out Terrorists Just Became Harder*, New York Times, December 6, 2001. James Orenstein is a former federal prosecutor and was associate deputy attorney general from 1999 to 2001.

procedure governing United States courts-martial are created by the Congress and have been regularly validated during appeals of courts-martial cases to the United States Supreme Court. However, despite the sound institutional foundation and certification of the United States courts-martial practice, the system is still subject to chronic criticism and mistrust within our own country because of the lack of clear systemic independence for military judges.[35] Military judges are appointed by the judge advocates general of the respective armed service and operate outside normal military chains of command during their judicial assignments. However, all military judges are subject to return to duty under the authority of the same commanders against whom some of their rulings may have been rendered. Not insignificantly, these commanders also comprise much of the pool of senior officers who sit on promotion boards that will consider the military judges' records for promotion during or after the officers' judicial assignments have been completed. This same apparent lack of independence will exist for any military officers appointed as judges or panel members for the prospective military tribunals.

In reality, there is no evidence that the military judge appointment and evaluation system has any actual effect on the fairness of military trials or the decision making process of military judges. However, despite the Department of Defense's own confidence in the integrity and professionalism of it's military judges, this aspect of the military justice system is repeatedly attacked by critics of the system.[36] Once this discussion is taken beyond the friendly confines of the United States, this sort of criticism

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[35] *See generally* Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213, (Winter, 1997); Fredric I. Lederer and Barbara S. Hundley, *Needed: An Independent Military Judiciary – A Proposal To Amend The Uniform Code Of Military Justice*, 3 Wm. & Mary Bill of Rts. J. 629, (Winter, 1994)

[36] *Id.*

will only increase. On the other hand, although it is still a national trial process, the Federal District Court system has a significant leg up on any sort of military adjudication system in that Federal District Court judges have lifetime tenure. Similarly, civilian juries who are selected from and return to private lives are immune from claim of working for the same company as the prosecutor. It should be stressed that none of this suggests that Federal District Court proceedings are any fairer, or better than a military court-martial. But in the world of international politics and coalition building, improper perceptions and appearances are a reality that cannot be dismissed simply due to a lack of evidence.

Just Because You Can, Doesn't Mean You Should

Unnecessary use of military tribunals in the face of reasonable international criticism is an ill-advised move toward unilateralism at a time when the long term campaign against international terrorism requires more than United States leadership. The shock of September 11th may reasonably cause policymakers to view international terrorism through a lens of temporal urgency. But the solution is not as simple as finding and punishing, or even killing, Osama Bin Laden and all the people associated with perpetration of the events of September 11th. In dealing with the terrorists *de jure*, we must not allow current operations to compromise our ability to deal with a broad range of international partners in the cases of other existing or future terrorist entities.

Although not clearly defined by the Bush administration, America's *de facto* grand strategy for crisis resolution of national security issues is one of selective engagement

supported and legitimized by formation of *ad hoc* international coalitions. Our continuing ability to attract support from nations across a wide cultural and political spectrum rests on the credibility of the United States as a fair and benign super power. Commentators have noted that part of the reason why a remarkable trans-cultural international coalition was able to be quickly constructed in the wake of September 11th was the perceived integrity of the United States in its stated intention to bring suspects to justice in courts of law.[37] This sort of credibility should be neither squandered, nor taken for granted.

Given the inextricable linkage between the war against terrorism and the prosecution of captured suspects, the forum choice for the trial of alleged terrorists should not be discussed as an issue unto itself. Credibility in international politics is often premised upon a series of apparently unrelated policy choices. For example one may reasonably argue that America's ability to gain the cooperation of moderate Islamic States such as Pakistan in the current anti-terror campaign was in large measure due to the elder President Bush's adherence to the limited Desert Storm coalition goals of expelling Iraqi forces from Kuwait. From an operational perspective, it is clear that on 27 February 1991, Gulf War coalition forces were well positioned to pursue fleeing enemy forces into Iraq and possibly even to occupy Baghdad and attempt to force the removal of Saddam Hussein from power. Instead, the hostilities were halted on what some authorities perceive to be unnecessarily favorable terms for Iraq that allowed Saddam Hussein to remain in power as a continuing threat to stability in the region. After the war, the elder

[37] Scheffer, *supra* note 24 at 2.

President Bush himself stated that he had miscalculated in thinking that the crushing defeat suffered by Iraqi forces and the domestic upheaval within Iraq would lead to the toppling of Saddam's government without further action by the United States. However, this sort of Monday morning quarterbacking overlooks a number of points that made the Gulf War a successful limited war and a stable foundation for other limited actions by the United States in cooperation with Muslim nations.

As will hopefully be the case in the terror war, a significant aspect of the United States' success in the Gulf War was the formation and maintenance of a coalition that spanned a broad political, religious and ideological spectrum. The Gulf War coalition was an unlikely collaboration of effort, based on pursuit of limited objectives that did not include the removal of Saddam Hussein from power or the invasion of Iraqi territory.[38] Even though the United States may have wished for more, agreement on these objectives obtained world-wide political legitimacy for the coalition's efforts and isolation of Iraq from its hoped for supporters.

On 27 February 1991, Saddam Hussein agreed to the demands issued by the relevant United Nations Security Counsel Resolutions.[39] The Iraqi's had been evicted from Kuwait and the sovereignty, independence and territorial integrity of Kuwait had been restored. If the United States had decided to unilaterally proceed into Iraq in March of 1991, it would have moved beyond its well formed plan of limited war in response to Iraqi aggression, and away from its well constructed scheme of United States led friends

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[38] *See* United State National Objectives declared 3 Aug 90; United Nations Security Council Resolutions 660 & 661.

[39] Michael R. Gordon & General Bernard E. Trainor, *The Generals' War*, Little, Brown and Company, 1995, p. 415.

versus an isolated Iraq.[40] The elder President Bush correctly resisted the temptation of operationally logical pursuit of retreating Iraqi forces in order to adhere to the limits of the Desert Storm coalition's stated war aim of expelling Iraqi forces from Kuwait. Shortsighted critics may persist in describing that decision as a missed opportunity. A longer view of events, however, suggests that United States restraint in that instance established a measure of credibility in the Islamic world that has proved valuable in attracting the support of moderate regimes in nations such as Pakistan in Operation Enduring Freedom. It is likely that moderate Muslim State cooperation would have been less forthcoming if the United States had undertaken unilateral pursuit into Iraq at the end of Operation Desert Storm.

Conclusion

Careful students of world politics know that hegemony has never proven to be a winning strategy. . . . Until recently, American policymakers have acted as if the United States is somehow exempt from this pattern. But if recent events are any indication, this is wishful thinking.[41]

Just as the United States had the power to proceed into Iraq in March of 1991, it now has the power to prosecute suspected terrorists in *ad hoc* military tribunals. And just as there was potential benefit in a unilateral offensive into Iraq, convictions might be more

[40] In the subsequent Desert Fox operations, the thirty-four partner Desert Storm coalition was reduced to a two party US-UK partnership.
[41] Christopher Layne, *The Problem With Being No. 1*, The Washington Post, November 22, 1999.

easily secured and secrets more easily guarded in trials conducted by military tribunals. However, if we view international terrorism as a world issue in which we expect the assistance of others, we should resist the easy solution of conducting *ad hoc* proceedings just because we can. If we elect to conduct national trials instead of seeking an international forum, we should seek to maximize the appearance of fairness so as to limit avenues for complaint of victor's justice. The appearance of fairness may best achieved by prosecution of terrorist suspects in United States Federal District Courts.

The members of al-Qaeda may or may not "deserve"[42] trials in a time-tested and jurisprudentially sound forum. However, the world-respected reputation of United States criminal courts has not been built nor maintained for the benefit of any evil person. For the benefit of rigorous due process is reaped not only by those that stand accused in our courts, but also by the larger portion of our society that never stand accused, but have trust and confidence in the fact that the government is both protecting them and being as fair as possible. The use of an established court system at this critical time should not be viewed as a action on behalf of accused terrorists, but rather as a representation to needed international partners that the course of our ship of state is steady, and properly charted for the rough waters ahead.

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[42] *See supra* note 28.

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Feb.21. 2006 10:59AM

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

February 5, 2007

MEMORANDUM FOR Maj M. D. Mori, USMC

Subject: Detailing as Defense Counsel in the Military Commission Case of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Defense Counsel in the military commission case of *United States v. David Hicks*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

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

February 5, 2007

MEMORANDUM FOR Ms. Rebecca Snyder

Subject: Detailing as Assistant Defense Counsel in the Military Commission Case of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Assistant Defense Counsel in the military commission case of *United States v. David Hicks*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Copy to:
Maj M. D. Mori, USMC

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS	**Defense Motion** for Appropriate Relief Prosecutorial Misconduct 19 Mar 2007

1. **Timeliness**: This motion is filed within the timeframe established by R.M.C. 905.

2. **Relief Sought**: Mr. Hicks requests this Court to Disqualify Colonel ("Col") , Chief Prosecutor, Military Commissions, from exercising any prosecutorial or supervisory responsibilities with respect to Mr. Hicks' case.

3. **Overview**: The Chief Prosecutor violated Section 949b(a)(2)(C) of the Military Commissions Act and Rule 3.4 of the Air Force Rules of Professional Conduct by attempting to "coerce or, by any unauthorized means, influence . . . the exercise of" Major ("Maj") Mori's "professional judgment" in the representation of his client. The Chief Prosecutor did so by alleging to a newspaper reporter and later to the Convening Authority that Maj Mori committed misconduct amounting to a violation of Article 88 of the Uniform Code of Military Justice and Department of Defense regulations. This conduct violates a "legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon" and is, therefore, prosecutorial misconduct.

4. **Burden of Proof**: The Defense, as the moving party, bears the burden of proof for factual issues by a preponderance of the evidence. Rule for Military Commissions ("R.M.C.") 905(c)(2).

5. **Facts**:

a. On 3 March 2007, an Australian newspaper reported that Col , Chief Prosecutor for the military commissions, accused Maj Mori of violating Article 88 of the Uniform Code of

Military Justice ("UCMJ") in the course of Maj Mori's defense of Mr. Hicks.[1] To support this allegation, Col told reporters:

> "Certainly in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was any of my prosecutors, they would be held accountable."[2]
>
> "Go back and look at some of the things he (Major Mori) has said. He's on the defence side and he doesn't seem to be held to the same standards of his brother officers."[3]

b. The article also reported that "Col said it would be up to the US Marine Corps to decide if charges should be laid."[4] Another newspaper reported that Col said "Major Mori was not playing by the rules and criticized his regular trips to Australia. He said he would not tolerate such behavior from his own prosecutors."[5]

c. Two days later, on 5 March, Col denied threatening Maj Mori with charges, incorrectly stating he did not have the power to charge Maj Mori.[6] At the same time, he implied Maj Mori had violated rules, stating "I would expect that of [Major Mori] or any defence counsel, to fight as hard as possible but I expect the fight to be within the rules." The next day, "Col stood by his allegation that Maj Mori had gone 'too far' in his campaign to free

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[1] *See, e.g.*, David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007 *available at*: http://www.news.com.au/story/0,23599,21315542-2,00.html (attachment A).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007, *available at:* http://www.theage.com.au/articles/2007/03/04/1172943276209.html (attachment B).

[6] Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007, *available at*: http://moora.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=562995&category=General&m=&y= (attachment C); RULE FOR COURTS-MARTIAL 307, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) ("Any person subject to the code may prefer charges.").

Hicks . . . 'I certainly wouldn't permit that from my folks,' Col said. 'But, he's not one of my folks.'"[7]

d. More than a week later, on 13 March 2007, Col wrote a detailed email to the convening authority arguing that Maj Mori has repeatedly violated Article 88, UCMJ, and Department of Defense Directive 1325.6 since at least 19 November 2005.[8] Col provided a dozen quotes from newspapers, which either quoted Maj Mori or attributed statements to him, that Col claims violate Article 88.[9]

6. **Law and Argument**:

A unanimous Court of Appeals for the Armed Forces has found that "[p]rosecutorial misconduct is generally defined as 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'"[10] The Military Commission Act ("MCA") sets forth the following standard: "No person may attempt to coerce or, by any unauthorized means, influence . . . the exercise of professional judgment by trial counsel or defense counsel."[11] Rule 3.4 of the Air Force Rules of Professional Conduct provides that "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal . . ."[12] An Air Force policy memorandum also explains that a lawyer should not "degrade the intelligence, ethics, morals, integrity or personal behavior of others, unless such matters are legitimately at issue in the proceeding."[13] More generally, it is

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[7] *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007, *available at*: http://www.worldnewsaustralia.com.au/region.php?id=135270&region=7 (attachment D).

[8] Email from Col dtd 13 Mar 07 (attachment E).

[9] *Id.*

[10] *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)) (denying relief for claim of prosecutorial misconduct on basis that military judge's curative action "secured the fairness and impartiality of the trial"); *see also Berger v. United States*, 295 U.S. 78, 84 (1935) (explaining prosecutorial misconduct occurs when the "prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense").

[11] 10 U.S.C. § 949b(a)(2)(C).

[12] TSJ-2, AF Rule 3.4 of Professional Conduct (attachment F).

[13] TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005) (attachment G); *cf. United States v.*

the duty of a prosecutor "to refrain from improper methods calculated to produce a wrongful conviction."[14] Accordingly, "[t]he government, which represents us all, should strive to be beyond reproach in the conduct of a prosecution; to expect less damages the sinews of our legal structure."[15]

Col has committed prosecutorial misconduct by violating the legal standard set forth in Section 949b(a)(2)(C) of the MCA. He attempted "to coerce or, by any unauthorized means, influence" Major Mori's "exercise of professional judgment" in representing Mr. Hicks.[16] Col did so by repeatedly accusing Maj Mori in the media of violating applicable rules.[17] He also attempted to exert command influence on Major Mori by suggesting the Marine Corps would decide whether Maj Mori would be court-martialed and by raising his allegations with the Convening Authority.

Furthermore, the curious timing of Col ' initial accusations – the day after charges were referred – is revealing, particularly given that Col alleges misconduct going back as far as November 2005. It suggests Col made the allegations to chill and hinder Maj Mori's representation of Mr. Hicks and to derail the defense shortly before the arraignment. These allegations diverted the defense team from preparing for Mr. Hicks' trial, forcing them to focus instead on assessing the potential conflict of interest between Maj Mori and Mr. Hicks. They also required Maj Mori to refrain from making public comments on behalf of Mr. Hicks until he could obtain legal advice on the issue.

Col ' conduct is even more appalling when one examines the merits of his claims. For example, "[i]f not personally contemptuous, adverse criticism of one of the officials or legislatures named in . . . [A]rticle [88] in the course of a political discussion, even though

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Fletcher, 62 M.J. 175, 181 (C.A.A.F. 2005) (finding prosecutorial misconduct where trial counsel made disparaging remarks regarding defense counsel in front of the members).

[14] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[15] *United States v. Horn*, 811 F. Supp. 739, 750 (D.N.H. 1992) (quoting *United States v. Ariza-Ibarra*, 651 F.2d 2, 17 (1st Cir. 1981)).

[16] *See* 10 U.S.C. § 949b(a)(2)(C).

[17] *Cf. United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) (concluding it may be prosecutorial misconduct if "the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify").

emphatically expressed, may not be charged as a violation of the article."[18] Nothing Maj Mori said was personally contemptuous – not to mention otherwise contemptuous -- of the President, Vice President or the Secretary of Defense. And Maj Mori's statements are consistent with his obligation to exercise judgment "solely for the benefit of the client and free of compromising influences and loyalties."[19] Col doesn't come close to alleging conduct that violates Article 88.[20] Additionally, the "particular facts" of Maj Mori's mission and conduct show that he did not violate Department of Defense Directive 1325.6 as Col alleges.[21]

One of Col ' statements to the Convening Authority reveals his motivation for attempting to quiet Maj Mori and it relates to the effectiveness of his representation, rather than the words he spoke: "MAJ Mori's campaign is having a direct impact on the elected government of one of our closest allies in an election year and while they are supporting us in a war. An article in today's Sydney Morning Herald notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor."[22] Obviously, the effectiveness of Maj Mori's representation of Mr. Hicks prompted Col ' attempt to chill that representation.

In addressing prosecutorial misconduct courts have considered disqualifying the prosecutor among other sanctions.[23] To remedy Col ' prosecutorial misconduct, this Court should relieve him of all prosecutorial and supervisory responsibilities with respect to Mr. Hicks' case. Mr. Hicks should not be punished by (1) having to waive any conflict of interest that Col created between Mr. Hicks and Maj Mori and proceed with Col still involved in and

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[18] Manual for Courts-Martial, United States, Pt. IV, ¶12.c (2005 ed.).

[19] JAGINST 5803.1C, Rule 5.4(d) (comment), 9 Nov 04 (attachment H).

[20] *Cf. United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (affirming conviction of contempt where the accused carries a sign at a demonstration calling the President a "facist" was personally contemptuous).

[21] DoDD 1325.6 ¶ 1 (1 Oct 96).

[22] App. E at 2-3.

[23] *See, e.g.*, *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) ("Courts faced with prosecutorial misconduct or violations of discovery rules have considered sanctions including granting a continuance, granting a new trial, disqualifying the prosecutor, imposing disciplinary sanctions on the offender, holding the offender in contempt, publicly chastising the offender and excluding evidence.") (citations omitted).

having influence over the process,[24] or (2) by having Maj Mori, who has represented Mr. Hicks for approximately three years, replaced with a brand new military counsel within months of trial whose representation may also be chilled by Col ' allegations regarding Maj Mori. "[J]ustice must satisfy the appearance of justice."[25] Any lesser remedy will deprive Mr. Hicks' trial of the appearance of fairness.

7. **Request for Oral Argument**: The defense requests oral argument. Oral argument is necessary to analyze the facts elicited from the witnesses requested. Furthermore, as provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."

8. **Request for Witnesses**: The defense requests the following witnesses:

   Col , Chief Prosecutor, Military Commissions

   David Nason

[24] *Cf. United States v. Ramos*, 350 F. Supp. 2d 413 (S.D.N.Y. 2004) (disqualifying defense counsel where the conflict was of the attorney's own making as opposed to prosecutorial misconduct).

[25] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

9. **Attachments**:

A) David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007

B) Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007

C) Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007

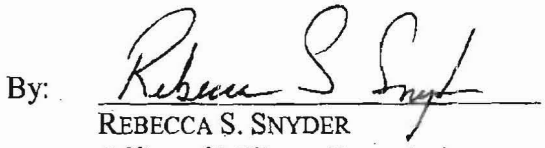
D) *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007

E) Email from Col dated 13 March 2007\

F) TSJ-2, AF Rule 3.4 of Professional Conduct

G) TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005)

H) JAGINST 5803.1C, Rule 5.4(d) (comment)

By: 

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Mori charges could be laid after trial

By David Nason
March 03, 2007 12:00am

Article fro... THE AUSTRALIAN

THE chief prosecutor of the US military has warned David Hicks's military lawyer, Michael Mori, that "politicking" on behalf of his client could result in charges under the Uniform Code of Military Justice.

"I don't know what Major Mori's plans are right now but if he wants to come back home and represent his client, that would be helpful," Colonel said.

"Certainly in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was any of my prosecutors, they would be held accountable."

Colonel said it would be up to the US Marine Corps to decide if charges should be laid.

He cited Article 88 of the code, which prohibits the use of contemptuous language against the President, Vice-President, Secretary of Defence and Congress.

"Go back and look at some of the things he (Major Mori) has said. He's on the defence side and he doesn't seem to be held to the same standards of his brother officers," Colonel said.

Major Mori would not discuss his comments regarding the military commission.

But he said the dropping of all original charges against Hicks was an admission by the US he had been held without justification for five years.

"The material support charge has never existed in the laws of war," Major Mori said.

"It was created in October 2006 and the US is applying this offence to David retrospectively, even though Australian ministers have said that is inappropriate.

"After five years, the US has not charged David with a single war crime. David has no hope of facing a fair trial, which would have been provided to an American a long time ago."

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Attachment A

Hicks trial at risk if Mori taken off case

Tom Allard
March 5, 2007

MAJOR Michael Mori, the defence lawyer for terror suspect David Hicks, could be removed from the case after threats from the chief US prosecutor to charge him under the Uniform Code of Military Justice.

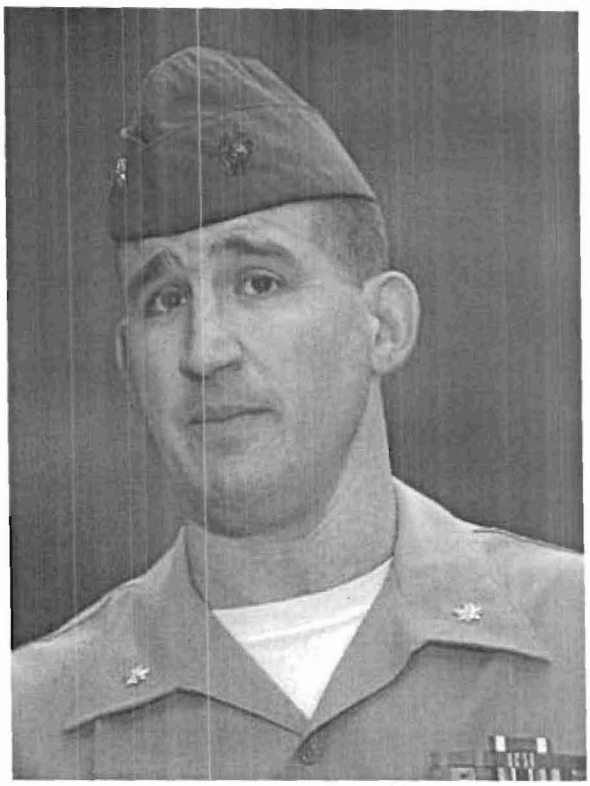
The intervention may derail Hicks' trial and possibly prompt his return to Australia.

It would take months for a new lawyer to get to grips with the case and the new military commission process.

Prime Minister John Howard has told Washington that any action leading to further delays would be unacceptable and would prompt him to demand the return of Hicks, 31, after being held for five years at the US base at Guantanamo Bay.

Colonel has accused Major Mori of breaching article 88 of the US military code, which relates to using contemptuous language towards the President, Vice-President or Secretary of Defence.

Penalties for breaching the code include jail and the loss of employment and entitlements.



Mori: Accused of breaching military rules.
Photo: *Craig Abraham*

Major Mori denied he had done anything improper, but said the accusations left him with an inherent conflict of interest.

"It can't help but raise an issue of whether any further representation of David and his wellbeing could be tainted by a concern for my own legal wellbeing," Major Mori told *The Age*. "David Hicks needs counsel who is not tainted by these allegations."

Major Mori, who has been to Australia seven times, will seek legal advice.

The issue will also have to be raised with Hicks when his legal team next sees him.

The Federal Government has highlighted Major Mori's work as proof of the fairness of the much-criticised US military commission system.

However, Colonel said Major Mori was not playing by the rules and criticised his regular trips to Australia. He said he would not tolerate such behaviour from his own prosecutors.

"Certainly, in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing," he reportedly said.

"He doesn't seem to be held to the same standards as his brother officers."

Hicks' lead defence counsel, Joshua Dratel, a New York attorney, said Colonel ' threats were the latest

Attachment B

example of the "corrupt" system that will try Hicks.

Mr Dratel pointed to the former senior Pentagon official in charge of detainee affairs, Cully Stimson, who resigned last month after urging businesses not to hire law firms that had worked for Guantanamo prisoners.

US prosecutors are under intense pressure to offer Hicks, a former kangaroo skinner and father of two, a plea bargain deal by the end of the month.

Senior Australian Government members want Hicks to come home a free man, provided he agrees to a pre-trial plea of guilty.

Amid rising public anger in Australia about Hicks' long wait for justice and alleged mistreatment, any Hicks trial risks becoming a public relations disaster. He is to be the first person to appear before a military commission.

The world's media will be focused on the case, including al-Jazeera and other Middle Eastern outlets.

They will hear graphic testimony of abuses and torture by US guards and interrogators. It will involve a man, Hicks, whose alleged offence pales alongside the serious accusations made against alleged senior al-Qaeda leaders at Guantanamo Bay.

Prosecutors have dropped three charges against Hicks — attempted murder, aiding the enemy and conspiracy to commit war crimes. There is now only the lesser charge of providing material support to a terrorist group. That charge did not exist for non-US citizens when Hicks was arrested.

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Attachment B

Monday, 5 March 2007

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Hicks faces another possible trial delay

By Peter Veness

Australian terror suspect David Hicks faces the prospect of yet another delay to his trial because his US lawyer has been threatened with court martial.

Last week Hicks was formally charged by the US with providing material support for terrorism and is due to face trial before a US military commission within four months.

But Hicks' outspoken military lawyer Major Michael Mori has said he could be pulled from the case for being too political and that could cause a further delay.

The chief US prosecutor, Colonel , has accused Major Mori of breaching Article 88 of the US military code by actively inserting himself into the political process.

That section relates to using contemptuous language towards the US president, vice-president, and secretary of defence.

Labor has called on the government to defend Major Mori or face the possibility of Hicks' trial being delayed again.

"If the Howard government does not intervene at this point, we face the prospect that Major Mori will not be able to continue to represent David Hicks in future," opposition legal affairs spokesman Kelvin Thomson told reporters.

"This will simply damage the defence case and the search for a replacement lawyer will add more delays to a situation where David Hicks has already been at Guantanamo Bay for over five years without a trial.'

Prime Minister John Howard said any delay would be unacceptable.

"We would not regard a further significant delay as being acceptable," Mr Howard told the Nine Network.

However, Mr Howard refused to comment on the threat to Major Mori.

In the past, Attorney-General Philip Ruddock has strongly backed the vigorous defence of Hicks offered by Major Mori as proof the military commission system the US is using to prosecute suspected terrorists is appropriate.

"Extensive safeguards are in place for a fair trial, and of course, Major Mori is part of that process," Mr Ruddock said.

"I presume that other members of that process will bring the same diligent approach to their roles as Major Mori."

The Adelaide-born Hicks has been held in the US prison at Guantanamo Bay for five years without trial since his capture in Afghanistan in late 2001.

The Australian Lawyers Alliance said any charges against Major Mori would delay a trial.

"News that ... Major Mori could face charges ... for inserting himself into the political process would do nothing but create further delays for Hicks," alliance president Simon Morrison said.

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Attachment C

CENTRAL MIDLANDS & COASTAL ADVOCATE

ADVOCATE

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Mori won't be charged: Davis

6.3.2007. 15:00:32

The US chief military prosector has denied reports he is moving to charge David Hicks' defence lawyer, Major Michael Mori, for being outspoken.

Colonel says he would be "dumbfounded" if the Australian terror suspect's lawyer was court-martialled for his comments.

Col said he had no power to charge him for contemptuous comments made against US President George W Bush, the US Secretary of Defence or Congress.

RELATED LINKS
- PM won't comment on Mori delay
- Hicks' trial possibly delayed
- Father may incriminate Hicks

The prosecutor also said he was not aware of any moves by US officials with that power to bring charges against Maj Mori.

There were fears that if he was court-martialled it would delay Hicks' long-awaited military commission trial.

"I'm not aware of anybody, anywhere that has any intention of charging Maj Mori with anything," Col said.

Col created headlines on the weekend when he suggested Maj Mori may have breached Article 88 of the US Uniform Code of Military Justice (UCMJ).

Article 88 prohibits military officers from using "contemptuous words" against the president, vice president, US secretary of defence or Congress.

Maj Mori, during numerous trips to Australia and in interviews in the US, has been a staunch critic of the military commission system to prosecute Hicks and other Guantanamo Bay inmates.

Mori has gone 'too far'

Col stood by his allegation that Maj Mori had gone "too far" in his campaign to free Hicks, including attending rallies dressed in US military uniform.

"I certainly wouldn't permit that from my folks," Col said.

"But, he's not one of my folks."

Asked if he believed Maj Mori should be court-martialled for breaching Article 88 of the UCMJ, Col said "it's not my decision".

"He's not in my chain of command," Col continued.

"I have no authority over him.

"I'm in the Air Force, he's in the Marine Corps.

"I'm not responsible for Major Mori."

Col said the origin of Article 88 can be traced back more than 200 years to the British Articles of War of 1769.

He said it was extremely rare for a military officer to be prosecuted for an alleged Article 88 violation.

Attachment D

"You can count the number of court martials for Article 88 violations on one hand," Col said.

"They are very uncommon.

"I would be absolutely dumbfounded if this kind of thing rose to that level."

Adelaide-born Hicks, 31, was charged last Thursday with providing material support for terrorism.

It is expected he will make his first appearance before the military commission at the US naval base at Guantanamo Bay, Cuba, in late March.

Hicks has been in US custody for more than five years after being picked up on the Afghanistan battlefield in December, 2001.

It is alleged Hicks trained and fought with al-Qaeda against US and coalition troops in Afghanistan.

SOURCE: AAP

http://www.worldnewsaustralia.com.au/region.php?id=135270&region=7

Attachment D

From: , COL, DoD OGC
To: , DoD OGC
CC: DoD OGC ; Sullivan, Dwight, COL, DoD OGC
Sent: Tue Mar 13 10:25:59 2007
Subject: Criticism of Statements Made by Colonel

Ms

I do not want to prolong this, but now is as good a time as any to bring some clarity to this area of confusion. Let me also state that it is not now, nor has it been in the past, my intent to seek disciplinary action against any member of the defense team. My intent is to ensure we all understand what the law is and that we all abide by the law. This is admittedly a confusing area and my sole intent is to seek clarification.

I believe MAJ Mori's words and actions exceed what the law allows. Specifically, Article 88 of the UCMJ prohibits using contemptuous language against certain civilian officials and DoDD 1325.6 prohibits service members from participating in demonstrations while on duty, in uniform, or in a foreign country. There are no defense counsel exemptions in either case and I believe COL Sullivan's reliance on the Rules of Professional Conduct to absolve MAJ Mori's conduct is misplaced.

Taking those points in reverse order. The underlying principles upon which the Rules of Professional Conduct are based (set out on page 12 of Navy JAGINST 5803.1B, which apply to COL Sullivan and MAJ Mori) state: "Ethical rules should be consistent with the law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based."

The law, as expressed by statute in Article 88, is that officers may not use contemptuous language against the President, Secretary of Defense, the Congress, and others. The military judge's benchbook defines contemptuous language as language that is insulting, rude, or disrespectfully attributes qualities of meanness, disreputableness, or worthlessness. The truth or falsity of the language is immaterial. The basis for the law is that permitting officers to disparage the civilian leadership erodes good order and discipline, and promotes insubordination. That is particularly true when, as now, we have troops engaged in armed conflict. I will not list every instance where I believe MAJ Mori's language exceeds what the law allows, but here is a sampling:

"The military commissions have been set up by the civilian administration to deliver political verdicts to justify their prior actions in Afghanistan and their PR statements that they have war criminals at Guantanamo." (Audio available at: http://www.theage.com.au/multimedia/hicks/interviews.html)

"This is a process designed by the President and the Vice-President and the imperative is to get convictions," (Mori) says. "This process is nothing like a court martial, nothing like it. I'm still not an expert on international law, but I know enough to know this is not justice." (Sydney Morning Herald, November 19, 2005)

"It was a political stunt. The Administration clearly didn't know anything about military law or the laws of war. I think they were clueless that there was a U.C.M.J. and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in convictions." (The New Yorker, July 3, 2006, Vol. 82, No. 20, at Pg. 44)

They don't want the Supreme Court coming in and finding this new system illegal before this administration can be out of office. (Australian Broadcasting Corp. Transcript, January 19, 2007)

Attachment E

Still, the biggest problem for Mori - and for Hicks - is that the US administration simply can't afford to back down. "They need concrete results to prove what they did was right." Mori said. It isn't an option for Hicks to be found not guilty, Mori said, which is exactly why the US is reluctant to give the Australian his day in court. "The US doesn't care how long the litigation takes," he said.

Although there is now limited dissent in Congress, where legislation for the new military commission is currently being discussed, the majority view amongst congressmen is that no matter the system, Hicks must be convicted, Mori said. The military commission system was the administration's attempt to achieve guaranteed results without risking judicial scrutiny in the form of a properly constituted court or court-martial, Mori said.

When asked, Mori said that he doesn't "believe in conspiracy from the [US] government unless you first rule out incompetence."
(Lawyers Weekly, August 25, 2006)

Major Mori said he was now waiting for US Defense Secretary Donald Rumsfeld to "write the rules" of the new commissions, which he believed would be a "rigged system." (Australian Associated Press, November 3, 2006)

"Because right now [Hicks' has] been a victim of a war crime far greater than he's ever done to anybody else. ... There would be a cause of action to prosecute the people who participated in the unlawful system." (Transcript of Enough Rope with Andrew Denton, August 14, 2006)

Hicks faces new military commissions set up in the US that Major Mori said are rigged for convictions only. (Australian Associated Press, August 13, 2006)

Michael Mori: "The system has to be written by the Secretary of Defence for the United States, which is another serious problem, that all the power sits in the Secretary of Defense's hands, and they need, the Secretary of Defence needs, a system that will guarantee convictions to justify what they've done to David [Hicks]." (Australian Broadcasting Corp. Transcripts, December 14, 2006)

"The reality is David Hicks is being left to be done over in another unfair system that is not good enough for anyone else so politicians don't have to admit they made mistakes." (Mori editorial, The Age, January 14, 2007)

I wholeheartedly support the right of defense counsel to forcefully and publicly criticize alleged defects in military commissions, but to go well beyond arguing where the system is flawed and attribute bad motives or incompetence as the basis for a deliberate design by the President, Vice President, Secretary of Defense, and Congress to justify their alleged mistakes is, in my opinion, the type of language Article 88 prohibits. (See U.S. v. Howe, 37 C.M.R. 165, USCMA 1967).

Additionally, DoDD 1325.6 prohibits service members from participating in demonstration on duty, in uniform, or in a foreign country, and it contains no exceptions for judge advocates. The photograph linked above shows MAJ Mori at a demonstration in Adelaide, Australia, last August doing all three: in uniform (minus hat), on orders (I believe), and in a foreign country. Below is a link to a video of the event. The event ended with a march in the streets to the foreign ministry office.
http://www.youtube.com/watch?v=1MJMp9ZKpts The prohibitions in the DoDD balance free expression against military effectiveness, morale and discipline, and foreign relations. MAJ Mori's campaign is having a direct impact on the elected government of one of our closest allies in an election year and while

they are supporting us in a war. An article in today's Sydney Morning Herald notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor
http://www.smh.com.au/news/national/qantas-sale-adds-to-voter-turbulence/2007/03/12/1173548109818.html

Again, I support zealous defense representation, but within the bounds of the law. Using contemptuous language against the SECDEF, tampering with evidence, bribing a juror, or kidnapping an adverse witness are all effective and are all in an accused's interest, but all four exceed what the law allows.

Respectfully,

Colonel, USAF
Chief Prosecutor
Office of Military Commissions

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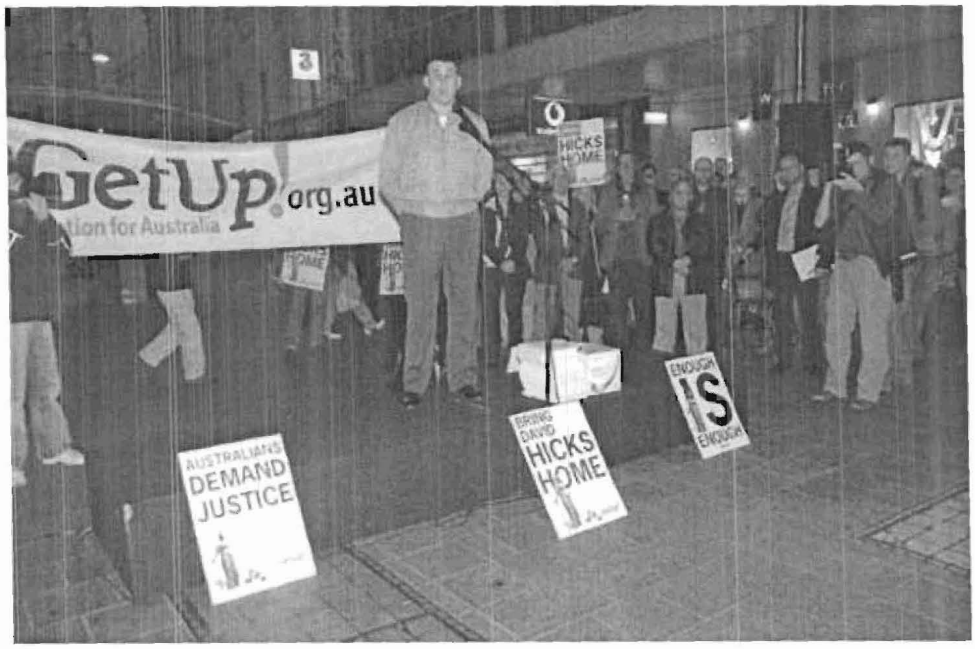

-----Original Message-----
From: Sullivan, Dwight, COL, DoD OGC
Sent: Monday, March 12, 2007 09:33
To: Lt Col AF/JAU
Cc: Hon, DoD OGC; BG, DoD OGC; , COL, DoD OGC; LtCol AF/JA
Subject: Re: Criticism of Statements Made by Colonel Morris Davis

Colonel ,

Attachment E

Thank you for sharing your analysis with me. Please note that my reference to the Rules of Professional Conduct was not intended to suggest that the statements attributed to Colonel had run afoul of those rules. Rather, the reference was intended to demonstrate that when assigned to represent an individual client, a judge advocate has unique responsibilities. The statements attributed to Colonel appeared to suggest that Major Mori acted improperly by purportedly making statements that would be impermissible for commission prosecutors or other military officers to make. Rule 5.4 refutes any such suggestion. Thus, my point was not to imply that anyone had violated the rules of professional conduct; rather, my point was that Major Mori had not.

Respectfully.
Dwight Sullivan
Col, USMCR
Chief Defense Counsel
Office of Military Commissions

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Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Lt Col AF/JAU
To: Sullivan, Dwight, COL, DoD OGC
CC: Hon, DoD OGC ; , BG, DoD OGC
: COL. DoD OGC ;
LtCol AF/JA
Sent: Mon Mar 12 08:46:40 2007
Subject: Criticism of Statements Made by Colonel

Col Sullivan-- I am the Chief of Professional Responsibility the Air Force JAG Corps. (We met at last October's Air Force "Keystone Conference" in Orlando, Florida, as I was assisting with travel arrangements.) I recently received a copy of an email you sent to the Appointing Authority for the Office of Military Commissions regarding statements made by Air Force Col , Chief Prosecutor, in connection with the Hicks prosecution. I considered your email under the Air Force Rules of Professional Conduct. Please see the attached letter for my analysis. Thank you for sharing your concerns and please let me know if I can be of any assistance. I will send the original directly.
<<Sullivan Letter - Complaint.pdf>> V/R

, Lt Col, USAF
Chief, Professional Responsibility Division (AF/JAU)

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Attachment E

that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *Nix v. Scurr*, 744 F.2d 1323,1328 (8th Cir. 1984), rev'd on other grounds, *Nix v. Whiteside*, supra. See *United States v Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

The term "legal authority in the controlling jurisdiction" in (a)(3) refers to Air Force or Department of Defense regulations or directives, the MCM, opinions by military appellate courts, or similar authorities.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

DISCUSSION

Rule 3.4(f) permits Air Force lawyers to advise officials, members, and employees of the Air Force to refrain from giving information to another party, especially when the individual's interests coincide with those of the Air Force. (See Rule 1.13 and Rule 4.2.)

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) [Modified] seek to influence a judge, court or board member, prospective court or board member, or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

OPR: AF/JAU

Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct

17 Aug 05

1. Summary. This policy memorandum transmits the *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*) and the *Air Force Standards for Civility in Professional Conduct* (*Standards for Civility*).

2. Background.

a. *Air Force Rules of Professional Conduct.* The *Rules* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although counsel are still obligated to their licensing bar authorities, the *Rules* govern Air Force practice. They were adapted from the *American Bar Association Model Rules of Professional Conduct* in order to minimize inconsistent ethical requirements. However, when there is a difference between state rules and the Air Force *Rules*, the Air Force provisions will control.

b. *Air Force Standards for Civility in Professional Conduct.* Along with our obligation to represent clients zealously, we must also fulfill our responsibilities to the administration of justice. Civility—treating others with courtesy, consideration, and mutual respect, regardless of the cause they espouse—enhances the dignity of the profession of law and the satisfaction of all who are affected by it. Incivility to counsel, adverse parties, judges, administrative personnel, and other participants in the legal process, undermines the administration of justice, diminishes respect for the legal profession and for the results of our judicial system, and can delay or deny justice. We are indebted to the Federal Bar Association and the District of Columbia Bar for their work on these standards.

3. Applicability. The *Rules* and the *Standards for Civility* apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps (TJAGC). This includes host nation lawyers, paralegals, and other personnel employed overseas by the Department of the Air Force, to the extent the *Rules* and the *Standards for Civility* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants) with no other connection to the Air Force. Staff judge advocates and Air Force military defense counsel working with defense counsel from outside the Air Force should ensure outside counsel are aware of the *Rules* and the *Standards for Civility* and have ready access to them.

Approved 17 August 2005 by:

, Major General, USAF
Deputy Judge Advocate General
Performing Duties of The Judge Advocate General
10 U.S.C. §8037

2 Attachments:
1. *Air Force Rules of Professional Conduct*
2. *Air Force Standards for Civility in Professional Conduct*

Attachment G

AIR FORCE STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT[1]

17 August 2005

PRINCIPLES OF GENERAL APPLICABILITY: LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY

General Principles:

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staffs, parties, witnesses, judges, court personnel, and other staff, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.

2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor, our clients' ill feelings, if any, towards other participants in the legal process.

3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process; nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from directing disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.

4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.

5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.

6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry, in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation, as well as disputed matters that are not, or are not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of all transactions.

7. The foregoing General Principles apply to all aspects of legal proceedings, both in the presence and outside the presence of a court or tribunal.

Scheduling Matters:

8. We will endeavor to schedule dates for trials, hearings, depositions, meetings, negotiations, conferences, vacations, seminars, and other functions to avoid creating calendar conflicts for other participants in the legal process, provided our clients' interests will not be adversely affected.

9. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences need to be canceled or postponed. Early notice avoids unnecessary travel and expense and may enable the court and the other participants in the legal process to use the previously reserved time for other matters.

---

[1] Adapted with the consent of the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996

10. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' interests will not be adversely affected.

11. We will not request an extension of time for the purpose of unjustified delay.

PRINCIPLES PARTICULARLY APPLICABLE TO LITIGATION

Procedural Agreements:

12. We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as requests for extensions of time, discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to the court.

13. We accept primary responsibility, after consultation with the client, for making decisions about procedural agreements. We will explain to our clients that cooperation between counsel in such matters is the professional norm and may be in the client's interest. We will explain the nature of the matter at issue in any such proposed agreements and explain how such agreements do not compromise the client's interests.

Discovery:

14. We will not use any form of discovery or discovery scheduling to harass, create unjustified delay, increase litigation expenses, or for any other improper purpose.

15. We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings, discovery requests, and objections.

16. We will not engage in any conduct during a deposition that would not be appropriate if a judge were present. Accordingly, we will not obstruct questioning during a deposition or object to deposition questions, unless permitted by the applicable rules to preserve an objection or privilege, and we will ask only those questions we reasonably believe are appropriate in discovery under the applicable rules.

17. We will carefully craft document production requests so they are limited to those documents we reasonably believe are appropriate under the applicable rules. We will not design production requests for the purpose of placing an undue burden or expense on a party.

18. We will respond to document requests reasonably and in accordance with what the applicable rules require. We will not interpret a request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

19. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are appropriate under the applicable rules, and we will not design them for the purpose of placing an undue burden or expense on a party.

20. We will respond to interrogatories reasonably and in accordance with what the applicable rules require. We will not interpret interrogatories in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

21. We will base our discovery objections on a good faith belief in their merit. We will not object solely for the purpose of withholding or delaying the disclosure of properly discoverable information.

22. During discovery, we will not engage in acrimonious conversations or exchanges with opposing counsel, parties, or witnesses. We will advise our clients to conduct themselves in accordance with these provisions. We will not engage in undignified or discourteous conduct that degrades the legal proceeding.

Sanctions:

23. We will not seek court sanctions or disqualification of counsel unless reasonably justified by the circumstances determined after conducting a reasonable investigation, which includes attempting to confer with opposing counsel.

Lawyers' Duties to the Court:

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court to any tribunal, we shall use language that is respectful of courts or tribunals, the system of justice, and the symbolism that these represent.

25. We will not engage in conduct that offends the dignity or decorum of judicial or administrative proceedings, brings disorder or disruption to the courtroom or tribunal, or undermines the image of the legal profession.

26. We will advise clients and witnesses to act civilly and respectfully toward the court, educate them about proper courtroom decorum, and, to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

27. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities and will immediately make any clarifications and corrections as these become known to us.

28. We will not degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

29. We will act and speak civilly and respectfully to the judge's staff, the courtroom and tribunal staff, and other court or tribunal personnel, with an awareness that they, too, are an integral part of the judicial system. We will also advise clients and witnesses to act civilly and respectfully toward these participants in the legal process.

30. We recognize that judicial resources are scarce, that court dockets are crowded, and that justice is undermined when cases are delayed and/or disputes remain unresolved. Therefore, we will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

31. We recognize that tardiness and neglect show disrespect to the court and the judicial system. Therefore, we will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time and proceed efficiently. We will also educate clients and witnesses concerning the need to be punctual and prepared. If delayed, we will promptly notify the court and counsel, if at all possible.

32. Before dates for hearings or trials are set, or, if that is not feasible, immediately after such a date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

33. We will avoid ex parte communications with the court or tribunal, including the judge's staff, on pending matters, in person (whether in social, professional, or other contexts), by telephone, or in letters or other forms of written communication, unless such communications relate solely to scheduling or other non-substantive administrative matters, or are made with the consent of all parties, or are otherwise expressly authorized by law or court rule.

Judges' Duties to Lawyers and Others:

34. We will be courteous, respectful, and civil to lawyers, parties, agency personnel, and witnesses. We will maintain control of the proceedings, recognizing that we have both the obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.

35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.

36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.

37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, witnesses, and of other courts. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

38. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. We will make all reasonable efforts to decide promptly any matters presented to us for decision.

39. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom, or the causes which, a lawyer represents.

41. We will do our best to ensure that court personnel act civilly towards lawyers, parties, and witnesses.

42. At an appropriate time and in an appropriate manner, we will bring to a lawyer's attention conduct which we observe that is inconsistent with these standards.

Judges' Duties to Each Other:

43. We will treat other judges with courtesy and respect.

44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.

45. We will endeavor to work cooperatively with other judges with respect to the availability of lawyers, witnesses, parties, and court resources.

OTHER GENERAL PRINCIPLES

46. We will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations, and will immediately make any clarifications and corrections as these become known to us.

47. We will not engage in personal vilification or other abusive or discourteous conduct in negotiations. We will not engage in acrimonious exchanges with opposing counsel or parties at the negotiating table. We will encourage our clients to conduct themselves in accordance with these principles.

48. We will honor all understandings with, and commitments we have made to, other lawyers. We will stand by proposals we have made in negotiations, unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them, and we will encourage our clients to conduct themselves in accordance with this principle.

49. We will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. We will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.

50. In memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely. In drafting proposed agreements based on letters of intent, we will strive to draft documents that fairly reflect the agreements of the parties.

c. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(3) Rule 4.1 Truthfulness in Statements to Others
(4) Rule 4.4 Respect for Rights of Third Persons
(5) Rule 5.5 Unauthorized Practice of Law

4. **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A COVERED USG ATTORNEY**

a. Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

b. Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

c. The exercise of professional judgment in accordance with subsections (a) or (b) above shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

d. COMMENT

(1) This Rule recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered

attorney's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

e. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.3 Diligence
(4) Rule 1.7 Conflict of Interest: General Rule
(5) Rule 1.13 Department of the Navy as Client
(6) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys

5. **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

a. A covered USG attorney shall not:

(1) except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction;

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(3) engage in the outside practice of law without receiving proper authorization from the Judge Advocate General.

b. COMMENT.

(1) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a covered USG attorney may

From: Mori, Michael, MAJ, DoD OGC
Sent: Wednesday, March 21, 2007 6:53 PM
To:

Cc:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

1. The defense objects to any 802 conference where Mr. Hicks is prohibited from being present. R.M.C. 802(d) provides that the accused's presence at an 802 conference is not prohibited. The defense objects to the SJA's decision and the Military Judge's apparent ruling that Mr. Hicks will not be present at the 802 conference. This prohibits Mr. Hicks' appearance at an 802 conference in violation of R.M.C. 802(d).

2. Prohibiting Mr. Hicks from attending 802 conferences deprives him of the right to be present for his commission as guaranteed by the MCA and to materially participate in his defense. See 10 U.S.C. § 949a(b)(1)(B) ("The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.").

3. The defense also objects to the 802 on the basis that it has been scheduled when lead counsel for Mr. Hicks cannot attend.

4. Maj Mori and Ms. Snyder will attend the conference. Please be advised that we will not be in a position to speak. See R.M.C. 802, Discussion ("Normally, the defense counsel may be presumed to speak for the accused".).

5. Finally, please be advised the defense intends to tape record the conference.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: LTC, DoD OGC
Sent: Wednesday, March 21, 2007 17:58
To:

Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Wednesday, March 21, 2007 14:22
To: DoD OGC
Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please forward this message to the counsel in subject case.

Counsel:

1. The R.M.C. 802 conference will go @ 1400 on 25 March 2007 as previously ordered. The time was not chosen at random and I am not seeking to frustrate anyone.The conference is intended to enable me to ensure that the arraignment hearing is conducted in as efficient and professional a fashion as possible. The requested change in the meeting time does not further my intentions in that regard.

2. I previously asked that counsel from both sides work together to develop a recommended litigation schedule that works as well as possible for both sides. Hopefully you have been doing this, and hopefully the defense has already taken Mr. Dratel's concerns into account. In any event, I expect that Maj Mori will be able to provide scheduling input from the defense side at the 802 conference.

3. No disputed matters will be resolved at the 802 conference.

4. With regard to Mr. Dratel, I would also note that this court has not yet received his notice of appearance and agreement as required by the preliminary procedural instructions. A signed copy of enclosure 4 to the preliminary procedural instructions must be submitted to the court prior to his participation in this case.

5. Mr. Hicks will not be present at the 802 conference on 25 March 2007.

6. Arrangements with regard to any visit with or movement of Mr. Hicks should be coordinated with appropriate personnel on the JTF-GTMO staff.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From: LtCol, DoD OGC
Sent: Tuesday, March 20, 2007 16:35
To:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

-- sir:

1. Per my phoncon today o/a 1530 with the SJA, JTF-GTMO (CAPT ; copied in this e-mail chain), the Prosecution objects to the presence of the accused at the 802 conference -- to include the accused being moved to any location other than to the courtroom for a session on the record.

2. For security and related logistical reasons, JTF-GTMO is prepared to move the accused only for purposes of the military commission session on the record and in the courtroom.

3. Defense will be provided adequate access to consult with their client throughout the day, to include after 1800 upon good cause being shown (e.g., to discuss the results of the 802 conference).

V/r-- LtCol

, LtCol, USMC
Prosecutor, Office of Military Commissions

-----Original Message-----
From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:19
To:

Subject: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

Mr. Dratel is not due to arrive until approx. 1630. As Mr. Dratel is lead counsel for Mr. Hicks, it is requested that the RMC 802 conference be scheduled after 1800. This will provide sufficient time for Mr. Dratel to get over from Leeward.

Ms. Snyder and I can work on getting the AEs formalized outside of an 802 conference but any discussion on the listed items will require Mr. Dratel's presence.

Additionally, pursuant to RMC 802(d), the defense would request that Mr. Hicks be made available at the Commission building at 0900 until the conclusion of any 802 conference on 25 March.

Mr. Hicks' presence will permit him to participate in the 802 conference, should he choose to as well as permit counsel to consult with Mr. Hicks in a timely manner. Additionally, Mr. Hicks' presence at the commission building will permit adequate time for preparation between Mr. Hicks and his counsel for the arraignment session scheduled on the 26th while facilitating counsel availability for the scheduled 802 conference or any subsequent conference that day.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: LTC, DoD OGC
Sent: Tuesday, March 20, 2007 15:00
To:

Subject: FW: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Tuesday, March 20, 2007 12:11
To: LTC, DoD OGC
Subject: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please send this message and the initial session trial guide to the counsel in subject case.

Counsel,

1. Attached is the trial guide we will use for the arraignment session. Please note the items referred to therein that you should be providing to for marking as AEs.

2. I am hereby directing a R.M.C. 802 conference re this case to be held in the conference room next to the GTMO court room @ 1400 on 25 March 2007. All counsel assigned to this case are directed to attend. (has been pr eviously excused from the arraignment session by me. I also understand that Mr. Dratel's travel schedule may not be able to facilitate his attendance.)

3. At this 802 session we will:

a. Ensure we have all items to be referenced in court marked as AEs.
b. Provide me an opportunity to receive input from both sides on the litigation schedule.
c. Have a preliminary discussion re Ms. Snyder's status as a civilian counsel in this case vis a vis the provisions of the M.C.A. and the M.M.C.

V/R,

Colonel, U.S. Marine Corps

DoD OGC

From: LTC, DoD OGC
Sent: Thursday, March 22, 2007 3:27 PM
To: SFC, DoD OGC
Cc: Ms, DoD OGC
Subject: FW: HICKS: SPECIAL REQUEST FOR RELIEF: TELEPHONIC TESTIMONY OF WITNESS FOR PROSECUTORIAL MISCONDUCT MOTION

From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:02
To:

Subject: HICKS: SPECIAL REQUEST FOR RELIEF: TELEPHONIC TESTIMONY OF WITNESS FOR PROSECUTORIAL MISCONDUCT MOTION

Sir,

Pursuant to RMC 703(c)(3), I request that [redacted], a witness on an interlocutory issue, be permitted to testify via telephone, should his testimony become necessary for the Defense's prosecutorial misconduct motion.

While Mr. Nason works in New York, he is currently on vacation in Australia. He is willing to testify via telephone. He is not scheduled to return to the United States until April.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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Filings Inventory – US v. Hicks
(Version 2)

As of 2100 hours, 30 March 2007

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Special Request for Relief to permit the absence of	14 Mar 07			• request filed • granted by MJ 14 Mar 07	OR - 009 A - 009
P 002:					

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion for Appropriate Relief - Prosecutorial Misconduct	19 Mar 07	26 Mar 07		• motion filed • A. Pros response 26 Mar 07 (at GTMO)	OR - 015
D 002: Special Request for Relief to permit telephonic testimony for Motion D001	20 Mar 07			• request filed •	OR - 017
				•	
				•	
				•	
				•	
				•	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• sent to all parties 6 Mar 07 w/arraignment date of 20 Mar • A. DC request continuance on 8 Mar to 27 Mar • B. Pros request on 9 Mar for 26 Mar date • C. MJ ruling on 9 Mar - arraignment on 26 Mar	OR - 003 A - 005 B - 005 C - 005
MJ 002: Preliminary Procedural Instructions	• sent to all parties 9 Mar 07	007
MJ 003 – Voir Dire	• MJ bio sent 6 Mar 07 • A. voir dire submitted by defense • B. voir dire submitted by prosecution • C. MJ responses to voir dire submitted by prosecution and defense	OR -006 A - 010 B - 012 C - 013
MJ 004: Notice of RMC 802 Hearing	• sent to all parties 20 Mar 07 w/hearing date of 25 Mar (follow-on email included)	016
	•	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	AE
	Protective Order	1	29 Mar 07	• Protection of Military Commission Members (ID of panel members)	032

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
				•	

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
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Inactive Section

MJ Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE

UNITED STATES MILITARY COMMISSIONS
GUANTANAMO BAY

----------x

UNITED STATES OF AMERICA	:	CIVILIAN DEFENSE COUNSEL NOTICE OF APPEARANCE AND AGREEMENT
- v. -	:	
DAVID HICKS,	:	MARCH 21, 2007
Defendant	:	

----------x

1. Pursuant to instructions by the military judge for counsel, I, JOSHUA L. DRATEL, hereby provide notice to the military judge of my appearance on behalf of DAVID HICKS. My office address, phone numbers, and e-mail address are: 2 Wall Street, 3rd Floor, New York, New York 10005, telephone: (212) 732-0707, facsimile: (212) 571-3792, and e-mail address: jdratel@joshuadratel.com. I am an active member in good standing licensed to practice in the following jurisdictions: New York State, United States Supreme Court, United States District Courts for the Southern, Eastern, Western, and Northern Districts of New York United States Courts of Appeals for the First, Second, Third, Fourth, and Eighth Circuits.

2. I understand and agree that I must comply with all presently existing applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings. I further agree to protect any classified information received during the course of the representation of the accused in accordance with all applicable law governing the protection of classified information, and shall not divulge such information to any person not authorized to receive it.

JOSHUA L. DRATEL

From: LTC OMC
Sent: Sunday, March 25, 2007 6:46 PM
To:
Cc:

Subject: RE: HICKS DEFENSE INPUT FOR SCHEDULING

has directed me to inform the parties that, pursuant to Maj Mori's request, there will be a brief R.M.C. 802 conference tomorrow, 26 Mar 07, at 0930 in the conference room.

, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: Mori, Michael D. MAJ OMC
Sent: Sunday, March 25, 2007 4:22 PM
To:

Subject: HICKS DEFENSE INPUT FOR SCHEDULING

Sir,

During the 802 today, the defense was requested to provide input to the Military Judge on scheduling of the trial. I am doing so, but would ask for an 802 tomorrow morning when lead counsel, Joshua Dratel and Mr. Hicks are present in the building. It is appropriate for the military Judge to hear from Mr. Dratel before setting any schedule.

Lead Counsel, Joshua Dratel, has a US Federal criminal trial set to commence on 23 April. It is expected to run until mid-June.

The defense has identified approximately 45 motions addressing legal issues which we are in the process of preparing for the first motions hearing.

The defense proposes the following schedule for the initial legal motion session:

Defense legal motions due to Prosecution NLT 21 May.
Prosecution responses due to Defense NLT 4 June.
Defense replies due to Prosecution NLT 11 June.
Motion hearing 20 to 24 June.

Mr. Dratel has a US Federal criminal trial set to begin the week of 9 July. This trial is expected to run until November.

As such, we would propose the following schedule for the evidentiary, witness,

and discovery motions.

Defense evidentiary, witness and discovery motions due to Prosecution NLT 24 September.
Prosecution responses due to Defense 8 October.
Defense replies due to Prosecution 15 October.

Motion hearing in November as soon as Mr. Dratel's trial finishes.

Trial to commence 3 December. (Please note. Mr. Dratel may have some religious commitments during December that I do not have the specifics on yet.)

The defense recognizes that scheduling the trial beyond the 120-day clock will result in delay attributable to the defense.

v/r
Maj Mori

From: LTC
Sent: Sunday, March 25, 2007 4:41 PM
To:

Cc:
Subject: HICKS: Prosecution Proposed MC Litigation Schedule

-- sir:

1. Per the RMC 802 of 25 Mar 07, the Prosecution proposed litigation schedule is the following:

a. 26 March: Arraignment;

b. 09 April: Defense legal motions due;

c. 18 April: Government responses due;

d. 25 April: Defense replies due;

e. 27-30 April: Hearing to litigate legal motions;

f. 11 May: Defense evidentiary motions due;

g. 23 May: Government responses due;

h. 30 May: Defense replies due;

i. 1-4 June: Hearing to litigate evidentiary motions;

j. 14 June: Voir Dire members panel;

k. 28 June - 9 July: Government case-in-chief;

l. 10-17 July: Defense case-in-chief;

m. 18-20 July: Government rebuttal; and if necessary,

n. 23-24 July: Sentencing.

2. The above reflects the same Pros. proposed dates as contained in an e-mail of 23 Mar 07 in response to the Def. proposed, in part, litigation schedule.

V/r--

LtCol, U.S. Marine Corps

Prosecutor, Office of Military Commissions

MJ Preliminary Draft Trial Schedule: US v Hicks

The following draft trial schedule is provided:

Law motions due on 4 April. Law Motions due to the military judge and opposing counsel. In general, law motions are those which require no evidentiary hearing to determine. If counsel intend to submit more than ten (10) law motions, counsel will tell the military judge and opposing counsel the total number of law motions which counsel intend to present NLT 1200 hours, 2 April. The military judge will advise counsel of a revised schedule to present the motions

Evidentiary motions due on 11 April. Evidentiary motions due to the military judge and opposing counsel. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence. If counsel intend to submit more than ten (10) evidentiary motions, counsel will tell the military judge and opposing counsel the total number of evidentiary motions which counsel intend to present NLT 1200 hours, 9 April.

A 23 April hearing in Gitmo on law motions and other matters.

A 7 May hearing in Gitmo on evidentiary motions.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

16 May - Submission of proposed group voir dire questions.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

17 May - Defense requests for government assistance in obtaining witnesses.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

18 June – Hearing in Gitmo re Witness Production.

20 June 2007 - Assembly and Voir Dire of the panel.

UNITED STATES OF AMERICA	}	**Schedule for Trial**
v	}	
DAVID MATTHEW HICKS a/k/a "David Michael Hicks a/k/a "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	}	**26 March 2007**

1. The following trial schedule is ordered.

a. 4 April 2007: Law Motions due to the military judge and opposing counsel. In general, law motions are those which require no evidentiary hearing to determine. If counsel intend to submit more than ten (10) law motions, counsel will tell the military judge and opposing counsel the total number of law motions which counsel intend to present NLT 1200 hours, 2 April. The military judge will advise counsel of a revised schedule to present the motions

b. 11 April 2007: Evidentiary Motions. Evidentiary motions due to the military judge and opposing counsel. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence. If counsel intend to submit more than ten (10) evidentiary motions, counsel will tell the military judge and opposing counsel the total number of evidentiary motions which counsel intend to present NLT 1200 hours, 9 April.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

c. 23 April 2007: Hearing in GTMO re Law Motions and Witness Production issues re evidentiary motions.

d. 7 May 2007: Hearing in GTMO re Evidentiary Motions.

e. 16 May 2007: Submission of requested group voir dire questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

f. 17 May 2007: Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. See R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

g. 18 June 2007: Hearing re Witness Production Motions and any unresolved matters.

h. 20 June 2007: Assembly and Voir Dire for Panel Members.

i Beginning of trial on the merits: To be determined.

2. Counsel should direct their attention to the Preliminary Procedural Instructions (P.P.I.), Part III, Motions Practice, and specifically Enclosures 1-3, for the procedures I have established for this trial. All motions, responses and replies shall comport with the terms of P.P.I., para 5 in terms of format and timeliness. Any request for continuance of any hearing associated with this schedule must be submitted 7 days prior to said hearing. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response.

Colonel, U.S. Marine Corps
Military Judge

Defense Summary of 802 Conference held at 1400 on 25 March 2007
United States v. Hicks

1. Your Honor stated that with regard to Defense Counsel's stated intention of taping the 802 session in light of Mr. Dratel's and Mr. Hicks' absence, it would not be permitted. Your Honor further stated that any future requests for permission to tape any conferences or conversations with Your Honor would always be denied. Your Honor also stated that counsel should never tape record him without Your Honor's knowledge.

2. Your Honor addressed the Inventory of Papers, specifically the Appellate Exhibits List and the Filings Inventory. Your Honor announced that the parties would be required to verify that the Filings Inventory was complete during the hearing today. Lt. Col. maintains the Inventory and would like documents submitted in Word Perfect format as opposed to PDF.

3. Your Honor stated that all Appellate Exhibits should be marked before the hearing and because Your Honor wants to avoid marking any exhibits in court.

4. The government raised the issue of the Protective Orders. The government has drafted an Order for consideration as a "Special Request" and not a Motion since the government believes the Protective Order issued in the last military commission system is still in effect. Your Honor requested that the government submit their draft Order along with a motion, rather than a "Special Request", in electronic form and in hard copy as soon as possible.

5. Your Honor stated he has not received Mr. Dratel's Notice of Appearance as of the last time Your Honor was able to check email on Thursday. Maj Mori will provide the Notice of Appearance immediately after the 802 session.

6. Your Honor asked what Your Honor described as the "$64,000 question": have the parties discussed among one another and with each other a litigation schedule? And, have they reached any agreement. LtCol stated that the parties did discuss the schedule, but had not reached an agreement. Your Honor stated that Your Honor would draft a schedule tonight or tomorrow and urged the parties to submit their input as quickly as possible as he was more amenable to consider their input ahead of time than to change his draft schedule based later input.

7. Your Honor stated that Your Honor was unaware of what rules permitted Ms. Snyder to be detailed as assistant defense counsel and that the matter could be addressed on the record. Your Honor invited counsel to bring Your Honor's attention to relevant rules and regulations.

Defense Summary of 802 Conference held at 0930 on 26 March 2007
United States v. Hicks

1. Major Mori raised the issue of the court rejecting Mr. Dratel's Notice of Appearance and Agreement on the basis that it states that Mr. Dratel will "comply with all presently existing applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings" as opposed to "comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings." Mr. Dratel expressed the concern that agreeing to the court's language would require him to agree to comply with regulations that don't yet exist. He stated that he was not trying to be defiant, but that the military judge's rules puts him in the position of buying a pig in a poke. Mr. Dratel offered to accept any compromise that the military judge could propose that would enable the process to move forward and allow Mr. Dratel to participate. The military judge stated that Mr. Dratel could either comply with the court's rules or not and that he wasn't going to force Mr. Dratel to do anything. Mr. Dratel provided an example from the prior military commission system. He explained that the original affidavit that civilian counsel were required to sign had unacceptable provisions in it, such as requiring conversations between the attorney and the client to be monitored. This provision and others would have required Mr. Dratel to violate ethical rules by which he is bound as an attorney licensed to practice law. As a result, the original affidavit was modified and Mr. Dratel was able to sign it. The military judge then explained to Mr. Dratel that whether he participates in the proceedings is up to him. The military judge said that Mr. Dratel can either comply with his instructions or not. The military judge stated that he would not change his instructions with regard to that point and that it was very simple. Mr. Dratel said that there was nothing he could do since the military judge was making it a question of authority, which the military judge has and Mr. Dratel does not.

2. Major Mori raised the issue of the trial schedule. The military judge provided a copy of his preliminary draft schedule. He said that objections could be heard on the record.

3. Major Mori raised the issue of security sitting directly behind Mr. Hicks in the courtroom within ear shot of counsel and Mr. Hicks. Major Mori said he has asked Col , who is in charge of security, if the security personnel could be moved out of earshot. The military judge told the defense to file a motion on the issue. The military judge also told the defense that they could request a recess to talk with the client.

4. Major Mori raised the issue of counsel not being able to sit on both sides of Mr. Hicks at counsel table. The military judge told the defense to make a motion.

5. Major Mori raised the issue of whether the military judge would allow the defense to reserve pleas or whether he expected the defense to enter a plea today. The military judge stated that it would be just like court-martial practice and he anticipated that the defense would reserve pleas and motions.

6. The defense requested a short break. After returning from the break, Mr. Dratel told the military judge that upon reviewing the court's schedule and knowing that the court is aware of Mr. Dratel's trial schedule, it is clear that the court's schedule is designed to prevent Mr. Dratel from participating in the proceedings. Mr. Dratel explained that he came to Guantanamo Bay at his own expense, that he takes time away from his practice to come here and that he does not appreciate this now after he is already in Guantanamo Bay.

7. The military judge stated that four seats are available at each counsel table and that it was fine to change who is sitting at counsel table, but that it should be noted on the record when that happens.

8. The military judge stated that his modus operandi is to be as adversarial as counsel want to be to allow for orderly litigation.

From: Sullivan, Dwight H COL USSOUTHCOM JTFGTMO
Sent: Monday, March 26, 2007 10:31 AM
To: Snyder, Rebecca CIV USSOUTHCOM JTFGTMO; Mori, Michael D. MAJ OMC
Subject: Court Dates e-mail from Chief Defense Counsel to SFC Diaz

---

From: Sullivan, Dwight, COL, DoD OGC
Sent: Friday, March 02, 2007 3:41 PM
To: DoD OGC
Cc: DoD OGC
Subject: Court Dates

SFC ,

Sorry I missed your call! Both Maj Mori -- Hicks' detailed defense counsel -- and Ms. Snyder -- Hick's assistant detailed defense counsel -- currently have orders overseas from 14-23 March. Among other purposes, this long-planned trip is for purposes of interviewing witnesses and conducting factual investigation of their case.

Please let me know if any additional information would be helpful.

Semper Fi,
DHS

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Militarv Commissions

From: LTC OMC
Sent: Tuesday, March 27, 2007 7:05 PM
To: USSOUTHCOM JTFGTMO; CIV USSOUTHCOM JTFGTMO
Cc: SFC OMC
Subject: FW: Initial Members Order

Attachments: Initial Members Order.pdf

Initial Members Order.pdf (17 ...

, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From:
Sent: Tuesday, March 27, 2007 5:02 PM
To:

Subject: FW: Initial Members Order

PLEASE IMMEDIATELY VERIFY RECEIPT OF THIS E-MAIL.

Ladies and Gentlemen,

Please read the Military Judges instructions below. Also, please read the Military Judges Order at the attachment.

Thank you.

V/R

Executive Administrative Assistant
Office of Military Commissions
Office of the Convening Authority

-----Original Message-----
From: LTC OMC

Sent: Tuesday, March 27, 2007 15:34
To:
Cc:

Subject: FW: Initial Members Order

Mr. ,

Pursuant to 's request, please forward this email and the attachment to the Military Commission Members. (Also, please CC me.) Thank you.

, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: USSOUTHCOM JTFGTMO
Sent: Tuesday, March 27, 2007 3:28 PM
To: LTC OMC
Subject: FW: Inital Members Order

LTC Chappell: Please have the Initial Members Instruction sent to the Members.

Instructions for Military Commission Members

You have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba (GTMO). You are directed to read the contents of this Order immediately and adhere to the requirements contained herein.

1. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. Your determination as matters given to you to decide must be based solely upon the matters you receive in court and the law as I will instruct you. Thus, it is important that you keep an open mind and not form or express any opinions on the case until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by me to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

2. Your duty as a potential Commission member will not begin before Friday morning, 30 March 2007, at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to GTMO may bring them into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

3. After you arrive at GTMO, there will be in-processing and you will be taken to your billets. An assigned escort or bailiff will be your driver. You will be given all necessary information regarding meals, etc. On your free time, you may use or visit the NEX, the varied eating establishments, and the available fitness and MWR activities.

4. Do not at any time visit or attempt to visit any of the detainee areas. The escort/bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to questions they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to me or my staff.

5. Members of my staff include
. They are responsible to me for making logistical and administrative arrangements. The Commission will also be assigned a bailiff. My staff and the bailiff will work with you on strictly administrative and logistical matters. Because members of my staff and the bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not discuss any case, or the evidence offered in any case, with my staff or the bailiff.

b. You may not discuss any case, or the evidence offered in any case, in the presence of the bailiff or my staff.

c. You may not seek from, or express an opinion to, my staff or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor my staff may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either members of my staff or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

6. Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff of any office as any such contact could be misinterpreted. Do not go into the defense area or prosecution area or upstairs in the Commissions building. If you are outside the Commissions building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group or by yourself while at GTMO and do not think about or discuss the Commission or any of the cases until instructed you may do so.

7. The escort/bailiff will pick you up and drive you to your meals in accordance with a schedule to be determined later. The uniform for service during any trial session is as follows:

Army: Class B
Navy: Summer White
Marine Corps: Summer Service C
Air Force: Class B

V/R,

Colonel, U.S. Marine Corps
Military Judge

OMC

From: LTC OMC
Sent: Tuesday, March 27, 2007 3:34 PM
To:
Cc:

Subject: FW: Initial Members Order

Attachments: Initial Members Order.pdf

Initial Members Order.pdf (20 ...

Mr. ,

Pursuant to 's request, please forward this email and the attachment to the Military Commission Members. (Also, please CC me.) Thank you.

USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: USSOUTHCOM JTFGTMO
Sent: Tuesday, March 27, 2007 3:28 PM
To: LTC OMC
Subject: FW: Inital Members Order

Please have the Initial Members Instruction sent to the Members.

From: USSOUTHCOM JTFGTMO
Sent: Tuesday, March 27, 2007 3:17 PM
To:
Cc:

Subject: RE: HICKS DEFENSE COMMENTS RE: Member Instructions

-- sir,

1. Prosecution objects to Defense request in paragraphs 1 and 2, on the basis that the present captioned case is relevant now because the case will be identified to the members. Knowing now may help members better avoid outside information. As for the removal of any "a/k/a" this has been the case caption for all filings, to date. Moreover, each "a/k/a" is included in Specification 1 of the Charge, to which the CA referred and the accused pled guilty (without any exceptions or substitutions).

V/r-- LtCol

, LtCol, U.S. Marine Corps Prosecutor, Office of Military Commissions

-----Original Message-----
From: Mori, Michael D. MAJ OMC
Sent: Tuesday, March 27, 2007 2:57 PM
To:

Subject: HICKS DEFENSE COMMENTS RE: Member Instructions

Sir

1. The defense would ask that Mr. Hicks not be identified to the members yet. The instructions are written in some areas as to not single out a particular case, such as in the introductory paragraph: "detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station." And the defense requests that all the instructions be non-case specific.

2. Should the military Judge believe it is best to identify Mr. Hicks in the instructions, the defense would ask that the AKAs be removed. The AKAs are not relevant to these initial instructions and could be matters in dispute. Instructions from the Military Judge with the AKAs included places the weight of the Military Judge's position in support of the truthfulness of the AKAs.

3. In paragraph 1 and its sub-paragraphs, the defense would request a direct instruction to avoid all new media. The current language focuses the members to avoid media regarding this case. As the defense explained above in paragraph (1), it is requested that the instructions be non-case specific and with the short window of time involved, an instruction to avoid all news media would be the best course of action. Once a member hears a news report and figures out it is about the Hicks case, it is too late.

4. In paragraph 6, only the Defense is mentioned. I would ask that

"prosecution area" also be added.

v/r
Maj Mori

-----Original Message-----
From: LTC OMC
Sent: Tuesday, March 27, 2007 2:10 PM
To:

Subject: Member Instructions

intends to send the attached Order to the members. Please let me know via reply ASAP, but NLT 1530, if you have any objection. Thanks

USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

UNITED STATES OF AMERICA	}	**Member Instructions**
v	}	
DAVID MATTHEW HICKS a/k/a "David Michael Hicks a/k/a "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	}	**27 March 2007**

Instructions for Military Commission Members

I am , the Military Judge in this case. You have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba (GOMO). You are directed to read the contents of this Order immediately and adhere to the requirements contained herein.

1. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. Your determination as matters given to you to decide must be based solely upon the matters you receive in court and the law as I will instruct you. Thus, it is important that you keep an open mind and not form or express any opinions on the case until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by me to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

2. Your duty as a potential Commission member will not begin before Friday morning, 30 March 2007, at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to (GTMO) may bring them into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

3. After you arrive at GTMO, there will be in-processing and you will be taken to your billets. An assigned escort or bailiff will be your driver. You will be given all necessary information regarding meals, etc. On your free time, you may use or visit the NEX, the varied eating establishments, and the available fitness and MWR activities.

4. Do not at any time visit or attempt to visit any of the detainee areas. The escort/bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to questions they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to me or my staff.

5. Members of my staff include

They are responsible to me for making logistical and administrative arrangements. The Commission will also be assigned a bailiff. My staff and the bailiff will work with you on strictly administrative and logistical matters. Because members of my staff and the bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not discuss any case, or the evidence offered in any case, with my staff or the bailiff.

b. You may not discuss any case, or the evidence offered in any case, in the presence of the bailiff or my staff.

c. You may not seek from, or express an opinion to, my staff or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor my staff may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either members of my staff or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

6. Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff of any office as any such contact could be

misinterpreted. Do not go into the defense area or upstairs in the Commissions building. If you are outside the Commissions building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group or by yourself while at GTMO and do not think about or discuss the Commission or any of the cases until instructed you may do so.

7. The escort/bailiff will pick you up and drive you to your meals in accordance with a schedule to be determined later. The uniform for service during any trial session is as follows.

Army: Class B
Navy: Summer White
Marine Corps: Summer Service C
Air Force: Class B

V/R,

Colonel, U.S. Marine Corps
Military Judge

OMC

From: LTC OMC
Sent: Thursday, March 29, 2007 11:14 AM
To:
Cc:

Subject: Member Questionnaire

Attachments: Member Questionnaire.pdf; Member Quest Cont Sheet.pdf

Member estionnaire.pdf (23 I

Member Quest Cont Sheet.pdf (1...

Mr. ,

Pursuant to .'s request and our phone discussion, please have each Member complete the attached questionnaire at a proper time at Andrews AFB or on your flight to GTMO. If possible and secure, please fax to me before wheels up on your flight.

Thank you.

v/r,

USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

MILITARY COMMISSIONS
MEMBER QUESTIONNAIRE

PLEASE COMPLETE THE FOLLOWING QUESTIONNAIRE AND PROVIDE TO MR.

THIS QUESTIONNAIRE MUST BE FILLED OUT BY EACH MEMBER.

YOU MAY NOT DISCUSS THE QUESTIONS OR YOUR ANSWERS WITH EACH OTHER, EITHER INDIVIDUALLY OR COLLECTIVELY.

MR. IS NOT ALLOWED TO ANSWER ANY QUESTIONS REGARDING THE QUESTIONS CONTAINED IN THIS QUESTIONNAIRE, EXCEPT TO PROVIDE CONTINUATION SHEETS.

YOU MUST PLACE YOUR NAME ON THE BOTTOM OF EACH PAGE OF THE QUESTIONNAIRE.

IF YOU NEED ANY MORE PAPER TO COMPLETE YOUR ANSWERS, PLEASE ASK MR. McCLOUD.

YOU MAY NOT DISCUSS YOUR ANSWERS WITH ANYONE UNTIL YOU APPEAR IN COURT.

COUNSEL AND THE MILITARY JUDGE WILL USE THE QUESTIONNAIRE TO PREPARE FOR TRIAL AND A COPY WILL BE ATTACHED TO THE RECORD OF TRIAL.

1. Name_____ Grade_____Date of Rank_____Service_____
2. Active Duty Base Date _____Date Current Tour Began_____Years of Service_____
3. Military Awards / Decorations:_____

_____

4. Current Duty Position: _____Work Phone: _____
5. Unit: _____
6. Date of Birth _____Gender _____Race or Ethnic Origin_____Marital Status_____
7. Age and gender of any children_____
8. Age, race, and occupation of spouse if married_____
9. Civilian Education: College / Vocational / Civilian Professional School / Civilian Post-Graduate:

Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

_____

10. Military Education. Dates attended, school/course title._____

_____

_____

Name: _____ 1

MILITARY COMMISSIONS
MEMBER QUESTIONNAIRE

11. Duty Assignments. Last four assignments, units, and dates of assignments.

_____

_____

_____

12. Have you ever sat as a member of a commission, a court-martial, a jury, or any other fact finding body capable of finding guilt or innocence and thereafter sentencing an individual to loss of liberty? What were the general natures of the charges for these cases (rape, murder, theft . . .)?_____

_____

_____

13. Have you or any close relative or friend ever had any legal or law enforcement training or experience? Explain: _____

14. Have you or a close relative or friend ever been the victim of any crime? Explain: _____

_____

15. Have you or a close relative or friend ever been the witness to any crime? Explain:_____

_____

16. Have you or a close relative or friend ever testified in any legal proceeding? Explain:_____

_____

17. Have you or a close relative or friend ever been arrested for, accused of, or investigated for committing any crime? Explain:_____

_____

18. Have you formed an opinion about the military commission system?_____

_____

19. Do you believe that anything about your religious beliefs would make it difficult for you to sit in judgment of another person? Explain: _____

20. After you leave military service, what profession or job do you plan to pursue? _____

_____

21. Do you believe you may be disqualified to sit as a commission member for any reason? Explain:

_____

_____

SIGNATURE OF MEMBER:_____ DATE:_____

Name: _____

MILITARY COMMISSIONS
MEMBER QUESTIONNAIRE
CONTINUATION SHEET

NAME: _____

PAGE ___ OF ___

UNITED STATES OF AMERICA v DAVID MATTHEW HICKS a/k/a "David Michael Hicks a/k/a "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	} } } } } } } } } } } } }	Member Instructions 30 March 2007

In announcing the sentence, the President should announce:

"David Matthew Hicks, this commission sentences you:

[NOTE: do not read the language in bold print]

~~NO PUNISHMENT~~

~~1. "To no punishment."~~

CONFINEMENT

2. "To be confined for SEVEN (7) ~~(days) (months)~~ (years)."

30 March 2007
Date

Note: **Before the President reads the Sentencing Worksheet in open court, this worksheet will be handed to the Military Judge for inspection. Please ensure that you have circled all portions that are part of your sentencing and crossed out any portions that are not part of your sentencing. The president should sign and date the worksheet.**

UNITED STATES	)	
	)	
v.	)	**OFFER FOR A PRETRIAL AGREEMENT**
	)	
DAVID MATTHEW HICKS	)	**Date:** 26 March 2007

1. I, David Matthew Hicks, am presently the accused under a military commissions charge that was sworn on February 2, 2007, and referred to trial on March 1, 2007. I have read the charge and specifications alleged against me, and they have been explained to me by my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel. I understand the charge and specifications, and am aware that I have a legal right to plead not guilty and to leave upon the United States the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence. Understanding the above and under the conditions set forth below, and in consideration of the Convening Authority's agreement to approve a sentence in accordance with the limitations set forth in Appendix A, I offer to plead as follows:

   To Specification 1 of the Charge and the Charge: Guilty

   I understand that this offer, when accepted by the Convening Authority, will constitute a binding agreement. I assert that I am, in fact guilty of the offense to which I am offering to plead guilty, and I understand that this agreement absolves the United States of its obligation to present any evidence in court to prove my guilt. I offer to plead guilty, freely and voluntarily, because I am guilty, and because it will be in my best interest that the Convening Authority grant me the relief set forth in Appendix A. I understand that I waive my right to avoid self-incrimination insofar as a plea of guilty will incriminate me.

2. Furthermore, upon acceptance of this offer by the Convening Authority:

   a. I agree that I will enter into a reasonable stipulation of fact with the United States to support the elements of the offenses to which I am pleading guilty.

   b. I agree that I will not communicate with the media in any way regarding the illegal conduct alleged in the charge and the specifications or about the circumstances surrounding my capture and detention as an unlawful enemy combatant for a period of one (1) year. I agree that this includes any direct or indirect communication made by me, my family members, my assigns, or any other third party made on my behalf.

c. I agree that as a material term of this agreement I will cooperate fully, completely and truthfully in post-trial briefings and interviews as directed by competent United States or Australian law enforcement and intelligence authorities. I agree to provide truthful, complete and accurate information and, if necessary, truthful, complete and accurate testimony under oath at any grand juries, trials or other proceedings, including military commissions and international tribunals. I understand that if I testify untruthfully in any material way I can be prosecuted for perjury. I further agree to provide all information concerning my knowledge of, and participation in al Qaeda, Lashkar-e Tayyiba (LET), or any other similar organizations. I agree that I will not falsely implicate any person or entity, and I will not protect any person or entity through false information or omission.

d. I hereby assign to the Government of Australia any profits or proceeds which I may be entitled to receive in connection with any publication or dissemination of information relating to the illegal conduct alleged in the charge sheet. This assignment shall include any profits and proceeds for my benefit, regardless of whether such profits and proceeds are payable to me or to others, directly or indirectly, for my benefit or for the benefit of my associates or a current or future member of my family. I hereby represent that I have not previously assigned, and I agree that I will not circumvent this assignment to the Government of Australia by assigning, the rights to my story to an associate or to a current or future member of my family, or to another person or entity that would provide some financial benefit to me, to my associates, or to a current or future member of my family. Moreover, I will not circumvent this assignment by communicating with an associate or a family member for the purpose of assisting or facilitating his or her profiting from a public dissemination, whether or not such an associate or other family member is personally or directly involved in such dissemination. I agree that this assignment is enforceable through the Australian Proceeds Act of 2002, and any other applicable provision of law that would further the purpose of this paragraph's prohibition of personal enrichment for myself, my family, or my heirs and assigns, through any publication or dissemination of qualifying information, and I acknowledge that my representations herein are material terms of this agreement.

3. In making this offer, I state that:

a. I am satisfied with my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel, who have advised me with respect to this offer, and I consider them competent to represent me in this military commission and agree that they have provided me effective assistance of counsel.

b. No person or persons have made any attempt to force or coerce me into making this offer or to plead guilty. This is a free and voluntary decision on my part made with full knowledge of its meaning and effect.

c. My counsel have fully advised me of the nature of the charge and specifications against me, the possibility of my defending against them, any defense that might apply, and the effect of the guilty plea that I am offering to make. I fully understand the advice of my defense counsel and the meaning, effect, and consequences of this plea.

d. I understand that the signature of the Convening Authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the United States.

e. I understand and agree that the Convening Authority can withdraw from this agreement and this agreement will become null and void, in the event that:

1. I fail to plead guilty as required by this agreement;
2. The commission refuses to accept my plea of guilty to any charge;
3. The commission sets aside my plea of guilty for whatever reason, including upon my request, before sentence is announced; or
4. I fail to satisfy any material obligation or term of this agreement, or I have misrepresented any material term of this agreement.
5. I fail to agree to a satisfactory stipulation of fact with the prosecution related to the charge and specification to which I plead guilty.

f. I understand and agree that, if this agreement becomes null and void for any reason, my offer for this plea agreement cannot be used against me in any way at any time to establish my guilt of the charge alleged against me, the United States may prosecute the charge and specifications alleged against me, and the limitations upon the disposition of my case set forth in Appendix A will have no effect.

g. I understand and agree that my failure to fully cooperate with Australian or United States authorities may delay my release from confinement or custody under applicable provisions of Australian law.

h. I acknowledge and agree that I am an alien unlawful enemy combatant, as defined by the Military Commissions Act of 2006, Title 10, United States Code, Section 948 (c).

i. I have never been illegally treated by any person or persons while in the custody and control of the United States. This includes the period after my capture and transfer to U.S. custody in Afghanistan in December 2001, through the entire period of my detention by the

United States at Guantanamo Bay, Cuba. I agree that this agreement puts to rest any claims of mistreatment by the United States.

j. I further understand and agree that the entire period of detention as an unlawful enemy combatant is based upon my capture during armed conflict, has been lawful pursuant to the law of armed conflict and is not associated with, or in anticipation of, any criminal proceedings against me.

4. In exchange for the undertakings made by the United States in entering this Pretrial Agreement, I voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law. In addition, I voluntarily and expressly agree not to make, participate in, or support any claim, and not to undertake, participate in, or support any litigation, in any forum against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to my capture, treatment, detention, or prosecution.

5. I agree that for the remainder of my natural life, should the Government of the United States determine that I have engaged in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement, the Government of the United States may immediately invoke any right it has at that time to capture and detain me, outside the nation of Australia and its territories, as an unlawful enemy combatant. If I engage in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement and during the period in which any part of my sentence is suspended, the Convening Authority may vacate any period of suspension agreed to in this Pretrial Agreement or as otherwise approved by the Convening Authority and the previously suspended portion of my sentence could be imposed on me. This pretrial agreement resolves all charges against me under the Military Commissions Act of 2006 and United States law that may have occurred before the signing of this agreement.

6. This document and Appendix A include all of the terms of this Pretrial Agreement and no other promises or inducements have been made by the Convening Authority or any other person which affect my offer to plead guilty or enter into this Pretrial Agreement.

DHicks

DAVID MATTHEW HICKS
Accused

26/3/07
Date

We certify that we provided David Matthew Hicks the advice referred to above and explained to him the elements of the offenses to which he is pleading guilty, and that he has voluntarily signed this offer for pretrial agreement.

MICHAEL D. MORI, Major, USMC
Detailed Military Defense Counsel

26 MAR 07
Date

JOSHUA L. DRATEL
Civilian Defense Counsel

26 Mar. 07
Date

I recommend (acceptance) (~~rejection~~) of this offer.

, Colonel, USAF
Chief Prosecutor

26 MAR 07
Date

I recommend (acceptance) (rejection) of this offer.

USAF
Legal Advisor to the Convening Authority

26 March 2007
Date

The foregoing instrument, including Appendix A., concerning David Matthew Hicks, dated March 26, 2007 is (approved and accepted) (~~disapproved~~). SJC

SJC

SUSAN J. CRAWFORD
Convening Authority

26 March 2007
Date

UNITED STATES	)	
	)	
	)	**APPENDIX A**
v.	)	**TO OFFER FOR A**
	)	**PRETRIAL AGREEMENT**
	)	
	)	
DAVID MATTHEW HICKS	)	**Date:** 26 March 2007

1. As consideration for the offer of David Matthew Hicks (the "Accused") to plead guilty and his agreement to other terms and conditions as set forth in the Offer for A Pretrial Agreement, dated March 26, 2007, the Convening Authority will undertake as follows:

   a. The maximum period of confinement that may be adjudged and approved is seven years. The Convening Authority agrees to suspend any portion of a sentence to confinement in excess of nine months.
   b. The Convening Authority agrees to dismiss Specification 2 of the Charge with prejudice, at or before the time of sentencing.
   c. The Military Judge will, in accordance with R.M.C. 1005(e) (5), instruct the commission members that the limits on their discretion, as pertains to a sentence to confinement, is as specified in a. above.
   d. The Government of the United States will transfer custody and control of the Accused to the Government of Australia by not later than sixty (60) days from the date upon which the sentence is announced.
   e. Upon signing of this agreement, the prosecution agrees not to present evidence in aggravation during the sentencing hearing and the defense agrees not to present evidence in mitigation. The accused may make an unsworn statement.

2. There are no limitations on the sentence other than that provided in paragraph 1, above.

3. This is original Appendix A submitted with the Offer for A Pretrial Agreement.

DHicks
DAVID MATTHEW HICKS

26/3/07
Date

We certify that we gave David Matthew Hicks the advice referred to above and explained to him the meaning and effect of the foregoing, and he has voluntarily signed this Appendix A.

MICHAEL D. MORI, Major, USMC
Detailed Military Defense Counsel

26 MAR 07
Date

JOSHUA L. DRATEL
Civilian Defense Counsel

26 Mar 07
Date

I recommend (acceptance) (~~rejection~~) of this Appendix A.

, Colonel, USAF
Chief Prosecutor

26 MAR 07
Date

I recommend (acceptance) (rejection) of this Appendix A.

USAF
Legal Advisor to the Convening Authority

26 March 2007
Date

The foregoing Appendix A is (approved) (~~disapproved~~) in conjunction with the pretrial agreement dated March 26, 2007.

SJC SJC

SUSAN J. CRAWFORD
Convening Authority

26 March 2007
Date

CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPECIFICATION: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

1. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

2. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

3. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

4. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

5. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

6. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

7. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

8. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

9. In or about 2001, al Qaeda's media committee which created As Sahab ("The Clouds") Media Foundation which has orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for its declared war against the United States.

10. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

11. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

12. In or about January 2001, the accused traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.

13. Upon entering Afghanistan, the accused traveled to Kandahar where he stayed at an al Qaeda guest house and met associates or members of al Qaeda. While attending al Qaeda's training courses, the accused would use the *kunya*, or alias, "Abu Muslim Australia," "Abu Muslim Austraili," "Abu Muslim Philippine," or "Muhammad Dawood;" and later was referred to as "David Michael Hicks."

14. The accused then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, the accused trained in weapons familiarization and firing, land mines, tactics, topography, small unit fire, maneuver tactics, field movements, and other areas.

15. In or about April 2001, the accused returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence and supplies to al Qaeda operatives.

16. While the accused trained at al Farouq, Usama bin Laden visited the camp on several occasions. During such visits, any weapons the trainees had were removed from them and they were seated as a group to hear bin Laden speak in Arabic. During one

visit, the accused asked bin Laden why there were no training materials provided in the English language.

17. After the accused completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and individually interviewed certain attendees. The accused was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel. After this interview with Muhammed Atef, the accused attended al Qaeda's urban tactics training course at Tarnak Farm.

18. In or about June 2001, the accused traveled to Tarnak Farm and participated in the training in a mock city located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

19. In or about August 2001, the accused participated in a four-week al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting windows and doors; documenting persons coming and going to and from certain structures; and, submitting reports to the al Qaeda instructor, who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. The course also included practical application where the accused and other student operatives conducted surveillance of various locations in Kabul, including the former American and British Embassy buildings. During this training, the accused personally conducted intelligence on the former American Embassy building.

20. After the surveillance course, the accused returned to Kandahar, where he received instruction from members of al Qaeda on the meaning of *jihad*. The accused also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.

21. On or about September 9, 2001, the accused traveled to Pakistan to visit a Pakistani friend. While at this friend's house, the accused watched television footage of the September 11, 2001 attacks on the United States, and the friend has said he interpreted the accused's gestures as approval of the attacks. The accused had no specific knowledge of the attacks in advance.

22. On or about September 12, 2001, the accused returned to Afghanistan to join with al Qaeda. The accused had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.

23. On or about the first of October, Saif al Adel--then al Qaeda's deputy military commander and head of the security committee for al Qaeda's *shura* council, who

was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces--informed Mr. Hicks that he could go to three different locations to position himself with combat forces (city, mountain, or airport). Mr. Hicks chose to join a group of al Qaeda and Taliban fighters near the Kandahar Airport.

24. The accused traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, the accused armed himself with six (6) ammunition magazines, approximately 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

25. On or about October 7, 2001, when the Coalition Forces initiated a bombing campaign at the start of Operation Enduring Freedom, the accused had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.

26. On or about October 10, 2001, after two nights of bombing, the accused was reassigned and joined an armed group outside the airport where he guarded a Taliban tank. For about the next week the accused guarded the Taliban tank, and every day received food, drink, and updates on what was happening from the fat al Qaeda leader in charge who was on a bicycle.

27. The accused heard radio reports that fighting was heavy at Mazar-e Sharif, that Kabul would be the next target, and that western countries, including the United States, had joined with the Northern Alliance.

28. The accused implemented the tactics that he had learned with al Qaeda and attempted to train some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, the accused decided to look for another opportunity to fight in Kabul.

29. On or about October 17, 2001, the accused told the fat al Qaeda leader of his plans, and then traveled to Kabul. The accused also took his weapon and all his ammunition.

30. The accused arrived in Kabul and met a friend from LET, who told the accused he was headed to the front lines in Konduz. The accused asked to travel with his LET friend.

31. On or about November 9, 2001, the accused and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after the accused arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban,

or other associated fighters, engaged in combat against Coalition forces. The accused spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, the accused saw bullets flying and Northern Alliance tanks coming over the trenches.

32. The accused spent two to three days walking back to Konduz while being chased and fired upon by the Northern Alliance.

33. The accused made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going to stay in Konduz in order to fight to the death. The accused, instead, decided to use his Australian passport to flee to Pakistan.

34. The accused then moved within Konduz to a *madafah*, an Arab safe house. The accused wrote a note for his LET associates that said not to come look for him because he was okay, and then ran away from the safe house. At this time the accused still had his weapon, and went to find a shopkeeper that he had met a few days earlier in the city market area. The shopkeeper took the accused to his home where he stayed for about three weeks. Later, the shopkeeper gave the accused some clothes and helped the accused sell his weapon so he could pay for a taxi to Pakistan.

35. In or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, the accused took a taxi and fled towards Pakistan. However, the accused was captured without any weapons by the Northern Alliance in Baghlan, Afghanistan.

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING ORDER
NUMBER 07-03

29 March 2007

The officers listed below were detailed as members of the military commission convened by the undersigned Convening Authority by Convening Order 07-01, dated 1 March 2007.

Vice COL US Army, and MAJ US Army, for the case of United States of America v. David Matthew Hicks only:

Add the following alternate members for the case of United States of America v. David Matthew Hicks only:

MEMBERS

RANK	NAME	SVC	ASSIGNMENT
COL		USA	
COL		USAF	

SUSAN J. CRAWFORD
Convening Authority
For Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Record Set (1)

Appellate Exhibit 030 Military Judge Mark-Up of the Pretrial Agreement

UNITED STATES	)	
	)	
v.	)	**OFFER FOR A PRETRIAL**
	)	**AGREEMENT**
DAVID MATTHEW HICKS	)	**Date: _____**

1. I, David Matthew Hicks, am presently the accused under a military commissions charge that was sworn on February 2, 2007, and referred to trial on March 1, 2007. I have read the charge and specifications alleged against me, and they have been explained to me by my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel. I understand the charge and specifications, and am aware that I have a legal right to plead not guilty and to leave upon the United States the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence. Understanding the above and under the conditions set forth below, and in consideration of the Convening Authority's agreement to approve a sentence in accordance with the limitations set forth in Appendix A, I offer to plead as follows:

   To Specification 1 of the Charge and the Charge: Guilty

   I understand that this offer, when accepted by the Convening Authority, will constitute a binding agreement. I assert that I am, in fact guilty of the offense to which I am offering to plead guilty, and I understand that this agreement absolves the United States of its obligation to present any evidence in court to prove my guilt. I offer to plead guilty, freely and voluntarily, because I am guilty, and because it will be in my best interest that the Convening Authority grant me the relief set forth in Appendix A. I understand that I waive my right to avoid self-incrimination insofar as a plea of guilty will incriminate me.

   The preceding paragraph uses the term "binding agreement". The parties do not understand this term to abrogate Mr. Hick's right to seek to withdraw from his guilty plea any time prior to announcement of sentence IAW R.M.C. 910(h).

2. Furthermore, upon acceptance of this offer by the Convening Authority:

   a. I agree that I will enter into a reasonable stipulation of fact with the United States to support the elements of the offenses to which I am pleading guilty.

"Offenses" rather than "offense" in the preceding paragraph is agreed to be a typographical error.

b. I agree that I will not communicate with the media in any way regarding the illegal conduct alleged in the charge and the specifications or about the circumstances surrounding my capture and detention as an unlawful enemy combatant for a period of one (1) year. I agree that this includes any direct or indirect communication made by me, my family members, my assigns, or any other third party made on my behalf.

The parties agree that the one year period discussed in the preceding paragraph was intended to commence upon the date sentence is announced.

The parties agree to strike the following language in the preceding paragraph: ", my family members, my assigns, or any other third party made on my behalf".

c. I agree that as a material term of this agreement I will cooperate fully, completely and truthfully in post-trial briefings and interviews as directed by competent United States or Australian law enforcement and intelligence authorities. I agree to provide truthful, complete and accurate information and, if necessary, truthful, complete and accurate testimony under oath at any grand juries, trials or other proceedings, including military commissions and international tribunals. I understand that if I testify untruthfully in any material way I can be prosecuted for perjury. I further agree to provide all information concerning my knowledge of, and participation in al Qaeda, Lashkar-e Tayyiba (LET), or any other similar organizations. I agree that I will not falsely implicate any person or entity, and I will not protect any person or entity through false information or omission.

The parties agree that initial determination with regard to compliance with terms of preceding paragraph will be made by the Convening Authority.

d. I hereby assign to the Government of Australia any profits or proceeds which I may be entitled to receive in connection with any publication or dissemination of information relating to the illegal conduct alleged in the charge sheet. This assignment shall include any profits and proceeds for my benefit, regardless of whether such profits and proceeds are payable to me or to others, directly or indirectly, for my benefit or for the benefit of

my associates or a current or future member of my family. I hereby represent that I have not previously assigned, and I agree that I will not circumvent this assignment to the Government of Australia by assigning, the rights to my story to an associate or to a current or future member of my family, or to another person or entity that would provide some financial benefit to me, to my associates, or to a current or future member of my family. Moreover, I will not circumvent this assignment by communicating with an associate or a family member for the purpose of assisting or facilitating his or her profiting from a public dissemination, whether or not such an associate or other family member is personally or directly involved in such dissemination. I agree that this assignment is enforceable through the Australian Proceeds Act of 2002, and any other applicable provision of law that would further the purpose of this paragraph's prohibition of personal enrichment for myself, my family, or my heirs and assigns, through any publication or dissemination of qualifying information, and I acknowledge that my representations herein are material terms of this agreement.

The parties agree that preceding paragraph is intended to provide a basis for civil action rather than amounting to a provision, the violation of which could support vacation of any portion of a sentence of this commission that might be suspended pursuant to the terms of this agreement.

The parties agree that the term "illegal conduct alleged" in the preceding paragraph includes all matters on the Charge Sheet which was referred to this commission for trial, and is not limited to the matters contained in Specification 1 of the Charge.

3. In making this offer, I state that:

   a. I am satisfied with my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel, who have advised me with respect to this offer, and I consider them competent to represent me in this military commission and agree that they have provided me effective assistance of counsel.

   b. No person or persons have made any attempt to force or coerce me into making this offer or to plead guilty. This is a free and voluntary decision on my part made with full knowledge of its meaning and effect.

c. My counsel have fully advised me of the nature of the charge and specifications against me, the possibility of my defending against them, any defense that might apply, and the effect of the guilty plea that I am offering to make. I fully understand the advice of my defense counsel and the meaning, effect, and consequences of this plea.

d. I understand that the signature of the Convening Authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the United States.

The preceding paragraph uses the term "binding agreement". The parties agree that this term does not abrogate Mr. Hick's right to seek to withdraw from his guilty plea any time prior to announcement of sentence IAW R.M.C. 910(h)

e. I understand and agree that the Convening Authority can withdraw from this agreement and this agreement will become null and void, in the event that:

1. I fail to plead guilty as required by this agreement;

2. The commission refuses to accept my plea of guilty to any charge;

The parties agree that the term "commission" used in the preceding paragraph refers to the Military judge.

3. The commission sets aside my plea of guilty for whatever reason, including upon my request, before sentence is announced; or

The parties agree that the term "commission" used in the preceding paragraph refers to the Military judge.

4. I fail to satisfy any material obligation or term of this agreement, or I have misrepresented any material term of this agreement.

The parties agree that initial determination with regard to compliance with material obligation or term of this agreement as mentioned in the preceding paragraph, will be made by the military judge prior to sentencing and by the Convening Authority thereafter.

5. I fail to agree to a satisfactory stipulation of fact with the prosecution related to the charge and specification to which I plead guilty.

f. I understand and agree that, if this agreement becomes null and void for any reason, my offer for this plea agreement cannot be used against me in any way at any time to establish my guilt of the charge alleged against me, the United States may prosecute the charge and specifications alleged against me, and the limitations upon the disposition of my case set forth in Appendix A will have no effect.

The parties agree that the preceding paragraph is intended to be read in a manner consistent with M.C.R.E. 410.

g. I understand and agree that my failure to fully cooperate with Australian or United States authorities may delay my release from confinement or custody under applicable provisions of Australian law.

The parties agree that a representative of the Australian Government would make any determination associated with regard to Mr. Hicks' compliance with the terms of the preceding paragraph.

h. I acknowledge and agree that I am an alien unlawful enemy combatant, as defined by the Military Commissions Act of 2006, Title 10, United States Code, Section 948 (c).

The parties agree that the words/figures "Section 948(c)" in the preceding paragraph are incorrect, and the correct words/figures are: Section 948a (1) and (3).

i. I have never been illegally treated by any person or persons while in the custody and control of the United States. This includes the period after my capture and transfer to U.S. custody in Afghanistan in December 2001, through the entire period of my detention by the United States at Guantanamo Bay, Cuba. I agree that this agreement puts to rest any claims of mistreatment by the United States.

The parties agree that the term "illegally treated" in the preceding paragraph shall be interpreted consistently with the definition of "illegal treatment" contained in paragraph 50 of the stipulation of fact.

The parties agree that the preceding paragraph is intended to reflect a statement by Mr. Hicks concerning his belief in the truth of this statement with regard to the time period from on or about 15 December 2001 until the date of trial.

The parties agree to strike the following language in the preceding paragraph: "I agree that this agreement puts to rest any claims of mistreatment by the United States." The sentence is deleted from the preceding paragraph because it is more fully addressed in paragraph 5 below.

j. I further understand and agree that the entire period of detention as an unlawful enemy combatant is based upon my capture during armed conflict, has been lawful pursuant to the law of armed conflict and is not associated with, or in anticipation of, any criminal proceedings against me.

The parties agree that the preceding paragraph reflects an acknowledgment by the defense and the prosecution and the Convening Authority that the accused will not be afforded any pretrial confinement credit to be counted against any sentence to confinement adjudged by this commission.

4. In exchange for the undertakings made by the United States in entering this Pretrial Agreement, I voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law. In addition, I voluntarily and expressly agree not to make, participate in, or support any claim, and not to undertake, participate in, or support any litigation, in any forum against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to my capture, treatment, detention, or prosecution.

The parties agree that the preceding paragraph is intended to be read in a manner consistent with R.M.C. 1110 such that the accused agrees to waive appellate review of his conviction in this case at the earliest time allowed, that is: immediately after the sentence is announced.

5. I agree that for the remainder of my natural life, should the Government of the United States determine that I have engaged in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement, the Government of the United States may immediately invoke any right it has at that time to capture and detain me, outside the nation of Australia and its territories, as an unlawful enemy combatant. If I engage in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement and during the period in which any part of my sentence is suspended, the Convening Authority may vacate any period of suspension agreed to in this Pretrial Agreement or as otherwise approved by the Convening Authority and the previously suspended portion of my sentence could be imposed on me. This

pretrial agreement resolves all charges against me under the Military Commissions Act of 2006 and United States law that may have occurred before the signing of this agreement.

The Trial Counsel affirms that the Convening Authority has been authorized to agree to the immunity provision contained in the preceding paragraph as required by R.M.C. 704(c).

6. This document and Appendix A include all of the terms of this Pretrial Agreement and no other promises or inducements have been made by the Convening Authority or any other person which affect my offer to plead guilty or enter into this Pretrial Agreement.

_____ _____

DAVID MATTHEW HICKS Date
Accused

We certify that we provided David Matthew Hicks the advice referred to above and explained to him the elements of the offenses to which he is pleading guilty, and that he has voluntarily signed this offer for pretrial agreement.

_____ _____
MICHAEL D. MORI, Major, USMC Date
Detailed Military Defense Counsel

_____ _____
JOSHUA L. DRATEL Date
Civilian Defense Counsel

I recommend (acceptance) (rejection) of this offer.

_____ _____
Colonel, USAF Date
Chief Prosecutor

I recommend (acceptance) (rejection) of this offer.

_____ _____
, USAF Date
Legal Advisor to the Convening Authority

The foregoing instrument, including Appendix A., concerning David Matthew Hicks, dated March _____, 2007 is (approved and accepted) (disapproved).

_____ _____
SUSAN J. CRAWFORD Date
Convening Authority

UNITED STATES	)	
	)	
	)	**APPENDIX A**
v.	)	**TO OFFER FOR A**
	)	**PRETRIAL AGREEMENT**
	)	
	)	
DAVID MATTHEW HICKS	)	**Date: _____**

1. As consideration for the offer of David Matthew Hicks (the "Accused") to plead guilty and his agreement to other terms and conditions as set forth in the Offer for A Pretrial Agreement, dated March _____, 2007, the Convening Authority will undertake as follows:

   a. The maximum period of confinement that may be adjudged and approved is seven years. The Convening Authority agrees to suspend any portion of a sentence to confinement in excess of nine months.

   The parties agree that the intent of the preceding paragraph includes an agreement by the Convening Authority that any confinement to be suspended will be suspended for a period of seven years from the date sentence is announced, at which time, unless sooner vacated, it will be remitted without further action.

   b. The Convening Authority agrees to dismiss Specification 2 of the Charge with prejudice, at or before the time of sentencing.

   c. The Military Judge will, in accordance with R.M.C. 1005(e) (5), instruct the commission members that the limits on their discretion, as pertains to a sentence to confinement, is as specified in a. above.

   d. The Government of the United States will transfer custody and control of the Accused to the Government of Australia by not later than sixty (60) days from the date upon which the sentence is announced.

   e. Upon signing of this agreement, the prosecution agrees not to present evidence in aggravation during the sentencing hearing and the defense agrees not to present evidence in mitigation. The accused may make an unsworn statement.

The parties agree that the preceding paragraph permits the presentation of the stipulation of fact to the members for their use and for their consideration during their deliberations upon sentencing.

The parties agree that the preceding paragraph includes an agreement not to offer evidence in extenuation.

2. There are no limitations on the sentence other than that provided in paragraph 1, above.

3. This is original Appendix A submitted with the Offer for A Pretrial Agreement.

_____ _____
DAVID MATTHEW HICKS Date

We certify that we gave David Matthew Hicks the advice referred to above and explained to him the meaning and effect of the foregoing, and he has voluntarily signed this Appendix A.

_____ _____
MICHAEL D. MORI, Major, USMC Date
Detailed Military Defense Counsel

_____ _____
JOSHUA L. DRATEL Date
Civilian Defense Counsel

I recommend (acceptance) (rejection) of this Appendix A.

_____ _____

Colonel, USAF Date
Chief Prosecutor

I recommend (acceptance) (rejection) of this Appendix A.

_____ _____
, USAF Date
Legal Advisor to the Convening Authority

The foregoing Appendix A is (approved) (disapproved) in conjunction with the pretrial agreement dated March _____, 2007.

_____ _____
SUSAN J. CRAWFORD Date
Convening Authority

Appellate Exhibit 31 - U.S. v David Matthew Hicks

Pursuant to the Protective Order, dated 29 March 2007, issued by Colonel , and marked as Appellate Exhibit 32, the commission member completed questionnaires marked as Appellate Exhibit 31 have been ordered sealed by the military judge in the original record of trial. All subsequent copies of the complete record of trial will contain this page in place of Appellate Exhibit 31.

OMC

From: LTC OMC
Sent: Thursday, March 29, 2007 6:54 PM
To:

Cc:

Subject: RE: Hicks - Protective Order - MC Members

Attachments: Protective Order - Members.pdf

Protective Order - Members.pdf...

Col has directed me to forward to the parties the attached Protective Order. The Order may be posted outside of the courtroom entrance, and a copy may be provided to PAO for distribution as necessary. He will refer to the Order on the record, but will not read it on the record.

v/r,

, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: LTC USSOUTHCOM JTFGTMO
Sent: Thursday, March 29, 2007 5:53 PM
To: LTC OMC
Cc:

Subject: RE: Hicks - Protective Order - MC Members

Pros. replies as follows:

1. Attached is a revised ProOrder that now pertains solely to MC panel members.

2. As stated, below, the previous draft present order was virtually identical to the PAO written ground rules. Per Maj 's e-m (pasted into this e-mail), she advised of the verbal modifications to the prohibitions of para. "g."

3. In sum, the revised ProOrd pertains exclusively to MC panel members, and is in its written form consistent with the written and verbal PAO guidance.

4. To promulgate, Pros. requests that the order: (a) be posted outside of the courtroom entrance; (b) a copy provided to PAO for distribution as necessary; and, (c) issued by the MJ on the record.

5. ***** MAJ 'S E-MAIL BEGIN:

-----Original Message-----
From: MAJ USSOUTHCOM JTFGTMO
Sent: Thursday, March 29, 2007 4:59 PM
To:
Cc:
JTFGTMO
Subject: RE: Hicks - Protective Order - MC Members

No concerns.

I reiterated the ground rules to the press today at 1500.

I advised that the parties and the judge had waived the restriction to being identified by name, and that DOD had approved that the sketch artist may draw the accused's facial features.

The sketch artist was advised she may not depict the members' faces.

I advised the press today they could refer to the panel members only by gender, rank, and branch of service.

MAJ

***** MAJ 'S E-MAIL END. *****

V/r-- LtCol

, LtCol, U.S. Marine Corps
Prosecutor, Office of Military Commissions

-----Original Message-----
From: LTC OMC
Sent: Thursday, March 29, 2007 5:35 PM
To:

Subject: RE: Hicks - Protective Order - MC Members

Per Col , the Order you have submitted appears to be at variance with current OMC policy at least regarding Judges and Prosecutors as we understood the rules applicable to the hearing on Monday. It appears that this Order will seem illogical to members of the press. Please verify. Also, he would like to know how this Order/info will be provided to the spectators. Will they be given a copy, etc. Thanks.

v/r,

USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: LTC USSOUTHCOM JTFGTMO
Sent: Thursday, March 29, 2007 5:00 PM
To: LTC OMC

Subject: FW: Hicks - Protective Order - MC Members

-- sir:

1. Prosecution requests Your Honor issue the attached protective order, to include on the record before the proceedings involving members.

2. Per below, Def. does not object.

3. Pls note this language mirrors the present para. "g" of the PAO "ground rules." The order is primarily intended to protect the panel members. Per OMC PAO (MAJ) the other listed participants, except panel members, were previously authorized (verbally) by PAO for disclosure by certain credentialed members of the media who have signed the ground rules. However, panel members identities remain prohibited from disclosure by all spectators, press or otherwise.

V/r-- LtCol

LtCol, U.S. Marine Corps
Prosecutor, Office of Military Commissions

-----Original Message-----
From: Mori, Michael D. MAJ OMC
Sent: Thursday, March 29, 2007 4:33 PM
To:

Cc:

Subject: RE: Hicks - Protective Order - MC Members

Sir,

I have no objection to following the PAO rules.
Sf
Maj Mori

-----Original Message-----
From: LTC USSOUTHCOM JTFGTMO
Sent: Thursday, March 29, 2007 3:58 PM
To: Mori, Michael D. MAJ OMC; MAJ USSOUTHCOM JTFGTMO

Subject: Hicks - Protective Order - MC Members

Maj Mori-- pls review and let me know if you have any objections. Upon receipt I will forward to the MJ. The provision is modeled after the "ground rules" provided by the OMC PAO. Per my mtg w/ OMC PA (MAJ) there appears to have been oral authorization provided to the press, but no one else.

MAJ -- pls advise if any other concerns. I believe this should suffice.

V/r--

LtCol, U.S. Marine Corps

Prosecutor, Office of Military Commissions

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS a/k/a "David Michael Hicks" a/k/a/ "Abu Muslim Australia" a/k/a "Abu Muslim Austraili" a/k/a "Abu Muslim Philippine" a/k/a "Muhammad Dawood"	**Protective Order** Protection of Military Commission Members **29 March 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC), to include but not limited to:

   a. Rules for Military Commissions (RMC) 701(f)(8) and (l)(2);
   b. RMC 806;
   c. Military Commission Rules of Evidence (MCRE) 104(a);
   d. MCRE 505(e); and,
   e. MCRE 611(d)(2).

2. IT IS HEREBY ORDERED:

   a. The identities of all commission panel members will not be reported or otherwise disclosed in any way without the prior release approval of the Office of Secretary Defense (Public Affairs). No drawings, sketches, photographs or videotape of commission panel members are permitted either inside or outside of the courtroom without prior release approval by OSD (PA) and the individual.

   b. This prohibited conduct applies to all spectators of the military commission proceedings, to include members of any press or other news organization, Non-governmental Organization (NGO) representatives, or any one else whether viewing the proceedings in official or private capacity.

3. **Violation and Remedy**. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Colonel, U.S. Marine Corps
Military Judge

UNITED STATES OF AMERICA	)	**Waiver of Appellate Review**
v.	)	**Military Commission Guantanamo Bay, Cuba**
DAVID HICKS	)	

1. I, David Hicks, waive appellate review of my military commission.

2. I, David Hicks, have discussed my right to appellate review and the effect of waiver of appellate review with my Detailed Military Counsel, Major Michael D. Mori. I understand these matters.

3. This waiver is submitted voluntarily.

Signed: _____
David Hicks

Date: 30/3/7

Signed: _____
M.D. Mori
Major, U.S. Marine Corps
Detailed Defense Counsel

Date: 30 MAR 07

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM – This form and the M.M.C., Rule 1103, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial for trials by military commission.

COPIES – See R.M.C. 1103(b). The convening authority may direct the preparation of additional copies.

ARRANGEMENT – When forwarded to the convening authority for review, the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 5, 6, and 13e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 12 will be inserted by either trial counsel or the convening authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of MC Form 490.

2. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

3. Briefs of counsel submitted after trial, if any.

4. MC Form 490, "Commission Data Sheet."

5. Military Commission orders promulgating the result of trial as to each accused, in 10 copies.

6. When required, signed recommendation of legal advisor, in duplicate, together with all clemency papers, including clemency recommendation by commission members.

7. Matters submitted by the accused.

8. MC Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

9. Congressional inquiries and replies, if any.

10. Advice of legal advisor.

11. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

12. Records of former trials.

13. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt

c. Record of proceedings in court, including R.M.C. 803 sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.