RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD
AKHBAR FARNAD

NO. 050008

VOLUME IX OF ___ TOTAL VOLUMES

1ST VOLUME OF REVIEW EXHIBITS (RE):
RES 1-53
JANUARY 11 & 12, 2006 SESSIONS
(REDACTED VERSION)

United States v. Omar Ahmed Khadr, NO. 050008

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

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

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

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
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Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Friday, December 02, 2005 10:30 AM
To: [redacted]
Cc:
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

6. All current POMs (Rules of Court) can be found at
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

RE 1 (Khadr)
Page 1 of 1

12/2/2005

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Wednesday, December 07, 2005 7:16 PM
To: [redacted]
Subject: US v Khadr - Reminder
Attachments: PO 1 - Khadr - Scheduling of first session 2 Dec 05.pdf

Counsel are reminded that in accordance with para 3 of PO 1 (copy attached) counsel were told by the Presiding Officer to "Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session."

The Presiding Officer requests negative replies, and that a lack of response to PO 1 will be interpreted as agreement to the session and the other provisions of PO 1.

This email will be placed on the filings inventory as PO 1 A.

BY DIRECTION OF THE PRESIDING OFFICER

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

<<PO 1 - Khadr - Scheduling of first session 2 Dec 05.pdf>>

RE 2 (Khadr)
Page 1 of 1

12/7/2005

[redacted]

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated October 25, 2004 and forwarded to me by the Acting Deputy Secretary of Defense by letter dated June 17, 2005;

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

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

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

(1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
- (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

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

Accordingly, it is hereby ordered that, effective this day, Omar Ahmed Khadr shall be subject to the Military Order of November 13, 2001.

DATE: July 29, 2005

White House Office-controlled Document

[redacted]

RE 3 (Khadr)
Page 1 of 1

UNITED STATES OF AMERICA	)	CHARGES:
	)	CONSPIRACY;
v.	)	MURDER BY AN UNPRIVILEGED
	)	BELLIGERENT;
OMAR AHMED KHADR	)	ATTEMPTED MURDER BY AN
a/k/a Akhbar Farhad	)	UNPRIVILEGED BELLIGERENT;
a/k/a Akhbar Farnad	)	AIDING THE ENEMY
	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 30, 2005 that Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, hereinafter Khadr) is subject to his Military Order of November 13, 2001.

2. Khadr's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS (AL QAIDA)

3. Al Qaida ("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.

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

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida 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.

8. 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.

9. 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."

10. 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."

11. Since 1989 members and associates of al Qaida, 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.

BACKGROUND

12. Khadr was born on September 19, 1986 in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

13. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaida to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaida member and close associate of Usama bin Laden and numerous other senior members of al Qaida.

14. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents. Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

15. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

16. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaida leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef, (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaida training camps and guest houses.

17. After al Qaida's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

18. In the summer of 2002, Khadr received one-on-one, private al Qaida basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades and explosives.

19. After completing his training, Khadr joined a team of other al Qaida operatives and converted landmines into remotely detonated improvised explosive devices, ultimately planting them at a point where U.S. forces were known to travel.

20. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of one U.S. service member.

CHARGE 1: CONSPIRACY

21. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

22. In furtherance of this enterprise and conspiracy, Khadr and other members of al Qaida committed the following overt acts:

a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmed Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives.

b. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.

c. On or about July 2002, Khadr received one month of land mine training.

d. On or about July 2002, Khadr joined a group of Al Qaida operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

e. On or about July 27, 2002, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound.

During the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer. In addition to the death of SFC Speer, two Afghan Militia Force members who were accompanying U.S. Forces were shot and killed and several U.S. service members were wounded.

CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT

23. Omar Ahmed Khadr did, in Afghanistan, on or about July 27, 2002, murder Sergeant First Class Christopher Speer, U.S. Army, while in the context of and associated with armed conflict and without enjoying combatant immunity, by throwing a hand grenade that caused Sergeant First Class Speer's death.

CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

24. Omar Ahmed Khadr did, in Afghanistan, between, on, or about June 1, 2002 and July 27, 2002, attempt to murder divers persons, while in the context of and associated with armed conflict and without enjoying combatant immunity, by converting land mines to improvised explosive devices and planting said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

CHARGE 4: AIDING THE ENEMY

25. Omar Ahmed Khadr did, in Afghanistan, on divers occasions between on or about June 1, 2002 and July 27, 2002, while in the context of and associated with armed conflict, intentionally aid the enemy, to wit: al Qaida.

[redacted]

Military Commission Case No. 05-0008

UNITED STATES	)	
	)	
v.	)	Approval of Charges
	)	
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	November 4, 2005

The charges against Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad) are approved. Referral for trial and appointment of a panel of officers to serve as a Military Commission will be published in a separate order.

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

[redacted]

[redacted]

Military Commission Case No. 05-0008

UNITED STATES	)	Military Commission Members
v.	)	Appointing Order No. 05-0004
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	NOV 23 2005

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Colonel Robert S. Chester, USMC, Presiding Officer
Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USA, Member
Colonel [redacted] USA, Member
Captain [redacted] USN, Member
Lieutenant Commander [redacted] USN, First Alternate Member
Lieutenant Colonel [redacted] USMC, Second Alternate Member

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

[redacted]

RE 6 (Khadr)
Page 1 of 1

Military Commission Case No. 05-0008

UNITED STATES v. OMAR AHMED KHADR a/k/a Akhbar Fachad a/k/a Akhbar Famad	)))))))))	Referral NOV 2 3 2005

The charges against Omar Ahmed Khadr (a/k/a Akhbar Fachad, a/k/a Akhbar Famad) are referred, as a noncapital case, to the Military Commission identified in Appointing Order No. 05-0004. As soon as practicable, the Presiding Officer will conduct those sessions he deems appropriate to ensure the expeditious conduct of the trial.

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

RE 7 (Khadr)
Page 1 of 1

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

OFFICE OF THE
CHIEF PROSECUTOR

December 2, 2005

MEMORANDUM FOR MAJOR [redacted] USMC
LIEUTENANT [redacted] USN
LIEUTENANT [redacted] USNR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated August 31, 2005, and Section 3B(9) of Military Commission Instruction No. 3, dated July 15, 2005, all previous detailing orders are rescinded and the above named counsel are detailed and designated as follows:

United States v. Khadr
Detailed Prosecutor:
Major [redacted] USMC
Detailed Assistant Prosecutors:
Lieutenant [redacted] USN
Lieutenant [redacted] USNR

MORRIS D. DAVIS
Colonel, U.S. Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

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RE 8 (Khadr)
Page 1 of 1

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

29 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Captain John J. Merriam, JA, USA

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR

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

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

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

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

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

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

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

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

November 30, 2005

Professor Richard J. Wilson
American University Washington College of Law
[redacted]
Washington, DC 20016

Re: United States v. Khadr

Dear Professor Wilson,

I am pleased to inform you that you have been detailed as a member of the defense team representing Mr. Khadr before Military Commissions.

As a member of the defense team, you have a confidential relationship with other members of the defense team and Mr. Khadr. This confidential relationship gives Mr. Khadr the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for facilitating the rendition of professional legal services to Mr. Khadr. Such confidential communications include communications between Mr. Khadr and members of the defense team. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to Mr. Khadr or those reasonably necessary for the transmission of the communication.

If you have any questions regarding your status or the requested/required documents please do not hesitate to contact my office at [redacted]

Sincerely,

Dwight H. Sullivan
Colonel, USMCR

cc:
Mr. [redacted]
Mr. John D. Altenburg, Jr.
BGen Hemingway

AMERICAN UNIVERSITY
WASHINGTON, DC

CLINICAL PROGRAM

July 14, 2005

Office of the General Counsel, Department of Defense
(Attn: Chief Defense Counsel, Office of Military Commissions)
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Application for Qualification as Member of Pool of Civilian Defense Counsel

Dear Chief Defense Counsel:

Pursuant to Military Commission Instruction No. 5 (DoD MCI No. 5, April 30, 2003), Section 3(A)(2), I hereby request your review and approval of my qualifications for membership in the pool of available Civilian Defense Counsel. I have enclosed the following documents to comply with the requirements of the instruction:

1. A certified true copy of my valid U.S. passport, demonstrating that I am a U.S. citizen;

2. An official certificate from the Bar of the District of Columbia demonstrating that I am a admitted to practice law in that jurisdiction, dated within 3 months of your receipt of this application;

3. My sworn statement identifying all jurisdictions in which I have been admitted or applied for admission, as well as my attestation that I have not been the subject of any sanctions, disciplinary actions or formal challenges to my fitness to practice law in any of these jurisdictions;

4. A properly executed Authorization for Release of Information;

5. My statement regarding my current security clearance at SECRET level;

6. A properly executed copy of the Affidavit And Agreement By Civilian Defense Counsel.

RE 10 (Khadr)

[redacted]

I look forward to your favorable response, and ask for acknowledgement of your receipt of my application materials. Per the instruction, I am sending this application by FedEx.

Sincerely,

Richard J. Wilson
Professor of Law and Director,
International Human Rights Law Clinic
Washington College of Law
American University

Enc.

District of Columbia Court of Appeals
Committee on Admissions
500 Indiana Avenue, N.W. — Room 4200
Washington, D. C. 20001
202 / 879-2718

I, GARLAND PINKSTON, JR., Clerk of the District of Columbia Court of Appeals, do hereby certify that

RICHARD J. WILSON

was on the 7TH day of SEPTEMBER, 1990 duly qualified and admitted as an attorney and counselor and entitled to practice before this Court and is, on the date indicated below, an active member in good standing of this Bar.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court at the City of Washington, D.C., on June 30, 2005.

GARLAND PINKSTON, JR., CLERK

By: C. Jackson
Deputy Clerk

RE 10 (Khadr)
Page 4 of 12

Washington, District of Columbia

The foregoing instrument was acknowledged and sworn before me this 14 day of July 2005 by Richard J. Wilson

Notary Public

My commission expires September 14, 2008

I certify this to be a true copy of the original document.

July 14, 2005

RE 10 (Khadr)
Page 5 of 12

Sworn Notarized Statement
Of Richard J. Wilson

I, Richard J. Wilson, submit the following statement, duly sworn and notarized:

1. I am admitted to practice law in Illinois and the District of Columbia. My original admission in Illinois was in 1972, and my status there has been inactive since approximately 2001 because I no longer reside in or practice law there. I was admitted to practice in the District of Columbia in 1990. I have not applied to any other state jurisdiction for admission, but am admitted to practice before several federal district and appellate courts, including the US Court of Appeals for the Armed Services (1995) and the United States Supreme Court (1975). I am also duly qualified to practice as defense counsel before the Special Court for Sierra Leone, a special criminal tribunal for international and war crimes in that country.

2. I have never been the subject of any sanction or disciplinary action for misconduct of any kind before any jurisdiction to which I am admitted to practice law.

3. No sanction, disciplinary action or challenge to my fitness to practice law has been imposed on or made against me.

4. I have been granted a valid and current security clearance at the SECRET level. Interim clearance was granted on September 15, 2004, and both background investigation and final clearance were granted on December 2, 2004.

I oath and affirm that the preceding statements are true.

July 14, 2006
Date

Richard J. Wilson
Signature

Stephanie Ann Fitts
Notary

Stephanie Ann Fitts
Notary Public, District of Columbia
My Commission Expires 09-14-2009

RE 10 (Khadr)
Page 6 of 12

ANNEX A to Department of Defense Military Commission Instruction No. 5,
"Qualification of Civilian Defense Counsel"

UNITED STATES OF AMERICA
Authorization for Release of Information
(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN [redacted]

July 14, 2005
Date

Certified True Copy

ANNEX B to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

1. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

   A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No.5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel

to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an Accused before military commissions, unless I obtain approval in advance from the Appointing Authority or the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable, rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case. In the case of doubt, I understand that I have an affirmative duty to request clarification from the Appointing Authority or Presiding Officer before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other Protected Information.

2. Once proceedings have begun, I will not travel from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other Protected Information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ Richard Wilson

Print Name: RICHARD WILSON

Address: [redacted]

Date: July 14, 2005

STATE OF)
Washington, DC
COUNTY OF)

Sworn to and subscribed before me, by RICHARD J. WILSON, this 14 day of July, 2005

Stephanie Ann Pitts
Notary

My commission expires: Stephanie Ann Pitts
Notary Public, District of Columbia
My Commission Expires 09-14-2006

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

November 28, 2005

Professor Muneer I. Ahmad
American University Washington College of Law
[redacted]
Washington, DC 20016

Re: United States v. Khadr

Dear Professor Ahmad,

I am pleased to inform you that you have been detailed as a member of the defense team representing Mr. Khadr before Military Commissions.

As a member of the defense team, you have a confidential relationship with other members of the defense team and Mr. Khadr. This confidential relationship gives Mr. Khadr the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for facilitating the rendition of professional legal services to Mr. Khadr. Such confidential communications include communications between Mr. Khadr and members of the defense team. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to Mr. Khadr or those reasonably necessary for the transmission of the communication.

If you have any questions regarding your status or the requested/required documents please do not hesitate to contact my office at [redacted]

Sincerely,

Dwight H. Sullivan
Colonel, USMCR

cc:
Mr. [redacted]
Mr. John D. Altenburg, Jr.
BGen Hemingway

DECLARATION OF MUNEER I. AHMAD

I, Muneer I. Ahmad, hereby declare under penalty of the laws of the United States that the following is true and correct:

1. I am an Associate Professor of Law at American University Washington College of Law in Washington, D.C.

2. I was admitted by application to practice law in the District of Columbia on September 8, 2004.

3. I was admitted by examination to practice law in California on December 21, 1997. Since 2002, I have been in inactive status in California because I no longer reside or practice law there.

4. I was admitted by examination to practice law in New York on September 23, 1997.

5. I have not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

Signed this 22nd of November, 2005, at Washington, D.C.

Muneer I. Ahmad

ANNEX B to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No.5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. Prior to undertaking representation of an Accused, I will ensure that I can commit sufficient time and resources to handle an Accused's case expeditiously through its conclusion. In making this assessment, I am aware that the Presiding

Officer may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the Presiding Officer's determination such a continuation would unreasonably delay the proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority as appropriate, and I will state any special requests regarding access to the Accused, Protected Information, as defined in MCO No. 1, Paragraph 6.D.5.a, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product will be required to complete an affidavit similar to this Annex prior to receiving any attorney confidences or attorney work product. I further understand that those I request to have access to an Accused, other detainees, or Protected Information will be required to obtain a security clearance and be specifically approved for access to each individual or item of Protected Information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or other Protected

Information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an Accused before military commissions, unless I obtain approval in advance from the Appointing Authority or the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case. Such discussions, transmissions, or sharing may include consulting with other legal professionals for assistance with defense tasks that I may have otherwise personally undertaken consistent with this agreement, and any other applicable laws, military commission

orders, instructions, rules, regulations, or directives. I understand that I may not share attorney confidences, attorney work product, or any Protected Information with anyone unless that individual has been previously approved for that specific type of relationship or information as part of the Defense Team in accordance with paragraph II(C) of this affidavit. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Appointing Authority or Presiding Officer before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other Protected Information.

2. Once proceedings have begun, I will not travel from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. I understand the Presiding Officer or the Appointing Authority will not unreasonably restrict travel from the site of the proceedings during extended breaks in commission proceedings.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting Protected Information under MCO No. 1. This restriction does not apply to discussions with other members of the Defense Team or the Chief Defense Counsel who are appropriately authorized

to receive the specific Protected Information in question, when such disclosure is related to the Defense efforts on behalf of the Accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of Protected Information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other Protected Information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that communications with an Accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ M. I. Ahmad

Print Name: Munaer I. Ahmad

Address: American University Washington College of Law
[redacted]
Washington DC 20016

Date: 11/11/05

STATE OF Washington, DC)
COUNTY OF)

Sworn to and subscribed before me, by MUNAER AHMAD, this 11 day of November, 2005

Stephanie Ann Fitts
Notary

My commission expires: Stephanie Ann Fitts
Notary Public, District of Columbia
My Commission Expires 9-14-2010

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APPOINTING AUTHORITY

NOV 18 · 5

MEMORANDUM FOR: Colonel Robert S. Chester, United States Marine Corps

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

SUBJECT: Selection as a Military Commission Member – Presiding Officer

I have selected you to serve, in the capacity of Presiding Officer, as a Member of a Military Commission convened pursuant to the President's Military Order of November 13,2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror."

In accordance with the duties of the Presiding Officer outlined in paragraph 4(A)(5) of Military Commission Order Number 1, August 31, 2005, you will preside over those Commission proceedings to which you are appointed. You will be notified of the time and location of specific Commission proceedings at a future date.

Questions you have regarding purely administrative matters should be addressed to my Staff Director, [redacted]

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

cc:
Secretary of the Navy
Commandant of the Marine Corps
General Counsel for Department of Defense

Printed on Recycled Paper

RE 12 (Khadr)
Page 1 of 1

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Thursday, December 08, 2005 8:44 AM
To: [redacted]
Subject: RE: First Session in US v. Khadr (PO 1)

CPT Merriam,

Thank you for your reply.

1. Of course the Presiding Officer and the parties want to know Mr. Khadr's decision with respect to counsel as soon as you know it, and what you believe you and the current defense team may and may not do in the absence of any addition to the defense team. Still, the Presiding Officer directs that current members of the team - even if additional counsel are to join it - be prepared to conduct voir dire of the presiding officer, enter (or reserve) pleas, and discuss as much as possible counsel's individual calendars and the general trial calendar.

2. Please make the necessary arrangements to be at GTMO, and assist Mr. Khadr's civilian counsel to do so as well.

3. This email will be added to the filings inventory as PO 1.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: Merriam, John J CPT (PKI)[redacted]
[redacted]

RE 13 (Khadr)
Page 1 of 3

12/8/2005

[redacted]

Subject: RE: First Session in US v. Khadr (PO 1)

Sir:

I know of nothing at this time that would preclude me from being present for this session.

I must note, however, that I am still in the process of assembling the defense team. I was detailed to this case on 29 November, and my detailing order specifically requires me to inform Mr. Khadr of his rights before a military commission, including his right to Selected Military Counsel IAW DoD MCO No. 1 and MCI No. 4. I have not yet had the opportunity to meet my client – I will be meeting with him in mid-DEC and explaining his rights to him.

If my client requests Selected Military Counsel, and that request is granted, then that counsel will assume the role of "lead counsel" for this case. Voir Dire, entering pleas, and the other things scheduled to be accomplished at this initial session are traditionally duties performed by the lead counsel for the defense. Thus, I am not certain I can make commitments for the defense until after these issues have been resolved.

v/r,

J.J. Merriam
CPT, JA
Trial Defense Attorney
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 02, 2005 7:30 AM
[redacted]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the

accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

6. All current POMs (Rules of Court) can be found at http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

RE 13 (Khadr)
Page 3 of 3

12/8/2005

Hodges, Keith

From: Rick Wilson [redacted]
Sent: Thursday, December 08, 2005 3:48 PM
To: [redacted]
Cc:
Subject: RE: First Session in US v. Khadr (PO 1)

Dear Mr. Hodges,

Sorry for the delay in responding. I will NOT be in attendance for the first session.

Richard J. Wilson
Professor of Law and Director
International Human Rights Law Clinic
American University
Washington College of Law
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 02, 2005 10:30 AM
[redacted]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

6. All current POMs (Rules of Court) can be found at
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

Hodges, Keith

From: Muneer Ahmad [redacted]
Sent: Thursday, December 08, 2005 3:52 PM
To: [redacted]
Cc: [redacted]
Subject: RE: First Session in US v. Khadr (PO 1)

Mr. Hodges:

I am available to attend the hearing in Mr. Khadr's case on January 10, 2006. However, my colleague Richard Wilson, who is lead civilian defense counsel, is not available.

Please note that as of now, Mr. Khadr has not consented to being represented by military defense counsel. In addition, because he has not met with counsel since charges were issued against him, he has not consented to Mr. Wilson or myself representing him in the military commission process. In the absence of authorization and instruction, I am therefore able to commit only to my availability. Until Mr. Khadr has exercised his right to counsel, I do not believe it is appropriate to proceed with voir dire of the Presiding Officer or with the entering of a plea.

Sincerely,

Muneer Ahmad

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]
Washington, D.C. 20016
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 02, 2005 10:30 AM
[redacted]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding

Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

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http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

RE 15 (Khadr)
Page 2 of 2

12/9/2005

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Thursday, December 08, 2005 4:12 PM
To: [redacted]
Cc:
Subject: RE: First Session in US v. Khadr (PO 1)

Thank you Professor Ahmad,

The Presiding Officer is considering the emails that you, Professor Wilson, and Captain Merriam have sent and he will provide a response - probably through me, his clerk.

One of the purposes of the session, as indicated by PO 1 (that is our filing system - a PACER of sorts) is to obtain Mr. Khadr's desires with respect to his representation. I do not think it would come as a surprise if the defense requested to reserve on motions and pleas. Whether voir dire will be conducted is a matter that the Presiding Officer will address.

I look forward to meeting you.

Keith Hodges

From: Muneer Ahmad[redacted]
Sent: Thursday, December 08, 2005 3:52 PM
To: [redacted]
Cc:
Subject: RE: First Session in US v. Khadr (PO 1)

Mr. Hodges:

I am available to attend the hearing in Mr. Khadr's case on January 10, 2006. However, my colleague Richard Wilson, who is lead civilian defense counsel, is not available.

Please note that as of now, Mr. Khadr has not consented to being represented by military defense counsel. In addition, because he has not met with counsel since charges were issued against him, he has not consented to Mr. Wilson or myself representing him in the military commission process. In the absence of authorization and instruction, I am therefore able to commit only to my availability. Until Mr. Khadr has exercised his right to counsel, I do not believe it is appropriate to proceed with voir dire of the Presiding Officer or with the entering of a plea.

Sincerely,

Muneer Ahmad

Muneer I. Ahmad

Associate Professor of Law
American University Washington College of Law
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 02, 2005 10:30 AM
To: [redacted]
Cc: [redacted]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other motions to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

6. All current POMs (Rules of Court) can be found at
http://www.dalnavlink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

Hodges, Keith

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

Cc:

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

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

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

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

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

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

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

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

BY DIRECTION OF THE PRESIDING OFFICER

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

Biographical Summary

Robert S. Chester
Colonel, USMC

Born [redacted] Graduated from University of Idaho, Moscow Idaho, with a BS in Accounting 1976.

Commissioned a second lieutenant in May 1976.
After The Basic School, designated a communications officer and attend Basic Communications Officer Course in 1977.

1977- 1979 assigned to Marine Wing Communications Squadron 38, Marine Wing Support Group 38, 3rd Marine Aircraft Wing, El Toro, California. Served as legal officer, CMS Officer, CMCC Officer, and Wire Platoon Commander.

1979 -1982 attended University of Idaho College of Law, on the Funded Law Education Program.

1982 - 1984 assigned to 1st Force Service Support Group, Camp Pendleton, CA where assigned as trial counsel and defense counsel.

1984 - 1986 assigned as Senior Judge Advocate, 11th Marine Amphibious Unit, I Marine Amphibious Force.

1986 – 1988 assigned to 1st FSSG and served as Senior Defense Counsel and Assistant Officer in Charge, Legal Services Support Section.

1988 – 1990 assigned to 2d FSSG, Camp Lejuene, NC and served as trial counsel and Senior Defense Counsel.

1990 – 1992 assigned to 2d Marine Division and served as Deputy Staff Judge Advocate, 2d Marine Division and II Marine Expeditionary Force. Deployed to Saudi Arabia for six months in support of Operations Desert Shield and Desert Storm

1992 – 1995 assigned to Navy-Marine Corps Trial Judiciary, Camp Pendleton, as a military judge.

1995 – 1998 assigned to 1st FSSG as OIC, LSSS.

1998 – 1999 assigned as Senior Legal Advisor, Joint Task Force 6, El Paso, Texas.

1999 – 2000 assigned as SJA, III MEF, Okinawa, Japan.

2000 – 2002 assigned as SJA, I MEF, Camp Pendleton, CA.

2002 – Present assigned as Circuit Military Judge, Sierra Judicial Circuit, Camp [redacted] Deployed to Iraq for three months in support of Operation Iraqi Freedom.

Admitted to Idaho Bar, 1982 and California Bar, 1986.

Education: BS in Accounting, University of Idaho, 1976.
MA in Human Resources Management, Pepperdine University, 1978.
JD, University of Idaho, 1982.

AWARDS: Joint Meritorious Service Medal, Meritorious Service Medal with 3 Gold Stars, Navy Commendation Medal.

[redacted]

RE 18 (Khadr)
Page 1 of 1

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Friday, December 16, 2005 8:39 AM
To: [redacted]
Subject: Presence of Counsel at sessions in GTMO: US v Khadr
Attachments: PO 1 F - Khadr - Announcement of specific Jan 06 session times, 8 Dec 05.pdf; PO 1 - Khadr - Scheduling of first session 2 Dec 05.pdf; PO 1 B - Khadr - CPT Mariam's Response and POs reply, 8 Dec.pdf; PO 1 C - Khadr - Prof Wilson's Response, 8 Dec.pdf; PO 1 D - Khadr - Prof Ahmad's Response, 8 Dec.pdf; PO 1 E - Khadr - Prof Ahmad's email for clarification and PO response, 9 Dec.pdf

This email addresses both LT[redacted] request to be excused from the Jan session in US v. Khadr (see below), and the email traffic concerning Mr. Wilson's attendance or non-attendance during the same session. (See the PO filings attached.)

1. As a general rule and starting point, all counsel who are detailed to a case, selected defense counsel, and civilian counsel on the case must attend all sessions of the Commission.

2. Notwithstanding the general rule above, counsel can be excused from attending a particular session if the client agrees. There are conditions:

a. Because a closed session may be required at any session and that could occur without warning, the detailed defense counsel must attend all sessions.

b. If a counsel is excused by a client, that excusal will not limit the business that is scheduled to be accomplished at the session for which a counsel is to be excused. This means that if the Commission is scheduled to hear motions, for example, the fact a client has excused the appearance of a counsel would not allow a party to defer or avoid litigating a motion because the excused counsel is not present.

c. The Presiding Officer is the one responsible for ensuring the business scheduled for a session is accomplished. If not all counsel on a case will attend the session because the client has excused a counsel, that matter must be brought to the immediate attention of the Presiding Officer, the Assistant, and opposing counsel. This notice is necessary so the Presiding Officer can be assured that business scheduled to be conducted will not be hindered or delayed by a counsel's being excused. This notice can be by email.

d. The notice to the Presiding Officer will contain the following assurances:

(1). In the case of a request to excuse any counsel for the Defense, the request to be excused has been approved by the accused and lead counsel for the Defense. If the counsel to be excused is a prosecutor, the excusal has been approved by the Chief Prosecutor or lead Prosecutor.

(2). The accused and lead counsel for the Defense (or the Chief Prosecutor or lead Prosecutor in the case a prosecutor being excused) and the counsel seeking to be excused, are aware that excusal of the counsel does not permit delay or deferral of business of the Commission because the counsel is

RE 19 (Khadr)
Page 1 of 3

12/16/2005

excused, and that another counsel for the Defense (or Prosecution) who will be present can fully address and litigate, if necessary, any business of the Commission.

(3). The request is not for the purposes of seeking delay, and will not in fact delay, Commission proceedings.

3. In the case of the Defense, the notice to the Presiding Officer addressed in paragraph 2 above will also include a document signed by the accused in English (or translated into English if the signed document is in a language other than English) that states:

a. The accused consents to excusal of the counsel, and that the accused understands that the business before the Commission will not be hindered or delayed because the counsel has been excused, and

b. The accused understands that another counsel of the Defense is responsible for ensuring all business of the Commission can be conducted at the session.

Recognizing the difficulties in obtaining documents signed by the accused on potentially short notice, the Presiding Officer will accept assurances of the requestor as to the accused's assurances provided that it is also represented that a member of the Defense team has personally spoken with the accused and that the accused agrees to the assurances.

4. In US v. Khadr, the Presiding Officer is aware that CPT Merriam and Professor Ahmad indicated they would be present at the January session. If that situation changes, the Presiding Officer must be advised immediately. Professor Wilson has indicated he will not be present, but the Presiding Officer is not aware whether Professor Wilson will be representing Mr. Khadr. If the accused requests representation from Professor Wilson - *or any other attorney* - who intends to be absent, the Defense will comply with paragraphs 2 and 3 above.

5. Provided the Prosecution in US v. Khadr can conduct all the business scheduled for the Commission and the other assurances in paragraph 2 above are met and understood, the Presiding Officer has no objection to LT [redacted] being excused from the session.

6. This email will be added to the filings inventory as PO 1 H.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: [redacted] LT, DoD OSC [redacted]
Sent: Monday, December 12, 2005 8:48 AM

To: [redacted]

Subject: Request for excusal from week of 9 January sessions in US v Khadr

Mr Hodges,

I respectfully request to be excused by the Presiding Officer from the 9 January session to be held in the case of the United States v Khadr. Although I believe that LT [redacted] informed you on 9 December that only he and Major [redacted] would be representing the United States at this initial session, I had not requested to be formally excused, and remain detailed to the case.

Very Respectfully,

[redacted]
Prosecutor, Office of Military Commissions
Department of Defense
[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Monday, December 19, 2005 2:23 PM
To: [redacted]
Subject: PO 2 (Discovery): US v. Khadr
Attachments: PO 2 - Khadr - Discovery Order - 19 Dec 05.pdf

All counsel, your attention is invited to the attached Discovery Order issued by the Presiding Officer this date in the above styled case.

<<PO 2 - Khadr - Discovery Order - 19 Dec 05.pdf>>

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

UNITED STATES OF AMERICA	)	DISCOVERY ORDER (PO 2)
v.	)	19 Dec 2005
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary. All correspondence to the Presiding Officer concerning this Discovery Order shall reference the filings designation, PO 2. (See POM 12-1 concerning filings designations.)

2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.

3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.

4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.

5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.

6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order.

a. If counsel need the requirements of this discovery Order clarified, the Presiding Officer will be available during the Jan 2006 trial term to discuss the matter.

b. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or rediret), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to

demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matters whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects, documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such

a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (*See* paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Monday, November 28, 2005 3:02 PM
Subject: Service as Member of a Military Commission

I am Keith Hodges, the Assistant to the Presiding Officer. Please confirm receipt of this email by replying to me.

I have been advised that you have been selected as a member (primary or alternate) that may sit as part of a Military Commission.

In the next week, the Presiding Officer will prepare and send instructions to you. I believe those instructions will advise you not to read or listen to any accounts concerning Military Commissions or activities at Guantanamo. You should moderate your reading and web surfing habits according. If any information I am providing you should conflict with what the Presiding Officer may instruct you, you must accept what the Presiding Officer says is correct.

We do not expect that your service as a member of the Military Commission will be required for the remainder of the calendar year. I will keep you advised of what I know when I know it, and provide you as much advance notice as I can. All traffic with you will be by email so that I may keep a record of exactly what information members have been provided and that you provide me.

Please also provide the following information to ensure the information I have is correct. Phone numbers indicate *commercial* please.

Office phone:
Home phone (will be used only for emergencies):
Cell phone (will be used only for emergencies):
Is there a different email address you would like us to use? (if so, please provide it.)

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

Hodges, Keith

From: Hodges, Keith
Sent: Monday, November 28, 2005 3:18 PM
Subject: Service as a Member of a Military Commission 2d email

Since I wrote you about an hour ago, I spoke to the Presiding Officer who confirms you will receive instructions from him shortly.

In the meantime, the Presiding Officer advises that as a member of the Military Commission, you are *directed* not to read or listen to any accounts concerning Military Commissions or activities at Guantanamo, and that you *must* moderate your reading and web surfing habits accordingly.

BY DIRECTION OF THE PRESIDING OFFICER

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

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 8:44 AM
To: undisclosed-recipients
Subject: First Instructions by the Presiding Officer
Attachments: Panel 2 - First PO Instructions to Prospective Commission Members - 1 Dec 05.doc

Gentlemen,

Earlier I promised that the Presiding Officer would arrange for his "first instructions." They are attached.

Please note that:

1. We request your acknowledging receipt of these instructions. The parties to any Commission trial have the right to know exactly how each Commission member was instructed.

2. Please provide your home address. We find mailing to home to be faster. I will not release your home address to anyone. It is just for my use.

CO[redacted] please also provide home phone number and cell if any.

Thank you.

BY DIRECTION OF THE PRESIDING OFFICER

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

<<Panel 2 - First PO Instructions to Prospective Commission Members - 1 Dec 05.doc>>

Instructions to Prospective Commission Members
To be provided by APO to each prospective member.

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.

2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.

3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)

Your personal-information will NOT be released to anyone else, and will ONLY be used for emergencies.

4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:

a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. 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 by emailing the Assistant, Mr. Hodges.

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 myself to determine whether you should serve.

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [redacted]

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/
Robert S. Chester
Colonel, USMC
Presiding Officer

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, December 20, 2005 3:21 PM
To: [redacted]
Subject: Instructions provided to members
Attachments: First PO instructions to Panel 2 email and attachment - 1 Dec 05.pdf; 2d email to members panel 2.pdf; first email to members panel 2.pdf

Prior to the Presiding Officer's knowing the identity of all counsel, he believed it necessary to provide preliminary instructions to them both initially through the Assistant and then later, his full instructions.

The "first instructions" provided to members are attached (Three attachments.) If there are objections to these instructions, counsel should consult POM # 4-3.

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

<<First PO instructions to Panel 2 email and attachment - 1 Dec 05.pdf>> <<2d email to members panel 2.pdf>> <<first email to members panel 2.pdf>>

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, December 20, 2005 3:37 PM
To: [redacted]
Subject: Protective Orders - US v. Khadr

1. NLT 3 Jan 06, the parties will provide the Presiding Officer and the Assistant a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect .

2. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.
3. This email will be placed on the filings inventory as ProOrd 1.

BY DIRECTION OF THE PRESIDING OFFICER

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

RE 24 (Khadr)
Page 1 of 1

12/20/2005

Hodges, Keith

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Friday, December 23, 2005 9:08 AM
To: [redacted]
Cc: [redacted]
Subject: Entry of Appearance ICO United States v. Khadr, Case No. 05-0004
Attachments: Entry of Appearance -- Khadr (ahmad).pdf

Colonel Chester,

Pursuant to Military Commission Instruction No. 5, para. 3.B(5) (April 30, 2003), I hereby communicate Professor Muneer Ahmad's attached written entry of appearance to the military commission.

Respectfully Submitted,

Dwight H. Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

RE 25 (Khadr)
Page 1 of 2

AMERICAN UNIVERSITY
WASHINGTON, DC

CLINICAL PROGRAM

December 22, 2005

VIA EMAIL
Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

RE: *United States v. Khadr*, M.C. Case No. 05-0008
Entry of Appearance

Dear Colonel Sullivan:

Pursuant to Military Commission Instruction No. 5 ¶ 3(B)(5), I am writing to enter my appearance on behalf of Omar Khadr in the above-referenced case.

Thank you for your prompt attention to this matter. If you have any questions, please call me at [redacted]

Sincerely,

Muneer I. Ahmad
Associate Professor of Law
American University
Washington College of Law
[redacted]

WASHINGTON COLLEGE OF LAW
[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Friday, December 30, 2005 8:19 AM
To: [redacted]
Cc:
Subject: ProOrd 1: Request for Protective Order - Protection of Identities of Investigators and Interrogators - U.S. v. Khadr
Attachments: Protective Order # 1 Khadr (Prosecution first Draft).doc

1. The below email and the attachment sent with the original email (copy attached), and this email, will be added to the filings inventory as ProOrd 1.

2. It appears that the Prosecution has complied with paragraphs 4a and b, POM 9-1.

3. The defense will respond by email NLT COB 4 January 2006 noting any objections to the proposed Protective Order and the reasons therefore. The Defense is welcome to edit and send the proposed Order showing additions or deletions - but do NOT use the Word "track changes" feature to accomplish this. All email traffic and other submissions should identify the correspondence as ProOrd 1.

4. The Presiding Officer will set a session for an 8-5 conference at GTMO to discuss these orders. Counsel should be prepared - through further discussions among counsel if possible - to fine-tune the language in the order so it meets the needs of the parties. At the aforementioned session, counsel will be prepared to make specific recommendations as to the wording of any proposed order.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: [redacted]
Sent: Wednesday, December 28, 2005 6:01 PM
To: [redacted]
Cc:
Subject: Request for Protective Order - Protection of Identities of Investigators and Interrogators - U.S. v. Khadr

Colonel Chester,

RE 28 (Khadr)
Page 1 of 3

12/30/2005

The Prosecution requests the Presiding Officer issue the attached Protective Order.

(1) The proposed protective order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of the government who participated in the investigation of the accused.

(2) This Protective Order is necessary to protect the identities of all investigators and interrogators from disclosure to the public. The comprising of their identities, especially since the war against al Qaida is still ongoing could; 1) compromise their ability to continue their service in furtherance of the prosecution of that war; 2) place their lives in jeopardy; and, 3) place the lives of their families in jeopardy.

(3) The Prosecution sent the proposed protective order to the Defense on 9 December 2005, and discussed the order with Captain Merriam later that afternoon. Defense Counsel advised that he would like to review further and provided comments to the Prosecution on 16 December. I replied to those comments on 19 December. We have since communicated via email; however, despite our efforts, we have not agreed on language for the Protective Order. Captain Merriam's primary objection was that he believed the order as written would prohibit showing the accused photos of interrogators and telling him what a certain interrogator was saying about him. I disagree. I don't believe the current order would prohibit showing the accused photos of his interrogators and letting him know what their statements say. I do not think that an investigator or interrogator's name or other identifying information should be given to the accused under any circumstances.

I request that the order be issued as soon as possible. Issuance of the Protective Order will allow the Prosecution to provide discovery materials to the Defense containing protected information.

V/R,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

[redacted]

UNITED STATES OF AMERICA	Protective Order #1 Protection of Identities of Investigators and Interrogators
v.	
OMAR AHMED KHADR	December 2005

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Friday, December 30, 2005 8:21 AM
To: [redacted]
Cc:
Subject: ProOrd 2: Request for Protective Order - Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings
Attachments: Protective Order # 2 Khadr (Prosecution first Draft).doc

1. The below email and the attachment sent with the original email (copy attached), and this email, will be added to the filings inventory as ProOrd 2.

2. It appears that the Prosecution has complied with paragraphs 4a and b, POM 9-1.

3. The defense will respond by email NLT COB 4 January 2006 noting any objections to the proposed Protective Order and the reasons therefore. The Defense is welcome to edit and send the proposed Order showing additions or deletions - but do NOT use the Word "track changes" feature to accomplish this. All email traffic and other submissions should identify the correspondence as ProOrd 2.

4. The Presiding Officer will set a session for an 8-5 conference at GTMO to discuss these orders. Counsel should be prepared - through further discussions among counsel if possible - to fine-tune the language in the order so it meets the needs of the parties. At the aforementioned session, counsel will be prepared to make specific recommendations as to the wording of any proposed order.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: [redacted]
Sent: Wednesday, December 28, 2005 7:18 PM
To: [redacted]
Cc:
Subject: Request of Protective Order - Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings

Colonel Chester,

The Prosecution requests the Presiding Officer issue the attached Protective Order.

(1) This Order seeks to protect and ensure compliance in the handling and dissemination under the applicable statutes, regulations, and Executive Orders of all information marked "For Official Use Only" or "Law Enforcement Sensitive" and seeks to protect and ensure compliance in the handling and dissemination under the applicable statutes, regulations, and Executive Orders of all information with Classified Markings (i.e. "Confidential," "Secret," "Top Secret.").

(2) This Protective Order is necessary to ensure any documents or any media containing information with the appropriate markings are handled and disseminated in accordance with applicable statues, regulations, and Executive Orders. Per FOUO and LES marked information, it is necessary to protect this information as the war against al Qaida is ongoing and so are numerous investigations into offenses against the law of war continuing. The mishandling or unauthorized dissemination of this information could lead to the compromise of those ongoing investigations and in many circumstances could lead to the compromising identity of investigative agents. It is also necessary to ensure all information, whether from documents, media, etc., that has the appropriate Classified markings are handled and disseminated in accordance with statutes, regulations and Executive Orders, as directed by the PMO. This is vital as the war against al Qaida continues and the mishandling or unauthorized dissemination of Classified Information could jeopardize the war effort and U.S. national security.

(3) The Prosecution sent the proposed protective order to the Defense on 9 December 2005, and discussed the order with Captain Merriam later that afternoon. Defense Counsel advised that he would like to review further and provided comments to the Prosecution on 16 December. I replied to those comments on 19 December. We have since communicated via email; however, despite our efforts, we have not agreed on language for the Protective Order.

I request that the order be issued as soon as possible. Issuance of the Protective Order will allow the Prosecution to provide discovery materials to the Defense containing protected information.

V/R,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Protective Order # __** **Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings** **December 2005**

1. The following Order is issued to provide general guidance regarding the described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who have been properly approved to assist in the Military Commission proceedings against the accused.

3. This Protective Order shall remain in effect throughout the proceedings, to include review and final action, against the accused unless specifically modified or cancelled.

4. <u>UNCLASSIFIED SENSITIVE MATERIALS:</u>

   a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

   b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

5. <u>CLASSIFIED MATERIALS:</u>

   a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," Page 1 of 2 "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

[redacted]

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any posttrial U.S. federal litigation that may occur.

6. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that members of the Defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team shall submit any book, article, speech, or other publication derived from, or based upon experience or information gained in the course of representation of the accused to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

7. REQUEST FOR EXCEPTIONS:

a. Either party may file a motion, under seal, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

8. BREACH:

a. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Friday, December 30, 2005 8:24 AM
To: [redacted]
Cc:
Subject: ProOrd 3: Request for Protective Order - Protection of Identities of all Witnesses
Attachments: Protective Order # 3 Khadr (Prosecution first Draft).doc

1. The below email and the attachment sent with the original email (copy attached), and this email, will be added to the filings inventory as ProOrd 3.

2. It appears that the Prosecution has complied with paragraphs 4a and b, POM 9-1.

3. The defense will respond by email NLT COB 4 January 2006 noting any objections to the proposed Protective Order and the reasons therefore. The Defense is welcome to edit and send the proposed Order showing additions or deletions - but do NOT use the Word "track changes" feature to accomplish this. All email traffic and other submissions should identify the correspondence as ProOrd 3.

4. The Presiding Officer will set a session for an 8-5 conference at GTMO to discuss these orders. Counsel should be prepared - through further discussions among counsel if possible - to fine-tune the language in the order so it meets the needs of the parties. At the aforementioned session, counsel will be prepared to make specific recommendations as to the wording of any proposed order.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: [redacted]
Sent: Wednesday, December 28, 2005 7:26 PM
To: [redacted]
Cc:
Subject: Request for Protective Order - Protection of Identities of all Witnesses

Colonel Chester,

The Prosecution requests the Presiding Officer issue the attached Protective Order.

RE 28 (Khadr)
Page 1 of 3

12/30/2005

(1) This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

(2) This Protective Order is necessary to protect the identities of all witnesses from disclosure to the public. The comprising of their identities, especially since the war against al Qaida is still ongoing could; 1) compromise their ability to continue their service in furtherance of the prosecution of that war; 2) place their lives in jeopardy; and, 3) place the lives of their families in jeopardy.

(3) The Prosecution sent the proposed protective order to the Defense on 9 December 2005, and discussed the order with Captain Merriam later that afternoon. Defense Counsel advised that he would like to review further and provided comments to the Prosecution on 16 December. We have since communicated via email; however, despite our efforts, we have not agreed on language for the Protective Order.

I request that the order be issued as soon as possible. Issuance of the Protective Order will allow the Prosecution to provide discovery materials to the Defense containing protected information.

V/R,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

12/30/2005

[redacted]

UNITED STATES OF AMERICA	Protective Order #3
v.	Protection of Identities of All Witnesses
OMAR AHMED KHADR	December 2005

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Friday, December 30, 2005 10:46 AM
To: [redacted]
Subject: PO 3 - Voir Dire Questionnaire for the Presiding Officer, US v. Khadr
Attachments: PO 3 - Khadr - Voir Dire questionaire for the PO.pdf

Find attached CPT Merriam's voir dire questionnaire for the Presiding Officer along with the Presiding Officer's answers.

FOR THE PRESIDING OFFICER

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

From: Merriam, John J CPT (PKI) [redacted]
Sent: Tuesday, December 27, 2005 11:03 AM
To: [redacted]
Subject: Voir Dire Questionnaire for the Presiding Officer, US v. Khadr

Sir:

Pursuant to your email of 9 December (below), please find attached a questionnaire prepared by the defense in advance of voir dire of the Presiding Officer in US v. Khadr.

v/r,

J.J. Merriam
CPT, JA
Trial Defense Attorney
Fort Lewis, Washington

RE 28 (Khadr)
Page 1 of 14

12/30/2005

From: Hodges, Keith
Sent: Friday, December 09, 2005 12:31 PM
To: M

Subject: RE: US v Khadr - Docketing of Jan session; Direction to respond

Professor Ahmad,

1. You have all the materials that COL Chester intends to provide for voir dire at this time. He will not be preparing a questionnaire on his own, but will consider any submitted by counsel. The Presiding Officer grants your request to extend the time to provide a questionnaire to 1200, 27 Dec 05.

2. There will be sessions of the Commission in two different cases involving different Presiding Officers. The 2 Dec 05 announcement was prepared as a courtesy to give the parties, and those making logistical arrangements, as much advance notice as possible - with the broadest possible picture - even though it had not then been decided exactly which case would go on which days. Since that time, the order of the cases has been decided hence the more specific time and date in today's email. The first session in US v. Khadr will be at 1000 hours, 11 Jan 06. Counsel need to be available at the call of the Presiding Officer for conferences at other times. In that respect, please see the information pasted below which was approved earlier today by both Presiding Officers, and which I was about to send when your email arrived.

3. Please accept my apologies for the misspellings.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

SUBJECT: Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba.

1. Colonels Brownback and Chester have scheduled a trial term for Military Commissions

during the week of 9 Jan 2006 at Guantanamo Bay, Cuba.

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

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

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

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

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

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

From: Munear Ahmad [redacted]
Sent: Friday, December 09, 2005 2:27 PM
To: [redacted]
Subject: RE: US v Khadr - Docketing of Jan session; Direction to respond

Mr. Hodges:

I write to raise several issues related to the message sent today, December 9, 2005, at the direction of the Presiding Officer.

1. Today's message, copied below, includes a biographical summary prepared by the Presiding Officer, and as provided in paragraph 5, states that counsel may submit a questionnaire for the Presiding Officer, by 1200 15 December 2005, in order to assist with voir dire. However, PO1, sent by direction of the Presiding Officer on 2 December 2005, states in pertinent part in paragraph 2:

"The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient."

Please advise as to (1) when we can expect to receive from the Presiding Officer "the answers to a questionnaire used in other cases" referenced above; (2) whether the 1-page biographical summary sent with today's message constitutes all of the "materials" referenced above; and (3) whether today's message is intended to rescind in whole or in part that portion of PO1 quoted above.

2. Paragraph 4 of today's message states:

"In summary... [a]n initial session of the Commission ...will be held at 1000, 11 Jan 2006".

However, another message sent by direction of the Presiding Officer on 2 December 2005, with the subject line "More Information: Commission Sessions week of 9 Jan 06," states in pertinent part:

"Colonels Brownback and Chester advise that the first session during the trial term at Guantanamo Bay, Cuba for the week of 9 Jan 2006 will begin at 1000 hours, 10 Jan 06. Counsel, Commission and defense translators (if required), court reporters, paralegals, and all other parties for BOTH cases should be prepared to proceed at the aforementioned time and date."

Please advise whether today's message, indicating that the hearing date is 11 January 2006, is correct, or if the message of 2 December 2005, referenced above and indicating the hearing date as 10 January 2006, is still operative.

3. Please note that Captain Merriam's name is misspelled in the body of today's message.

4. Please note that my last name is misspelled in the body of today's message.

5. Civilian and Military defense counsel request a 10-day extension for the filing of a questionnaire for the Presiding Officer in order to assist with voir dire. Captain Merriam and I will be traveling to Guantanamo from 12 December through 15 December 2005. Because Captain Merriam is on the West Coast, his travel will start earlier than that. Our time at Guantanamo will be spent meeting with Mr. Khadr. As I have noted in previous correspondence, Captain Merriam has not yet met with Mr. Khadr, and I have not yet had the opportunity to discuss with him the charges against him or the military commission process. In light of this previously scheduled case-related travel, we believe a 10-day extension on the 15 December 2005 deadline to be reasonable and warranted.

Thank you,

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 09, 2005 11:26 AM
To: [redacted]
Subject: US v Khadr - Docketing of Jan session; Direction to respond

1. The Presiding Officer has received replies to PO 1 from the prosecution that they will be present at the session to be held in GTMO the week of 9 Jan 2006.

2. Captain Miriam and Professor Ahmed have replied to PO 1 that they will be present though they have reservations about what Mr. Khadr's choice of counsel might be, the entering of pleas, the making of motions, and whether voir dire of the Presiding Officer might be conducted at that time. In regard to those concerns:

a. Mr. Khadr's choice of counsel comes from him, and the only proper way to do that is in a session of the Commission where his rights to counsel are explained to him by the Presiding Officer and Mr. Khadr can make an election. Possible confusion over choice of counsel alone is an important reason to hold the January session.

b. If the defense requests to reserve on pleas, the Presiding Officer will grant the request.
c. If the either party requests to reserve on motions, the Presiding Officer will grant the request.
d. The Presiding Officer will decide at the appropriate time whether voir dire of the Presiding Officer shall be conducted at the January session, at a later session, or both. However, all counsel will be prepared to conduct voir dire at the January session.

3. Professor Wilson's response to PO 1 stated only that he will not attend the session.
a. PO 1 stated that a session would be held at a certain time and called for reasons why it should not be held then. Accordingly, Professor Wilson was not responsive to PO 1 and the Presiding Officer again directs Professor Wilson to "Advise soonest .... of any reasons - personal or professional - that would preclude [his} attending and participating in this session." The Presiding Officer extends the time to respond until 1200 December 10, 2005.

b. It is noted that in accordance with paragraph II B, Annex B of MCI # 5 of the attached agreement, Professor Wilson has made certain assurances concerning the priorities of his commitment to this Commission case.

4. In summary, the Presiding Officer directs that:
a. An initial session of the Commission, without any members except the Presiding Officer, will be held at 1000, 11 Jan 2006, at Guantanamo Bay, Cuba. All detailed counsel (military and defense) shall attend this session unless excused by the Presiding Officer. At this point, no counsel have been excused or requested to be excused.

b. At the aforementioned session, the Commission will be convened, rights to counsel explained, counsel choices made, and the accused will be asked to enter pleas and motions. (*See* paragraphs 2b and c above with respect to motions and pleas.) The parties will also be prepared to conduct voir dire of the Presiding Officer.

c. Not later than 1200 December 10, 2005, Professor Wilson will respond with those reasons - personal or professional - that would preclude his attending and participating in this session. If, as believed, Professor Wilson is or will be representing the accused in this case, he will attend the session unless the Presiding Officer excuses him. Whether Professor Wilson will be excused depends in part upon his statement, if any, of reasons why he cannot attend the session.

5. Attached is a biographical summary prepared by the Presiding Officer to assist counsel in voir dire. Counsel who wish to submit a questionnaire for the Presiding Officer are welcome to do so not later than 1200, 15 Dec 05.

6. All the Presiding Officer Memoranda currently in effect, and as later modified or supplemented, are in effect as Rules of Court for this Commission.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]
<<COL Chester Biographical Summary - Voir Dire.doc>>

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	PO 3 Presiding Officer's Answers to Voir Dire Questionnaire Submitted to the Presiding Officer December 30, 2005

The below document was submitted to the Presiding Officer by the detailed defense counsel. The Presiding Officer has inserted his reply in ALL CAPTIAL LETTERS. This document will be added to the filings inventory as PO 3.

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	Voir Dire Questionnaire Submitted to the Presiding Officer 27 December 2005

1. In response to the email dated 9 December 2005 by Mr. Keith Hodges, Assistant to the Presiding Officer, the Defense in the above-styled case respectfully submits the following questions to the Presiding Officer. The purpose of this questionnaire is to increase the efficiency and effectiveness of oral voir dire of the Presiding Officer by counsel.

2. The questions that follow are broken into several sub-acts based on general subject matter. In all cases, the more detailed the response, the better counsel will be able to determine what issues should be explored during oral voir dire. The defense appreciates the opportunity to submit these questions to the Presiding Officer.

A. Knowledge of Accused, Counsel, or Facts of the Case

1) Do you know the accused in the case currently before the Commission over which you preside? NO.

2) Do you know any person named in any of the charges referred against the accused in this case? This includes any alleged victim, co-accused, alleged co-conspirator, or any other person named in the charge sheet. NO.

3) Do you know any person named as a potential witness in any documents currently before the Commission over which you preside? I AM UNAWARE OF THE NAMES OF ANY WITNESSES.

4) Do you personally know the detailed military defense counsel, the civilian defense counsel, any civilian counsel who has represented the accused in other judicial proceedings, or any of the prosecuting attorneys detailed to this case? I MAY KNOW ONE OF THE PROSECUTING ATTORNEYS. NOT SURE. I RAN INTO A MARINE MAJOR, DON'T RECALL HIS NAME, WHEN I WAS VISITING THE OMC DURING THE WEEK OF 12 DECEMBER 2005. Do you personally know either the Chief Prosecutor or the Chief Defense Counsel? I MAY KNOW THE CHIEF DEFENSE COUNSEL. NOT SURE. HE IS A MARINE AND IT IS A SMALL COMMUNITY. For any "yes" answer, please detail the nature and extent of your relationship.

5) Have you had, made, received, or participated in any *ex parte* dealings or communications with government counsel about law, facts, parties, representation, or procedure in this case? NO. I MET THE DEPUTY CHIEF PROSECUTING ATTORNEY DURING MY VISIT TO OMC DURING THE WEEK OF 12 DECEMBER 2005. WE DID NOT DISCUSS THE FACTS OR LAW INVOLVED IN THIS CASE. DISCUSSION WAS BY WAY OF INTRODUCTION. HE WAS A MILITARY JUDGE PRIOR TO HIS RETIREMENT AND WE WOULD HAVE SEEN EACH OTHER AT THE ISMJ CONFERENCE HELD ANNUALLY IN ALABAMA. Have you had any *ex parte* dealings or communication with either civilian or military defense counsel about law, facts, parties, representation, or procedure in this case? NO. I LISTENED TO A SPEAKER PHONE CONVERSATION BETWEEN MR. HODGES AND THE CHIEF DEFENSE COUNSEL (WHO WAS IN CUBA) CONCERNING THE NEED FOR ALL COUNSEL REPRESENTING THE ACCUSED TO BE PRESENT AT ALL PROCEEDINGS. I DON'T RECALL THAT THE CIVILIAN OR MILITARY COUNSEL TALKED ON THE PHONE. THIS OCCURRED DURING MY DECEMBER VISIT TO OMC. This includes communication with the Chief Prosecutor, Deputy Chief Prosecutor, or the Chief Defense Counsel. If so, please

detail the substance and general nature, the approximate time, date, and location of those dealings or communications.

6) Do you have any prior knowledge of the facts of this case, or of the alleged acts of the accused in this case? NO. If so, please detail the nature and extent of that knowledge.

7) Has any prior knowledge of the facts of this case, to include general knowledge about the 9-11 attacks and the "war on terrorism" prejudiced you or in any way made it difficult for you to fairly and impartially rule on matters of law or fact in this case? NO.

B. Direct or Indirect Impact of Terrorism and Combat Operations on the Presiding Officer, Friends or Family of the Presiding Officer, or Professional Colleagues of the Presiding Officer

1) Have you had any experiences, either personal or military, that would impact your ability to remain impartial and to fairly decide the issues presented in this case? NO.

2) Do you personally know any person who has been killed or injured as a result of a terrorist attack of any kind? YES. I KNOW SOME MARINES AND CIVILIAN EMPLOYEES THAT WERE INJURED IN THE PENTAGON. THEY WORKED IN THE COUNSEL TO THE COMMANDANT'S OFFICE AND STAFF JUDGE ADVOCATE TO CMC. I DO NOT RECALL THE NAMES OTHER THAN MR. PETER MURPHY. NONE OF THEM WERE SERIOUSLY INJURED. I AM NOT SURE MR. MURPHY WAS INJURED. This includes, but is not limited to, the bombing of the USMC barracks in Beirut, Lebanon I KNOW A COUPLE OF MARINES PRESENT AT BEIRUT. DON'T RECALL THEIR NAMES, BUT THEY HAVE SINCE RETIRED FROM THE MARINE CORPS. ; the bombing of the Khobar Towers in Saudi Arabia NONE. ; the bombing of the USS COLE NONE. ; the attacks on 11 SEP 2001 against the World Trade Center or the Pentagon; or any other attack fairly characterized as an act of "terrorism" or conducted by a party who was not part of the regular armed forces of a nation-state. I KNOW TWO MARINE JAS INJURED IN IRAQ DURING OIF II. ONLY KNOW THEM IN PASSING AND DON'T RECALL THEIR NAMES.

3) Do you personally know any person who has been killed or injured as a result of combat in Afghanistan, Iraq, Somalia, Kosovo, or in any other theater of operations since 1990? YES. IRAQ AND SOMALIA. This includes, but is not limited to, the conflicts in the Persian Gulf, Somalia, Kosovo, Afghanistan, Iraq, the Horn of Africa, or in any other theater of operations in which US or allied forces participated in hostilities.

4) Have you personally participated in combat operations or hostilities of any kind during the course of your military career? NOT SURE WHAT YOU ARE ASKING. YOU WILL NEED TO CLARIFY. If so, please describe which conflict you were involved in and summarize that participation. Please include "indirect participation," such as conducting rehearsals, planning sessions, or writing operations orders or other documents in support of a combat operation, even if you did not personally deploy in support of that operation. I WROTE PART OF 2D MARINE DIVISION OPORDER FOR OPERATION DESERT STORM. I ALSO WROTE SEVERAL ORDERS AND INSTRUCTIONS FOR THE DEPLOYMENT AND DEPLOYED TO SAUDI ARABIA FOR APPROXIMATELY 6 MONTHS. I PARTICIPATED IN THE INITIAL PLANNING FOR OIF AS THE I MEF SJA. I LEFT THE STAFF PRIOR TO THE FINAL PLANNING. I DEPLOYED IN SUPPORT OF OIF II AND SPENT 2-3 MONTHS IN IRAQ. I SPENT TIME IN SEVERAL IRAQI CITIES TRYING COURTS-MARTIAL.

5) At any time during which you served as the primary legal advisor to a combat commander at any echelon, did that combat command or unit, or any part thereof, deploy to combat operations at home or abroad? YES. 2D MAR DIV.

6) Do you know any person who is deployed, or has deployed, to combat in Iraq or Afghanistan? Does this knowledge or relationship prejudice you in any way that might affect your ability to fairly and impartially try matters of fact or law in this case? I KNOW MANY PEOPLE DEPLOYED TO IRAQ, AND IT DOES NOT.

C. <u>Subject-Matter Expertise and Professional Background</u>

1) Do you have any specialized training or education in the field of international law? I HAD A WEEK LONG COURSE IN THE LAW OF ARMED CONFLICT FOLLOWING THE BASIC COURSE AT NJS IN 1982. I HAVE ATTENDED SEVERAL CONFERENCES ADDRESSING LEGAL ASPECTS OF MILITARY OPERATIONS ON THE INTERNATIONAL LEVEL. THESE WERE PRIMARILY SPONSORED BY PACOM. This includes any military or civilian coursework, in law school or in any service school. Please describe this training or education, including, to the extent possible the dates, any significant casebooks or textual references used, and the professor or instructor who taught the class or provided the training.

2) Have you ever provided legal advice on matters of international law, the law of war, military tribunals or commissions, international tribunals convened to try war crimes, crimes against humanity, crimes against

peace, or genocide? YES. To whom and in what capacity? VARIOUS COMMANDERS AND THEIR STAFF TO INCLUDE CG, 2D MAR DIV, II MEF, III MEF, I MEF AND SEVERAL OFFICERS IN THE ROYAL THAI MILITARY. ADVICE PERTAINED TO LAW OF WAR AND SOME INTERNATIONAL LAW AS IT PERTAINED TO US MILITARY AND HOST NATIONS RELATIONSHIPS.

3) Have you ever tried a case, as either a military judge, a trial counsel, or a defense counsel, in which issues of international law or the law of war were decided? YES. I TRIED TWO CASES IN PARTICULAR AS THE MJ WHICH ADDRESSED THE APPLICABILITY OF GENEVA CONVENTIONS TO THE US MILITARY. THE ACCUSED WERE CHARGED WITH ABUSING IRAQI DETAINEES.

4) Do you have any specialized training or education in juvenile law or juvenile justice systems? NO.

5) Have you ever tried a case, as either a military judge, a trial counsel, or a defense counsel, or in a civilian capacity of any kind, in which the accused was a legal minor? NOT THAT I RECALL.

6) Have you received any specialized training of any kind on Al Queda, international terrorism, the "war on terrorism," Operation Enduring Freedom, Operation Iraqi Freedom, the Taliban, Islamic fundamentalism, or detainee operations? WHILE ON THE I MEF STAFF, I RECEIVED REGULAR INTELLIGENCE BRIEFINGS ON THE WAR ON TERROR.

7) Have you ever written an article or spoken in public regarding Al Queda, international terrorism, the Global War on Terror, Operation Enduring Freedom, Operation Iraqi Freedom, the Taliban, Islamic fundamentalism, or detainee operations? NO.

8) Have you ever given a formal opinion regarding the status of any combatant under international law in any conflict? NO. Have you ever served on or advised an "Article 5 Tribunal" or "Combatant Status Review Board?" NO.

D. <u>Relationship with Other Personnel Involved in the Military Commissions</u>

1) Do you know, in either a personal or professional capacity, the Appointing Authority for the Military Commissions? YES. I MET HIM DURING MY 12 DECEMBER VISIT TO OMC. Please describe the nature and extent of any relationship with John D. Altenburg, Jr. that

existed prior to your selection as a candidate for, or your appointment as, a Presiding Officer. WE MET AND INTRODUCED OURSELVES.

2) Have you ever discussed the facts of this case or any other Military Commissions case with the Appointing Authority in any way? NO.

3) Have you ever discussed with the Appointing Authority any ruling or decision made in this case or any other Military Commissions case? NO.

4) Do you know, in either a personal or professional capacity, the General Counsel for the Department of Defense? NO. Please describe the nature and extent of any relationship with the General Counsel that existed prior to your selection as a candidate for, or your appointment as, a Presiding Officer.

5) Have you ever discussed the facts of this case or any other Military Commissions case with the General Counsel in any way? NO.

6) Do you know, in either a personal or professional capacity, the Assistant to the Presiding Officer, Mr. Keith Hodges? YES. Please describe the nature and extent of any relationship with Mr. Keith Hodges that existed prior to your selection as a candidate for, or your appointment as, a Presiding Officer. I NEVER MET HIM PRIOR TO MY SELECTION. I MAY HAVE MET HIM OR SAW HIM AT THE ISMJ CONFERENCE.

7). What duties does Mr. Keith Hodges perform for you in this case? SEE POM 2-2. What duties does he perform for any other member of the Commissions process, including the Appointing Authority? SEE POM 2-2. Are you aware of any communications between Mr. Hodges and the Appointing Authority? NONE OTHER THAN PLEASANTRIES.

8) Do you know, in either a personal or professional capacity, any other officer who has been appointed to serve as a Presiding Officer in a Military Commissions case? YES. Please describe the nature and extent of any relationship with Col. (Ret.) Brownback that existed prior to your selection as a candidate for, or your appointment as, a Presiding Officer. I HAD HEARD OF HIM, BUT DON'T BELIEVE WE HAD EVER MET UNTIL I SAW HIM IN WASHINGTON IN DECEMBER 2005.

9) Have you ever discussed the facts of this case or any other Military Commissions case with any other Presiding Officer or candidate for a position as a Presiding Officer? ANY SUCH CONVERSATIONS ARE PRIVILEGED.

10) Do you know, in either a personal or professional capacity, any other officer who has been appointed to serve as a Member, other than a Presiding Officer, in a Military Commissions case? NOT THAT I KNOW OF. Please describe the nature and extent of any relationship with any Member of either this case or another Military Commissions case that existed prior to your selection as a candidate for, or your appointment as, a Presiding Officer.

11) Have you ever discussed the facts of this case or any other Military Commissions case with any Member of any Military Commission? NO. Have you ever had any communications of any kind with any Member of any Military Commission? YES. I DIRECTED PRELIMINARY INSTRUCTIONS SENT TO THEM. THESE WERE PROVIDED TO ALL COUNSEL. Did you have any role in selecting the members of the Military Commission? NO.

12) How did you come to be selected as a Presiding Officer over a Military Commission? I DON'T KNOW. Did you volunteer for this duty? YES. If so, why? IT IS IMPORTANT. If not, do you know why you were selected and by whom?

13) Do you consider past decisions by the Appointing Authority on this case or other Military Commissions cases to be binding on you? YOU NEED TO CLARIFY THIS QUESTION. Is it possible for you to rule in a way contrary to the way the Appointing Authority has ruled, decided, or acted in this case? YOU NEED TO CLARIFY YOUR QUESTION.

E. Military Commissions Law and Procedure, Legal Presumption of Innocence

1) Have you pre-judged the guilt or innocence of the accused, in any way, on any element of any offense with which he is charged? NO. Do you accept that the accused is presumed innocent until proven guilty, and that the government bears the burden of proof beyond a reasonable doubt? YES.

2) Can you keep an open mind and remain impartial on all matters of law, fact, or procedure in this case? YES.

3) Do you accept that, in order for the accused to be found guilty of any charge, the government must prove each and every element of the charged offense beyond a reasonable doubt? YES.

4) Do you consider rulings or decisions made in other military commissions cases, either those already under way or those that will be conducted during the same timeframe as this one, to be binding or to hold

precedential value in the case currently before you? In other words, if another Presiding Officer were to rule on a discrete issue and that same issue arose in the case at bar, do you consider the prior ruling to have any effect on how you should rule? I MIGHT CONSIDER IT, BUT DON'T CONSIDER MYSELF IN ANYWAY BOUND BY A RULING BY A PRESIDING OFFICER IN ANY OTHER CASE.

5) Do you have an opinion regarding the legality of Military Commissions generally? Do you have an opinion regarding the legality of the Military Commissions as currently constituted? What are those opinions, if any? ANY QUESTIONS OF LAW SHOULD BE MADE THE SUBJECT OF A MOTION PER POM 4-3.

6). To whom, and in what manner, do you believe challenges to the legality or the structure of the Military Commissions, to the Military Commission Orders, to the Military Commission Instructions, and to the Appointing Authority Regulations should be made, respectively? ANY LEGAL CHALLENGES SHOULD BE MADE THE SUBJECT OF A MOTION PER POM 4-3. Do you consider those matters to be within the purview of the Presiding Officer and Members of the Commission itself to rule upon? I WOULD HAVE TO SEE THE MOTION.

F. Personal

1) What religious denomination are you? METHODIST. Do you hold religious beliefs that cause, engender, or require as a matter of doctrine or theology, hostility towards or distrust of Islam? NO.

2) Are you a member of, or affiliated with, any political party? NO.

3) Are you aware of any matter, whether or not addressed by the questions posed in this questionnaire, which may cause a reasonable person to believe that you cannot act in a fair and impartial manner in these proceedings? NO.

//original signed//
JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: [redacted]
To: [redacted]
Cc:

Subject: RE: Charge Sheet in Arabic

All counsel.

Though the email sent by Professor Ahmad at the beginning of this thread (Monday, January 02, 2006 08:16) addresses me, it was not sent to me.

It is important that all parties know that the Presiding Officers have adopted the Presiding Officer Memoranda (POMs) as the Rules of Court. One of the hallmarks of the POMs is that a request for relief from the Presiding Officer must be in the form of a motion or other request for relief unless the Presiding Officer gives leave otherwise. (See POM 4-3.) Tied into POM 4-3 is POM 12-1 concerning the filings inventory. That inventory reflects all actions pending before the Presiding Officer.

I make this observation so the parties know that the issue raised by Professor Ahmad is not before the Presiding Officer at present. While the solution to Professor Ahmad's concerns seems easy enough, the Presiding Officer is obligated to act only when POM 4-3 has been complied with or he has given his consent to use another mechanism. Failure to raise a matter in a timely and proper fashion could also result in a waiver. On the other hand, should the accused need a copy of the charges in Arabic - and it seems he would be the one best to know - failure to provide the charges in written form could cause avoidable complications next week.

The parties may also wish to consider the need for a Commission and/or defense translator as those terms are used in POM 11.

Keith Hodges

Assistant to the Presiding Officers

(by web mail)

From: Muneer Ahmad[redacted]
Sent: Mon 1/2/2006 12:32 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Charge Sheet in Arabic

Major[redacted]

Thank you for your reply. I respectfully disagree with your assertion that "The accused has read and spoken English the entire time he has been in U.S. custody." I believe that you are equating speaking ability and literacy.
It is my understanding that Mr. Khadr's interrogations have been conducted in English. However, his ability to comprehend written English is limited, and his reading ability is far greater in Arabic. In light of this, I believe it is "appropriate," as that term is used in MCO No. 1 Para. 5(a), to provide the Charge Sheet to Mr. Khadr in Arabic, and on his behalf, I renew that request.

Thank you.

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]

-----Original Message-----
From: [redacted] Jeff, Maj, DoD OGC [redacted]
Sent: Monday, January 02, 2006 12:01 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Charge Sheet in Arabic

Mr. Ahmad/Captain Merriam,

The Prosecution does not intend to provide the accused with a copy of the charges or any other documents in Arabic, unless the document was originally written in Arabic. Military Commission Order No. 1 would only require the Prosecution to provide documents in Arabic if the accused does not understand English. Paragraph 5(a) provides "[t]he Prosecution shall furnish to the accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and

appropriate, in another language that the Accused understands." Paragraph 5(j) provides "[t]he Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary."

The accused has read and spoken English the entire time he has been in U.S. custody. He has been interrogated dozens of times, all in English, and all without the need of an interpreter. In addition, the accused has been provided books and magazines in English which he read and later discussed with his interrogators. Up until now, the accused has not given any indication that he does not speak and understand English. On the contrary, during his most recent interview with a CITF agent on 16 Sept 2005, again conducted entirely in English, the accused advised that he spoke English and also that he was often used as a translator for the guards to communicate with other detainees.

Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

—Original Message—
From: Muneer Ahmad [redacted]
Sent: Monday, January 02, 2006 08:16
To: [redacted]
Cc: [redacted]
Subject: Charge Sheet in Arabic

Major [redacted] and Mr. Hodges:

I don't know who is the right person to address this issue, but I assume it is one of you: on behalf of our client Omar Khadr, I request that a copy of the Charge Sheet, and any other documents provided to accused detainees, be given to Mr. Khadr in Arabic, with a copy to his counsel as well. I ask that this be done as soon as possible. In addition, I request that any future documents to which Mr. Khadr is entitled to a copy be provided to him and his counsel in both Arabic and English.

Please let me know if there is someone else to whom this request should be addressed. Thank you.

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]

[redacted]

Hodges, Keith

From: Hodges, Keith
Sent: Tuesday, January 03, 2006 1:26 PM
To: [redacted]

Subject: Attire and Grooming for Accused at Sessions of the Commission

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

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

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

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

RE 31 (Khadr)
Page 1 of 1

1/3/2006

ProOrd 3 A – Khadr – FOUO and other markings

NOTE BY APO: The Defense Counsel replied to three filings in a single email as below. Though a multi-subject/filing email is contrary to the POMs, he was not required to refile.

The APO has taken the defense's email and created three different filings for the three protective orders addressed in the email (ProOrd 2, ProOrd 3, and ProOrd 4.) Each of these filings reflects only that information pertaining to the specific filing to assist the readers what is pertinent to the filing.

For the convenience of the parties, this filing includes the government's submission and the defense revision.

Keith Hodges, APO

NOTE BY APO: The Defense Counsel replied to three filings in a single email as below. Though a multi-subject/filing email is contrary to the POMs, he was not required to refile.

The APO has taken the defense's email and created three different filings for the three protective orders addressed in the email (ProOrd 2, ProOrd 3, and ProOrd 4.) Each of these filings reflects only that information pertaining to the specific filing to assist the readers what is pertinent to the filing.

Keith Hodges, APO

From: Merriam, John J CPT (PKI)[redacted]
Sent: Wednesday, January 04, 2006 2:50 PM
To: Hodges, Keith;[redacted]ChesterRS[redacted]
Cc:[redacted]
DoD OGC; Davis, Morris, COL, DoD OGC; Swann, Robert,[redacted]
Sullivan, Dwight, COL, DoD OGC
Subject: Defense Objections to Protective Orders

Attachments: Protective Order # 1 Khadr (Defense Revisions).doc; Protective Order # 2 Khadr (Defense Revisions).doc

Mr. Hodges:
Please find attached modified versions of Protective Order #1 and Protective Order #2. They have been re-named "Defense Revisions" in lieu of "Prosecution First Draft" for clarity's sake.

The defense respectfully makes the following objections to the prosecution's proposed Protective Orders, and, where applicable, has made the following revisions to the versions attached to this email:

Protective Order #1

1. The defense objects to the current language, which (if literally read) apparently would prevent us from consulting the accused in his own defense. The defense has added a proposed paragraph 3.d. that explicitly allows us to show photographs of investigators and interrogators to the accused. This is essential in order to achieve the assistance of the accused in his defense. The Prosecutor, Major Groharing, has indicated that he did not oppose this, though he has not specifically consented to the proposed language shown here.
2. In the same paragraph, the defense also adds language allowing us to use nicknames, false names, or even real names if those names have already been made known to, or used in the presence of, the accused. For example, if Mr. Khadr is routinely interrogated by a woman who calls herself "Michelle," then there should be no prohibition on us calling her Michelle - whether that is her actual name or not.

Finally, the defense wishes to state its objection to resolving any outstanding issues regarding these protective orders in an 8-5 session. MCI 8, Section 5 does contemplate that the Presiding Officer may need to hold "in camera meetings to facilitate efficient trial proceedings." However, the contemplated issuance of a court order is hardly the "facilitation" of efficient trial proceedings. The defense believes that this is something properly discussed only on the record. MCO No. 1, at Section 6.B(3), allows for the closure of proceedings when necessary to protect information, but that does not seem to extend to holding closed, in camera hearings about whether or not to protect information.

The defense position is well-supported by case law in the military justice system, which cautions against use of RCM 802 conferences for matters properly addressed on the record (8-5 conferences in the commissions process are substantially similar to RCM 802 sessions). See, e.g., *United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990); *United States v. Garcia*, 24 M.J. 518, 519 (A.F.C.M.R. 1987). The defense believes that any discussion of protective orders should occur on the record. The defense will submit a written motion on this matter.

Respectfully submitted,
<<Protective Order # 1 Khadr (Defense Revisions).doc>> <<Protective Order # 2 Khadr (Defense Revisions).doc>>

John J. Merriam
CPT, JA
Trial Defense Attorney

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Protective Order # __** Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings **ProOrd 3 - Prosecution** **December 2005**

1. The following Order is issued to provide general guidance regarding the described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who have been properly approved to assist in the Military Commission proceedings against the accused.

3. This Protective Order shall remain in effect throughout the proceedings, to include review and final action, against the accused unless specifically modified or cancelled.

4. UNCLASSIFIED SENSITIVE MATERIALS:

   a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

   b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

5. CLASSIFIED MATERIALS:

   a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and

other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," Page 1 of 2 "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any posttrial U.S. federal litigation that may occur.

6. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that members of the Defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team shall submit any book, article, speech, or other publication derived from, or based upon experience or information gained in the course of representation of the accused to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

7. REQUEST FOR EXCEPTIONS:

a. Either party may file a motion, under seal, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

8. BREACH:

a. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

UNITED STATES OF AMERICA	**Protective Order # __**
v.	Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings
OMAR AHMED KHADR	**ProOrd 3 A – Defense Submission**
	December 2005

1. The following Order is issued to provide general guidance regarding the described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who have been properly approved to assist in the Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

3. This Protective Order shall remain in effect throughout the proceedings, to include review and final action, against the accused unless specifically modified or cancelled.

4. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

5. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," Page 1 of 2 "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any posttrial U.S. federal litigation that may occur.

6. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

7. REQUEST FOR EXCEPTIONS:

b. Either party may file a motion, under seal, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

8. BREACH:

a. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, January 04, 2006 4:54 PM
To: [redacted]
Cc: [redacted]
Subject: PO Reply: Defense Objections to Protective Orders - US Khadr

1. Thank you for your reply.

2. The Presiding Officer will take these submissions under advisement and schedule an 8-5 conference with all counsel at GTMO next week to discuss the matter and focus the issues. Argument, presentation of evidence if any, and a ruling will be made on the record consistent with Commission Law.

3. Per POM 9-1, counsel are directed to continue to attempt to reach consensus on the wording of protective orders.

4. Please be attentive to the POM requirement for single subject emails. Strict compliance with the POMs would have you send three emails: one for each Order. This procedure facilitates filing, organizing, and replying. You do not have to resend this email however, and it will be placed on the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: Merriam, John J CPT (PKI) [redacted]
Sent: Wednesday, January 04, 2006 2:58 PM
To: Hodges, Keith; [redacted]
Cc: [redacted]
Subject: Defense Objections to Protective Orders

Mr. Hodges:
Please find attached modified versions of Protective Order #1 and Protective Order #2. They have been re-named "Defense Revisions" in lieu of "Prosecution First Draft" for clarity's sake.

The defense respectfully makes the following objections to the prosecution's proposed Protective Orders, and, where applicable, has made the following revisions to the versions attached to this email:

RE 33 (Khadr)
Page 1 of 5

Protective Order #1

1. The defense objects to the current language, which (if literally read) apparently would prevent us from consulting the accused in his own defense. The defense has added a proposed paragraph 3.d. that explicitly allows us to show photographs of investigators and interrogators to the accused. This is essential in order to achieve the assistance of the accused in his defense. The Prosecutor, Major [redacted] has indicated that he did not oppose this, though he has not specifically consented to the proposed language shown here.
2. In the same paragraph, the defense also adds language allowing us to use nicknames, false names, or even real names if those names have already been made known to, or used in the presence of, the accused. For example, if Mr. Khadr is routinely interrogated by a woman who calls herself "Michelle," then there should be no prohibition on us calling her Michelle - whether that is her actual name or not.

Protective Order #2

1. Paragraph 2 has been modified to add a definition of the term "Prosecution." This is essential for the other modifications.
2. Paragraph 6 has been modified to add the Prosecution to the group of people restricted from divulging information relating to military commissions proceedings. The defense objects to the fact that this order forbids only defense counsel from divulging information. There does not appear to be any good reason to not also include the Prosecution.
3. The word "experiences" has been deleted from Paragraph 6. This is overbroad and vague.
4. The phrase "in the course of representation of the accused" has been added to; it now reads "in the course of representation of the accused in military commission proceedings." The defense objects to the prosecution's proposed language, which would cover representation in other forums (such as habeas litigation in federal court) that are not properly the concern of this commission. The defense notes that habeas litigation is already covered by separate protective orders, and so there is no need for the redundancy of an additional order from this commission.

Protective Order #3

1. The defense objects to this entire order as overbroad and not ripe. The order, as written, will apparently prohibit the defense from informing Mr. Khadr of any witness, either for or against him. This would have a detrimental impact on our ability to prepare a full and vigorous defense.
2. Moreover, the order as written fails to account for the fact that many witnesses who may testify in commission proceedings have already made themselves available to the media or are properly within the public domain. For example, Lane Morris has appeared on both Canadian and American television and radio interviews; it is not unreasonable to expect that he would be called by the government to testify. SFC Speer's family has filed a lawsuit against the Khadr family; it is not unreasonable to expect that family members may be called by the government to testify.
3. Finally, this order does not take into account the testimony of expert witnesses called by either party, who may include eminent and widely-known lawyers or other professionals. For example, if the world's leading scholar on war crimes agreed to testify on behalf of the defense, suppression of his name would deprive the public of an understanding of just how powerful that testimony was. Given what has already occurred in other commissions cases, it is not at all unreasonable to expect expert witnesses to testify in commission proceedings.
4. The defense respectfully suggests that the need for this order has not been demonstrated, and is not ripe. A better solution, and one that is more in keeping with the Secretary of Defense's guidance (in MCO No. 1) to close proceedings only when required to actually protect information, physical safety, etc., would be to have the government move to protect names of witnesses on a case-by-case basis. Both the accused and the public have the right to proceedings that are as open and transparent as the national security will allow.

Finally, the defense wishes to state its objection to resolving any outstanding issues regarding these protective

orders in an 8-5 session. MCI 8, Section 5 does contemplate that the Presiding Officer may need to hold "in camera meetings to facilitate efficient trial proceedings." However, the contemplated issuance of a court order is hardly the "facilitation" of efficient trial proceedings. The defense believes that this is something properly discussed only on the record. MCO No. 1, at Section 6.B(3), allows for the closure of proceedings when necessary to protect information, but that does not seem to extend to holding closed, in camera hearings about whether or not to protect information.

The defense position is well-supported by case law in the military justice system, which cautions against use of RCM 802 conferences for matters properly addressed on the record (8-5 conferences in the commissions process are substantially similar to RCM 802 sessions). See, e.g., *United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990); *United States v. Garcia*, 24 M.J. 518, 519 (A.F.C.M.R. 1987). The defense believes that any discussion of protective orders should occur on the record. The defense will submit a written motion on this matter.

Respectfully submitted,
<<Protective Order # 1 Khadr (Defense Revisions).doc>> <<Protective Order # 2 Khadr (Defense Revisions).doc>>

John J. Merriam
CPT, JA
Trial Defense Attorney

[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Protective Order #1** **Protection of Identities of** **Investigators and Interrogators** **December 2005**

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

   d. Nothing in this order prevents the defense from showing the accused photographs of investigators and interrogators, discussing the statements of particular investigators and interrogators using photographs to identify them, or from referring to an investigator or interrogator by any name that the investigator or interrogator has used in the presence of the accused or any other detainee, or that the accused has already learned through any other means.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester

[redacted]

Colonel, U.S. Marine Corps
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, January 04, 2006 4:54 PM
To: [redacted]
Cc: [redacted]
Subject: PO Reply: Defense Objections to Protective Orders - US Khadr

1. Thank you for your reply.

2. The Presiding Officer will take these submissions under advisement and schedule an 8-5 conference with all counsel at GTMO next week to discuss the matter and focus the issues. Argument, presentation of evidence if any, and a ruling will be made on the record consistent with Commission Law.

3. Per POM 9-1, counsel are directed to continue to attempt to reach consensus on the wording of protective orders.

4. Please be attentive to the POM requirement for single subject emails. Strict compliance with the POMs would have you send three emails: one for each Order. This procedure facilitates filing, organizing, and replying. You do not have to resend this email however, and it will be placed on the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: Merriam, John J CPT (PKI) [redacted]
Sent: Wednesday, January 04, 2006 2:50 PM
To: [redacted]
Cc: [redacted]
Subject: Defense Objections to Protective Orders

Mr. Hodges:
Please find attached modified versions of Protective Order #1 and Protective Order #2. They have been re-named "Defense Revisions" in lieu of "Prosecution First Draft" for clarity's sake.

The defense respectfully makes the following objections to the prosecution's proposed Protective Orders, and, where applicable, has made the following revisions to the versions attached to this email:

RE 34 (Khadr)
Page 1 of 3

Protective Order #1

1. The defense objects to the current language, which (if literally read) apparently would prevent us from consulting the accused in his own defense. The defense has added a proposed paragraph 3.d. that explicitly allows us to show photographs of investigators and interrogators to the accused. This is essential in order to achieve the assistance of the accused in his defense. The Prosecutor, Major [redacted] has indicated that he did not oppose this, though he has not specifically consented to the proposed language shown here.
2. In the same paragraph, the defense also adds language allowing us to use nicknames, false names, or even real names if those names have already been made known to, or used in the presence of, the accused. For example, if Mr. Khadr is routinely interrogated by a woman who calls herself "Michelle," then there should be no prohibition on us calling her Michelle - whether that is her actual name or not.

Protective Order #2

1. Paragraph 2 has been modified to add a definition of the term "Prosecution." This is essential for the other modifications.
2. Paragraph 6 has been modified to add the Prosecution to the group of people restricted from divulging information relating to military commissions proceedings. The defense objects to the fact that this order forbids only defense counsel from divulging information. There does not appear to be any good reason to not also include the Prosecution.
3. The word "experiences" has been deleted from Paragraph 6. This is overbroad and vague.
4. The phrase "in the course of representation of the accused" has been added to; it now reads "in the course of representation of the accused in military commission proceedings." The defense objects to the prosecution's proposed language, which would cover representation in other forums (such as habeas litigation in federal court) that are not properly the concern of this commission. The defense notes that habeas litigation is already covered by separate protective orders, and so there is no need for the redundancy of an additional order from this commission.

Protective Order #3

1. The defense objects to this entire order as overbroad and not ripe. The order, as written, will apparently prohibit the defense from informing Mr. Khadr of any witness, either for or against him. This would have a detrimental impact on our ability to prepare a full and vigorous defense.
2. Moreover, the order as written fails to account for the fact that many witnesses who may testify in commission proceedings have already made themselves available to the media or are properly within the public domain. For example, Lane Morris has appeared on both Canadian and American television and radio interviews; it is not unreasonable to expect that he would be called by the government to testify. SFC Speer's family has filed a lawsuit against the Khadr family; it is not unreasonable to expect that family members may be called by the government to testify.
3. Finally, this order does not take into account the testimony of expert witnesses called by either party, who may include eminent and widely-known lawyers or other professionals. For example, if the world's leading scholar on war crimes agreed to testify on behalf of the defense, suppression of his name would deprive the public of an understanding of just how powerful that testimony was. Given what has already occurred in other commissions cases, it is not at all unreasonable to expect expert witnesses to testify in commission proceedings.
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Finally, the defense wishes to state its objection to resolving any outstanding issues regarding these protective

orders in an 8-5 session. MCI 8, Section 5 does contemplate that the Presiding Officer may need to hold "in camera meetings to facilitate efficient trial proceedings." However, the contemplated issuance of a court order is hardly the "facilitation" of efficient trial proceedings. The defense believes that this is something properly discussed only on the record. MCO No. 1, at Section 6.B(3), allows for the closure of proceedings when necessary to protect information, but that does not seem to extend to holding closed, in camera hearings about whether or not to protect information.

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Respectfully submitted,
<<Protective Order # 1 Khadr (Defense Revisions).doc>> <<Protective Order # 2 Khadr (Defense Revisions).doc>>

John J. Merriam
CPT, JA
Trial Defense Attorney

Hodges, Keith

From: Merriam, John J CPT (PKI) [redacted]
Sent: Wednesday, January 04, 2006 2:50 PM
To: Hodges, Keith; [redacted]
Cc: [redacted]
Subject: Defense Objections to Protective Orders
Attachments: Protective Order # 1 Khadr (Defense Revisions).doc; Protective Order # 2 Khadr (Defense Revisions).doc

Mr. Hodges:
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Protective Order #3

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3. Finally, this order does not take into account the testimony of expert witnesses called by either party, who may include eminent and widely-known lawyers or other professionals. For example, if the world's leading scholar on war crimes agreed to testify on behalf of the defense, suppression of his name would deprive the public of an understanding of just how powerful that testimony was. Given what has already occurred in other commissions cases, it is not at all unreasonable to expect expert witnesses to testify in commission proceedings.
4. The defense respectfully suggests that the need for this order has not been demonstrated, and is not ripe. A better solution, and one that is more in keeping with the Secretary of Defense's guidance (in MCO No. 1) to close proceedings only when required to actually protect information, physical safety, etc., would be to have the government move to protect names of witnesses on a case-by-case basis. Both the accused and the public have the right to proceedings that are as open and transparent as the national security will allow.

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The defense position is well-supported by case law in the military justice system, which cautions against use of RCM 802 conferences for matters properly addressed on the record (8-5 conferences in the commissions process are substantially similar to RCM 802 sessions). See, e.g., *United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990); *United States v. Garcia*, 24 M.J. 518, 519 (A.F.C.M.R. 1987). The defense believes that any discussion of protective orders should occur on the record. The defense will submit a written motion on this matter.

Respectfully submitted,
<<Protective Order # 1 Khadr (Defense Revisions).doc>> <<Protective Order # 2 Khadr (Defense Revisions).doc>>

John J. Merriam
CPT, JA
Trial Defense Attorney

UNITED STATES OF AMERICA	Protective Order # __
v.	Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings
OMAR AHMED KHADR	December 2005

1. The following Order is issued to provide general guidance regarding the described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who have been properly approved to assist in the Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

3. This Protective Order shall remain in effect throughout the proceedings, to include review and final action, against the accused unless specifically modified or cancelled.

4. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

5. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," Page 1 of 2 "SECRET," or "TOP SECRET") and the

information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any posttrial U.S. federal litigation that may occur.

6. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

7. REQUEST FOR EXCEPTIONS:

a. Either party may file a motion, under seal, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

8. BREACH:

a. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester
Colonel, U.S. Marine Corps
Presiding Officer

[redacted]

UNITED STATES OF AMERICA	Protective Order #1 Protection of Identities of Investigators and Interrogators
v.	
OMAR AHMED KHADR	December 2005

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

   d. Nothing in this order prevents the defense from showing the accused photographs of investigators and interrogators, discussing the statements of particular investigators and interrogators using photographs to identify them, or from referring to an investigator or interrogator by any name that the investigator or interrogator has used in the presence of the accused or any other detainee, or that the accused has already learned through any other means.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

Robert Chester

[redacted]

Colonel, U.S. Marine Corps
Presiding Officer

UNITED STATES OF AMERICA	DEFENSE
v.	Motion for a Continuance in Military Commissions Proceedings Until Resolution of Accused's Request for Selected Detailed Defense Counsel
OMAR AHMED KHADR	5 January 2006

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr*.

2. **Relief Requested.** The defense requests that a continuance be granted in the Military Commission proceedings currently pending against Omar Ahmed Khadr.[1] The defense requests a continuance until 11 March 2006 for the following purposes:

A. To await action on O.K.'s timely request for Selected Detailed Defense Counsel, which has not been acted upon;

B. If the request is granted, to allow the Selected Detailed Defense Counsel time to prepare;

C. If the request is denied, to appeal that decision; and,

[1] Omar Ahmed Khadr was a juvenile at all times during which he is charged with crimes before this Commission. At the first date mentioned in the Charge Sheet prepared by the government (1989, see para. 7, Charge Sheet), Omar Khadr was two years of age. At the time of his capture and all of his alleged crimes, he was fifteen years of age. In communications from this Commission's Assistant to the Presiding Officer, Omar Khadr has been referred to as "Mr. Khadr." It is probably more appropriate to refer to Omar Khadr as "Master Khadr" (reflecting English usage for a male juvenile), by his first name alone, or by his initials, as is the practice in many jurisdictions. Therefore, throughout this motion, when Omar Ahmed Khadr is referred to in shorthand, he will be referred to as "O.K." or "Omar."

D. If that appeal is denied, to request a different Selected Detailed Defense Counsel.

Consistent with the continuance, the defense also requests modification to timelines identified in other orders of this Commission, including, but not limited to, the Discovery Order issued by the Presiding Officer on 19 December 2005.

3. **Synopsis.** The accused in the above-styled case, Omar Ahmed Khadr, has submitted a request for Selected Detailed Defense Counsel in accordance with MCO. No. 1, § 4.C.(3)(a) and MCI. No. 4.3.E. As of 5 January 2006, that request has not been acted upon by the government. The first session in this case is currently scheduled for 11 January 2006. A continuance is necessary in order for the accused to exercise his right to be represented by the counsel of his choice.

4. **Burden of Proof and Persuasion.** The burden of proof is on the moving party to show, by a preponderance of the evidence, that a continuance is necessary in the interests of justice. However, when the moving party is the accused, "the judge should err on the side of liberalism in taking action on a delay request when good cause for a delay exists." *United States v. Andrews*, 36 M.J. 922, 925-26 (A.F.C.M.R. 1993).

5. **Facts.** The defense submits the following facts with respect to this issue:

A. On 9 November 2005, the Chief Defense Counsel, Office of Military Commissions (Col. Dwight Sullivan), requested the support of the Chief Defense Counsel for the United States Marine Corps in providing an available defense counsel for military commissions cases. That same day, the Chief Defense Counsel for the United States Marine Corps responded in writing and affirmatively declared Lt. Col. Colby Vokey, a Regional Defense Counsel, to be available.

B. On 15 November 2005, Lt. Col. Vokey was detailed to represent Omar before a Military Commission.

C. On 29 November 2005, in a verbal conversation, the Staff Judge Advocate to the Commandant of the Marine Corps informed Col. Sullivan that Lt. Col. Vokey would *not* be made available. Colonel Sullivan then issued another order revoking Lt. Col. Vokey's detail as defense counsel.

D. Later that same day, CPT John J. Merriam was detailed to this case as the detailed defense counsel. CPT Merriam is assigned to the US Army Trial Defense Service, Region V, at Fort Lewis, Washington, and was detailed to represent Omar on a TDY basis.

E. On 14 December 2005, CPT Merriam traveled to Guantanamo Bay, Cuba, to meet with Omar. This was the first opportunity for CPT Merriam to travel to Cuba.

F. On 22 December 2005, Professor Muneer I. Ahmad, a civilian attorney who represents O.K. in his *habeas corpus* litigation in U.S. District Court and as his commissions civilian defense attorney, forwarded a written request from Omar for Selected Detailed Defense Counsel to Col. Sullivan.

G. On 23 December 2005, Col. Sullivan forwarded the request for Selected Detailed Defense Counsel to the Judge Advocate General of the Navy, through the Staff Judge Advocate to the Commandant of the Marine Corps.

H. As of 1200 hours on 5 January 2006, neither Omar, CPT Merriam, nor Professor Ahmad has received any communication from the government to indicate whether this request has been granted, denied, or was still being considered.

6. Argument.

A. O.K. Has the Right to Representation by Counsel of His Own Choosing

The President's Military Order of 13 November 2001 ("PMO") requires that persons who are tried before a military commission be given "a full and fair trial, with the military commission sitting as triers of both fact and law." PMO, at § 4(c)(2). The PMO does not further define "full and fair trial," but a long tradition of jurisprudence in the United States has held that "the right to counsel is one of those 'rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *United States v. Remal*, 19 M.J. 229, 232 n.4 (C.M.A. 1985) (quoting *United States v. Hasting*, 461 U.S. 499, 103

S.Ct. 1974, 1980 n.6, 76 L.Ed.2d 96 (1983)); *see also United States v. Ferguson*, 6 M.J. 844, 846-47 (N.M.C.M.R. 1979), stating that "[t]o have the assistance of counsel for his defense is the inalienable right of every person prosecuted for a criminal offense. . . . Unquestionably, it is a fundamental right of such proportions that its abrogation or curtailment should be under-taken only with extreme caution."

MCO No. 1 provides the accused with the right to "select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that [the attorney is determined to be available]." MCO No. 1, at § 4.C.(3)(a). MCI No. 4. also explains this right of the Accused, stating that the accused "may select a judge advocate of any United States armed force," again provided that that attorney is available. MCI. No. 4, at § 3.E.1). Both the MCO and the MCI are modeled on R.C.M. 506, which creates the right to individual military counsel for accused soldiers facing trial by court-martial. Rule for Court-Martial 506, Manual for Courts-Martial (2002 edition) at II-50.

B. The Requested Counsel Has Not Been Determined to Be Unavailable By Competent Authority

MCI No. 4 explains how a determination of availability should be made. After listing several categories of attorneys who are *per se* unavailable based on their duties, the Instruction provides that "the Judge Advocate General of the Military Department concerned may determine" what counsel are available or unavailable. MCI No. 4, at §3.E.2). In the instant case, this means that the Judge Advocate General of the Navy (a Military Department) is the appropriate authority to determine the availability or

unavailability of the requested counsel, since Lt. Col. Vokey falls under the Department of the Navy.

It is also worth noting that, under applicable service regulations and instructions for Individual Military Counsel ("IMC"), Lt. Col. Vokey has already been determined to be available. The USMC LEGADMINMAN, at paragraph 2002, page 2-5, states that "RDCs ['Regional Defense Counsel'] are under the operational control of the CDC ['Chief Defense Counsel'] for all purposes, including assignment to duty as IMCs . . ." This USMC provision mirrors that of the Army, in AR 27-10, para. 6-10a., which delegates the decision on availability of defense counsel to the Chief of the Army Trial Defense Service. This delegation of the power to control RDCs for IMC purposes to the Chief Defense Counsel reflects the growing consciousness in all branches of the military that it is preferable that determinations of availability be delegated, when possible, to a senior *defense attorney*, in order to avoid the appearance of impropriety. *See generally* John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 Mil. L. Review 4 (Spring 1983) (noting the strong perception of impropriety that accrued when senior government attorneys, "and thus indirectly the commander, played critical roles in administering the defense function." *Id.*, at 5).

In either case, whether reviewed against the USMC procedures for IMC or the Military Commissions procedures under MCI No. 4, Lt. Col. Colby Vokey has not been determined to be unavailable by the proper authority. Moreover, based on the representation of the Chief Defense Counsel of the Marine Corps (Col. [redacted] who is Lt. Col. Vokey's supervisor, the senior *defense* counsel in the Marine Corps, and the person who would ordinarily decide his availability, according to the USMC

LEGADMINMAN provision cited above) in her memorandum of 9 November 2005, Lt. Col. Vokey is presumably available.

C. O.K.'s Request Has Not Resulted in Unreasonable Delay of the Military Commission Proceedings

MCI. No 4 requires that the "selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings." MCI No. 4, at § 3.E.3). However, this provision is expressly required to be "consistent with" Section 6(B) of MCO. No. 1. *Id.* That section of MCO No. 1 outlines the duties of the Commission, and the very first duty it lists is the duty to "provide a full and fair trial." MCO. No. 1, at § 6.B. Thus, any delay must be balanced against the requirement to provide a fair trial, and (as noted above) the right to counsel is an absolute requirement to a fair trial.

CPT Merriam was detailed to this case on 29 November, arranged for travel to Cuba the next week, traveled to Cuba on 13 December, and met with O.K. and Professor Ahmad on 14 December. O.K. requested a specific military defense counsel (Lt. Col. Colby Vokey, the same counsel who had been previously detailed to this case), and that request was transmitted in writing to the Chief Defense Counsel on 22 December 2005. In other words, the request for selected detailed defense counsel was made within 24 days of CPT Merriam being detailed to the case, and within 7 days of the time CPT Merriam had his first conversation with O.K. – not at all an unreasonable time, considering the difficulty of travel to and from Guantanamo Bay, Cuba (a process which required 2 weeks notice to the OMC in order to obtain a country clearance and schedule a flight).

Since the request was forwarded to the Chief Defense Counsel, there has been no response from the government on whether or not the requested counsel is available to be detailed.

In *United States v. Smith*, 1986 Lexis CMR (N.M.C.M.R., 1986), the Navy-Marine Corps Court of Military Review determined that the military judge abused his discretion:

> when he denied the appellant's motion for a continuance to afford him the opportunity to procure individual military counsel and continue his search for civilian counsel. The judge's finding that the continuance request was made for the purpose of delay is unsupported. There is nothing in the record to demonstrate that [appellant] sought 'only to vex the Government with needless delay in order to avoid the certain consequences of his . . . misconduct.

Id., citing United States v. Kinard, 21 U.S.C.M.A. 300, 304 (U.S.C.M.A. 1972) (internal citations omitted). The same is true in the instant case – there is nothing in the record to suggest that O.K. seeks only to "vex the government." O.K. has submitted a timely request for counsel in accordance with his right under the PMO, MCO No. 1, and MCI No. 4.

D. The Government Suffers No Injury From A Continuance

O.K. has requested a continuance of 2 months, from 11 January 2006 to 11 March 2006. The defense submits that this amount of time is needed for O.K. to exercise his right to Selected Detailed Defense Counsel. This allows time for the government to act on O.K.'s request, as well as time for the selected counsel to assume the case and prepare

for the opening of proceedings, should the request be granted. If the request is denied, then this continuance would allow time for O.K. to appeal the decision to deny him the counsel of his choice, to litigate the issue of the selected counsel's availability if necessary, and then to submit a new request for counsel (assuming his appeal was denied). This amount of time also takes into consideration the logistical difficulty of travel to and from Cuba to prepare for trial and provide counsel to O.K.. Finally, this request takes into consideration the current courts-martial case load carried by CPT Merriam, who would have to continue to assist O.K. in seeking counsel of his choice if his pending request is denied, while at the same time appearing in courts-martial docketed at Fort Lewis, Washington.

The government can hardly argue, in this case, that it suffers some harm from a delay. O.K. has been in the custody of the United States for *three and a half years* – an extraordinarily long time for the government to perfect its case. The government has thus far shown no regard for O.K.'s right to a speedy trial (a right which O.K. intends to assert), and the defense respectfully suggests that the Commission should view skeptically any assertion by the government that it has a compelling interest in opposing a continuance of this length.

Even if the government does assert such an interest, the courts enjoin us to jealously guard the fundamental right of the accused. to representation of his choice. As the court in *Ferguson* stated, "we recognize the Government's desire to process cases in an expeditious manner. Nonetheless, it is to be remembered that *it is a basic and vested right with which we presently deal.* If that right is to have substance, it must be recognized and duly protected by those whose duty it is to ensure the even-handed

administration of [justice]." *United States v. Ferguson*, 6 M.J. 844, at 848. Similarly, "since the military judge remains accountable for prejudice that may result to an accused, the judge should err on the side of liberalism in taking action on a delay request when good cause for a delay exists." *United States v. Andrews*, 36 M.J. 922, 925-26 (A.F.C.M.R. 1993).

B. Even if the Request is Denied, a Continuance is Warranted

If O.K.'s Request is denied, he intends to appeal that denial. Should that appeal fail, O.K. intends to submit a new request for another Selected Detailed Defense Counsel. In either case, a continuance is clearly warranted in order to ensure that his right to representation by counsel of his choosing is not abridged.

In *United States v. Villines*, 9 M.J. 807 (N.C.M.R. 1980), the court held that it was not error to deny an accused's request for a continuance. In *Villines*, however, the accused did not appeal the determination that his requested counsel was unavailable. *Id.*, at 808. More importantly, the accused requested a continuance "in order to discuss the matter with the officer he had requested and to decide whether to request still another counsel." *Id.* The court held that this was not a valid ground for a continuance:

> In the instant case, appellant, over the Government's strenuous opposition, moved for a continuation, not for the purpose of processing another request for counsel or in order to appeal the denial of the request already submitted, but to discuss the denial with requested counsel and, after that, possibly request another counsel. We find that the judge did not abuse his discretion in denying appellant's request for further delay of the trial *to discuss matters with a counsel who was not available to represent him*, particularly in light of the Government's opposition to such a continuance based on logistical problems associated with providing defense witnesses to be present that day.

Id. (emphasis added). In other words, the accused's request for a delay in order to discuss the denial with *the denied counsel*, and then to "possibly" request another counsel, was not a compelling ground for a continuance, given the prejudice that would adhere to the government, which had to overcome "logistical problems" in order to provide defense witnesses.

None of these conditions apply to the instant case. 1) O.K. *does* intend to appeal any decision that his requested counsel is unavailable. That action, alone, likely requires a continuance, given the time it has taken the government to respond to his initial request. 2) If that appeal ultimately fails, O.K. intends to request a different qualified attorney to represent him. This is not a mere "possibility" – by virtue of this motion, O.K. is making it clear that this is one of the grounds on which he seeks this continuance. Again, the rulings in both *Furgason* and *Villines* strongly suggests that this is a proper ground for delay. 3) Finally, for this initial session of the Military Commission, the only logistical problems faced by the government are those of its own making; namely, the logistical problems associated with holding these hearings in Guantanamo Bay, Cuba. Over defense objection, no Members will be present. There are no witnesses expected to testify (at least, the defense has received notice of no witnesses). It is thus much harder to see what possible harm the government would suffer by the granting of the requested relief.

F. It Would Be Error For this Commission to Proceed Until the Matter of O.K.'s Representation Has Been Finally Resolved

Under the circumstances, it would be error for this Military Commission to proceed until O.K. has had a fair opportunity to select counsel of his choice. Selection of counsel is the very first thing addressed on the record, in both courts-martial practice and according to the "script" disseminated by the Assistant to the Presiding Officer in these proceedings, for an obvious and important reason – everything that occurs after that point impacts the ultimate outcome of the proceeding.

In the Assistant to the Presiding Officer's email dated 5 December 2005, he identified the following issues that would be addressed at the initial session: 1) arraignment of the accused; 2) entry, or deferment, of pleas; 3) setting a schedule for motions and discovery, and 4) voir dire of the Presiding Officer. Each of these is an important step in the conduct of a trial, and each is one in which he must be represented by counsel. Voir dire, in particular, is a critical procedural step in any proceeding, but it is important to recognize that it is a vital step in the advocacy process as well, a point recognized by the Court of Appeals for the Armed Forces in *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996):

> Voir dire is a valuable tool, *United States v. Holt*, 33 M.J. 400, 411 (CMA 1991) ("few experienced trial advocates would doubt the importance of ... voir dire"), for both the defense and prosecution to determine whether potential court members will be impartial. It is also used by counsel as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise peremptory challenges and challenges for cause. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222,

> 2230, 119 L. Ed. 2d 492 (1992) ("part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors").

Jefferson, id. (citations in the original). As such, the conduct of voir dire is a step to be performed only by that advocate whom O.K. has chosen to represent him. The Assistant to the Presiding Officer's email of 8 December 2005 appears to indicate that it is the intention of this Commission to proceed to voir dire of the Presiding Officer, regardless of whether or not O.K. is represented by the appropriate counsel. The defense submits that this would be a grievous error. *See, e.g., United States v. Ferguson*, 6 M.J. 844, at 848.

The PMO, MCO No. 1, and MCI No. 4 have all provided the accused with the right to a fair trial in which he is represented by counsel selected by him. It would be a hollow right indeed if the accused, having made a request for counsel, were to be forced to proceed with any procedural or substantive matter in this Commission without the representation of his chosen counsel.

7. **Oral Argument** is requested in the event that the Military Commission has not ruled on this motion before 11 January 2006. The defense believes argument on this motion should occur immediately following O.K.'s statement regarding representation, and that a ruling on this motion should be made prior to moving forward on any other matter in this Commission.

8. **Witnesses and Evidence.** Attachments A. through F., below.

9. **Reservation.** In making this motion, O.K. does not waive any objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to try him. O.K. likewise does not waive any motions for a speedy trial pursuant to the U.S. Constitution, Article 10 of the UCMJ, R.C.M. 707, or common law.

10. **Attachments.** The following attachments have been electronically merged with, and incorporated into, this motion:

A. Chief Defense Counsel of the Marine Corps, Memorandum for the Chief Defense Counsel, Office of Military Commissions, SUBJECT: REQUEST FOR TEMPORARY DUTY SUPPORT FOR THE OFFICE OF MILITARY COMMISSIONS' DEFENSE OFFICE (9 November 2005) (1 page)

B. Memorandum Detailing Defense Counsel, to Lt. Col. Colby Vokey, USMC, SUBJECT: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR (15 November 2005) (2 pages)

C. Memorandum Detailing Defense Counsel, to CPT John J. Merriam, US Army, SUBJECT: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR (29 November 2005) (2 pages)

D. Request for Selected Detailed Defense Counsel from Mr. Omar Ahmed Khadr (2 pages).

E. Endorsement of Request for Selected Detailed Defense Counsel from the Chief Defense Counsel, Office of Military Commissions to the Judge Advocate General of the Navy.

F. Email of the Assistant to the Presiding Officer to Detailed Defense Counsel, SUBJECT: RE: First Session in US v. Khadr (PO 1) (8 December 2005) (3 pages).

By: _____
JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law
[redacted]
Civilian Defense Counsel for Omar Ahmed Khadr

DEPARTMENT OF THE NAVY
CHIEF DEFENSE COUNSEL OF THE MARINE CORPS
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, D.C. 20380-1775

IN REPLY REFER TO:
5800
CDC
9 Nov 2005

From: Chief Defense Counsel of the Marine Corps
To: Chief Defense Counsel, Office of Military Commissions

Subj: REQUEST FOR TEMPORARY DUTY SUPPORT FOR THE OFFICE OF MILITARY COMMISSIONS' DEFENSE OFFICE

Ref: (a) Col Sullivan's email of 8 Nov 05

1. The reference is approved. The Regional Defense Counsel for the West Coast Region, Lieutenant Colonel Colby C. Vokey, will be made available to assist your office.

2. Any additional requests for defense counsel will require approval by me under separate correspondence. It is also this office's understanding that all travel and expenses will be covered by the Office of Military Commissions.

3. Lieutenant Colonel Vokey can be reached at [redacted] (office), [redacted] (Blackberry), and by email at [redacted]

[redacted]

Copy to:
RDC, West
File

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

15 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Lieutenant Colonel Colby C. Vokey, USMC

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR

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

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

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

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

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

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

RE 36 (Khadr)
Page 17 of 27

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

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

29 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Captain John J. Merriam, IA, USA

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR

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

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

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

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

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

AMERICAN UNIVERSITY
WASHINGTON, D.C.

CLINICAL PROGRAM

December 22, 2005

VIA EMAIL
Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

RE: *United States v. Khadr*, M.C. Case No. 05-0008
Request for Selected Detailed Defense Counsel

Dear Colonel Sullivan:

Pursuant to Military Commission Order No. 1 and Military Commission Instruction No. 4, I am writing on behalf of my client, Omar Khadr, to request selected detailed defense counsel to represent Mr. Khadr in the military commission proceedings that have been initiated against him. Specifically, my client requests that Lt. Colonel Colby Vokey, United States Marine Corps, serve as his detailed defense counsel. A signed statement from Mr. Khadr making this request is enclosed with this letter.

Thank you for your prompt attention to this matter. If you have any questions, please call me at [redacted]

Sincerely,

Muneer I. Ahmad
Associate Professor of Law
American University
Washington College of Law
International Human Rights Law Clinic
[redacted]

REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

I, OMAR KHADR, understand that under Military Commission Order No. 1 and Military Commission Instruction No. 4, I am entitled to request selected detailed defense counsel to represent me in military commission proceedings.

In accordance with this right, I hereby request that Lt. Colonel Colby Vokey, United States Marine Corps, serve as my detailed defense counsel.

Dated this 14 day of December, 2005 at Guantánamo Bay, Cuba.

Omar A. Khadr
OMAR KHADR

1001
OMC-D
23 December 2005

From: Chief Defense Counsel, Office of Military Commissions
To: Judge Advocate General of the Navy
Via: Staff Judge Advocate to the Commandant of the Marine Corps

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

Ref: (a) Military Commission Order No. 1, ¶4.C(3)(a) (Aug. 31, 2005)
(b) Military Commission Instruction No. 4, ¶3.E (Sept. 16, 2005)

Encl: (1) Professor Muneer Ahmed's letter of 22 December 2005 requesting selected detailed defense counsel
(2) Omar Khadr's request for selected detailed defense counsel

1. The enclosed requests to make Lieutenant Colonel Colby Vokey, USMC, available as a selected detailed defense counsel in the military commission case of *United States v. Khadr* are forwarded, recommending approval.

2. Reference (a) provides that the accused in a military commission proceeding "may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A)." *See also* reference (b) at ¶3.E(1).

3. Paragraph 2 of reference (b) lists several billets that will render a requested selected detailed defense counsel unavailable per se. LtCol Vokey, who is serving as the Regional Defense Counsel at Camp[redacted], does not appear to fall within any of these per se disqualifying billets.

4. Paragraph 2 of reference (b) also provides that a requested selected detailed defense counsel will be deemed unavailable if he or she is serving "in any other capacity that the Judge Advocate General of the Military Department concerned may determine precludes availability because of the nature or responsibilities of the judge advocate's assignments, exigent circumstances, military necessity, or other appropriate reasons."

5. I recommend approval of the request to make LtCol Vokey available as a selected detailed defense counsel. The detailed defense counsel currently assigned to the case is Captain John J. Merriam, JA, USA. Captain Merriam is an Army judge advocate assigned to the Trial Defense Service office in Fort Lewis, Washington, who the Army Trial Defense Service made available as a defense counsel for a commission case. Significantly, Captain Merriam has never served as

a defense counsel in a court-martial case, and his entire litigation experience is confined to nine months of service as a trial counsel. Captain Merriam appears to be insufficiently experienced to serve as the lead detailed defense counsel in a military commission case. LtCol Vokey, on the other hand, has seven years of experience as a judge advocate, including service as a regional defense counsel, senior defense counsel and officer in charge of two Legal Service Support Teams at Camp[redacted]. LtCol Vokey also has an LL.M. from The Judge Advocate General's School, U.S. Army.

6. LtCol Vokey appears to possess the experience, talents and education to successfully litigate a military commission case. I very respectfully request that he be made available to serve as the selected detailed defense counsel in the case of *United States v. Khadr*.

7. Please let me know if I can provide any additional information. My direct dial telephone number is [redacted]

D. H. SULLIVAN
Colonel, USMCR

Copy to: Mr. [redacted]
Mr. John D. Altenburg, Jr.
BGen Thomas L. Hemingway, USAF

Merriam, John J CPT (PKI)

From: Hodges, Keith [redacted]
Sent: Thursday, December 08, 2005 5:44 AM
To: [redacted]
Subject: RE: First Session in US v. Khadr (PO 1)

CPT Merriam,

Thank you for your reply.

1. Of course the Presiding Officer and the parties want to know Mr. Khadr's decision with respect to counsel as soon as you know it, and what you believe you and the current defense team may and may not do in the absence of any addition to the defense team. Still, the Presiding Officer directs that current members of the team - even if additional counsel are to join it - be prepared to conduct voir dire of the presiding officer, enter (or reserve) pleas, and discuss as much as possible counsel's individual calendars and the general trial calendar.

2. Please make the necessary arrangements to be at GTMO, and assist Mr. Khadr's civilian counsel to do so as well.

3. This email will be added to the filings inventory as PO 1.

BY DIRECTION OF THE PRESIDING OFFICER

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

From: Merriam, John J CPT (PKI) [redacted]
Sent: Wednesday, December 07, 2005 8:01 PM
To: [redacted]

[redacted]
Cc: [redacted]
Subject: RE: First Session in US v. Khadr (PO 1)

Sir:

I know of nothing at this time that would preclude me from being present for this session.

I must note, however, that I am still in the process of assembling the defense team. I was detailed to this case on 29 November, and my detailing order specifically requires me to inform Mr. Khadr of his rights before a military commission, including his right to Selected Military Counsel IAW DoD MCO No. 1 and MCI No. 4. I have not yet had the opportunity to meet my client -- I will be meeting with him in mid-DEC and explaining his rights to him.

If my client requests Selected Military Counsel, and that request is granted, then that counsel will assume the role of "lead counsel" for this case. Voir Dire, entering pleas, and the other things scheduled to be accomplished at this initial session are traditionally duties performed by the lead counsel for the defense. Thus, I am not certain I can make commitments for the defense until after these issues have been resolved.

v/r,

J.J. Merriam
CPT, JA
Trial Defense Attorney
[redacted]

From: Hodges, Keith [redacted]
Sent: Friday, December 02, 2005 7:30 AM
To: [redacted]
Cc: [redacted]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL Chester.

2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cube. At that session, the Presiding Officer intends to arraign the accused. (Khadr)

accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.

3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.

4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.

5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.

6. All current POMs (Rules of Court) can be found at
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

BY DIRECTION OF THE PRESIDING OFFICER

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

UNITED STATES OF AMERICA	DEFENSE
v.	Motion to Abate Proceedings of the Military Commission Due to MCO No. 1's Fatal Inconsistency With the President's Military Order
OMAR AHMED KHADR	5 January 2006

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr*.

2. **Relief Requested.** The defense requests that the military commission proceedings be abated until such time as competent authority resolves the fatal inconsistencies between the President's Military Order of 13 November 2001 ("PMO") and the Military Commission Orders ("MCO's") and Instructions ("MCI's") that purport to implement it.

3. **Synopsis.** The Military Commission cannot convene in the absence of the Members, and the Presiding Officer cannot rule alone on matters of law, under the President's Military Order. These proceedings must be abated until new implementing regulations can be drafted that conform to the minimum requirements of the current PMO, or until a new PMO is issued which changes these requirements.

The President's Military Order of 13 November 2001 states, in relevant part, that the commission "shall at a minimum provide for . . . a full and fair trial, with *the military commission* sitting as the *triers* of both law and fact." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). In apparent conflict with this very

specific language, military commissions appointed to decide the cases against several detainees, including Omar Ahmed Khadr, [1] have convened or attempted to convene initial sessions during which only the Presiding Officer and parties were to be present. The basis for this action is apparently the revised Military Commission Order Number 1, dated 31 August 2005, which provides for the Presiding Officer to "rule upon all questions of law" and which allows him to preside over sessions in the absence of the other members.

MCO No. 1 and the PMO are thus inconsistent on their face – the MCO allows for an action that the PMO clearly does not contemplate. This inconsistency must be resolved in favor of the PMO, since the MCO's are merely implementing regulations of the PMO. Moreover, MCO No. 1 itself states the proper rule of construction when, at Section 7.B., it states that *"[i]n the event of any inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military Order shall govern."* MCO. No. 1 at § 7.B. (emphasis added).

Only revision of the PMO itself will serve to correct the inconsistency and allow the Presiding Officer of a Military Commission to convene sessions without the other members, and to decide matters of law without the other members. Until the President promulgates a new order that modifies or further delineates the powers of individual members (the Presiding Officer, in this case) of a military commission, this proceeding

[1] Omar Ahmed Khadr was a juvenile at all times during which he is charged with crimes before this Commission. At the first date mentioned in the Charge Sheet prepared by the government (1989, see para. 7, Charge Sheet), Omar Khadr was two years of age. At the time of his capture and all of his alleged crimes, he was fifteen years of age. In communications from this Commission's Assistant to the Presiding Officer, Omar Khadr has been referred to as "Mr. Khadr." It is probably more appropriate to refer to Omar Khadr as "Master Khadr" (reflecting English usage for a male juvenile), by his first name alone, or by his initials, as is the practice in many jurisdictions. Therefore, throughout this motion, when Omar Ahmed Khadr is referred to in shorthand, he will be referred to as "O.K." or "Omar."

must be abated. Alternatively, the Secretary of Defense can promulgate new MCOs that adhere to the requirements laid out in the PMO.

4. **Burden of Proof and Persuasion.** This motion is jurisdictional. Once a jurisdictional challenge is fairly raised, the burden shifts to the prosecution to establish jurisdiction by a preponderance of the evidence. *See United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F 2002) ("Jurisdiction is an interlocutory issue . . . with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence").

5. **Facts.** This motion is predicated on a purely legal issue; no facts will be argued. However, for purposes of clarity, the defense offers the following facts regarding the PMO:

A. On 13 November 2001, the President of the United States issued a military order acting in his capacity as Commander-In-Chief of the armed forces (the "PMO").

B. The PMO is the source of authority upon which the government bases its power to convene military commissions against detainees held at Guantanamo Bay, Cuba.

C. The PMO has not been changed, rescinded, re-issued, or otherwise replaced as the basis of authority for the Secretary of Defense to promulgate orders and regulations for the conduct of the military commissions.

6. **Argument.**

A. MCO No. 1 Clearly Violates the PMO

The PMO is the foundational document upon which the entire current Military Commissions process is built. From that order flow the powers of the Secretary of Defense to detain, and eventually try, members of Al Qaeda. It is thus critical to read the language and text of the PMO closely in order to evaluate the legality of the regulations, orders, and instructions that purport to implement it.

First, the President makes it clear (in the section of the order dedicated to "Definitions and Policy") that the PMO is the only source of procedure for the Military Commissions; the Secretary is enjoined to ensure that no other procedure for trial be used. Specifically, the President ordered that individuals who are to be tried by military commission be "tried *only* in accordance with Section 4." PMO at § 2(b), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added).

Section 4 then proceeds to define the authority of the Secretary of Defense regarding these trials. The Secretary is directed to promulgate orders and regulations which provide for "a full and fair trial, with *the military commission* sitting as the *triers* of both fact and law." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). The language chosen – corporate in the first instance and plural in the second – has only one clear meaning: that the body or tribunal composed of *both* the Presiding Officer and the Members shall convene to try both law and fact.

Contrasted to the clear language of the PMO is the revised language of MCO No.1, which (as currently drafted) authorizes the Presiding Officer to convene sessions in

the absence of the other members, and to rule on matters of law. Indeed, MCO No. 1 may very well have been rescinded and re-issued precisely to address the inconsistency at issue here (if so, it has obviously failed to do so). On 21 March 2002, the Secretary of Defense issued the original Department of Defense Military Commission Order Number 1. That order specified, in Section 4.A.(5), the duties of the Presiding Officer. None of these included a specific duty or power to rule alone on matters of law. On 31 August 2005, the Secretary of Defense rescinded the original Military Commission Order Number 1 and issued a new Order by the same name. This is the Military Commission Order Number 1 currently in effect. The current version of MCO No. 1 has been amended to specifically include, at Section 4.A.(5)(a), the power of the Presiding Officer to "rule upon all questions of law" and to "conduct hearings . . . outside the presence of the other members for purposes of hearing and determining motions, objections, pleas, or other such matters as will promote a fair and expeditious trial." MCO No. 1 at § 4.A.(5)(a).

Thus, the PMO and MCO No. 1 are clearly at odds. The PMO requires a full and fair trial, with *the military commission* sitting as *triers* of law and fact. MCO No. 1, on the other hand, allows for the Presiding Officer to conduct hearings in the absence of the other members and to rule on questions of law. The defense believes that the PMO does not allow the Presiding Officer to do either of these things – by the terms of the PMO, only the full commission can sit, and the members of the commission (including the Presiding Officer, who is included in the definition of "members", see MCO No. 1 at § 4.A.(5)(a)) must be the triers of both law and fact.

B. Ordinary Principles of Statutory Construction Resolve this Conflict in Favor of the PMO.

This, then, reduces the question to one of "construction." The first rule of legal construction has always been to accept the plain meaning of the text at issue. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (1989) ("It is well established that 'when the . . . language is plain, the sole function of the courts . . . is to enforce it according to its terms.'"). The language of the PMO is plain – "the commission" (one corporate body) shall sit as "the triers" (plural, indicating more than simply the Presiding Officer) of law and fact.

The government may suggest that the defense places too much emphasis or weight on the President's choice of words when drafting the PMO, and urge this Commission to overlook or ignore the plain meaning of this language. Again, this is not what the law of statutory construction says we are to do. "It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), *quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). In *Duncan*, the Court was reviewing the meaning and construction of the word "State" in a federal habeas corpus statute, and the Court noted that strict statutory construction was especially important when "the term occupies so pivotal a place in the statutory scheme as does the word 'State' in the federal habeas statute." *Id.*, at 174. The analogy between that case and this one is clear – the subject matter of the PMO is almost exclusively the establishment of

military commissions to try alleged members of Al Queda – there can be no more "pivotal" word in the PMO than the word "commission."

Thus, by all the ordinary rules of statutory construction, the Presiding Officer cannot convene a session of the commission without the other members, and cannot rule alone on matters of law. This is the conclusion reached by the Presiding Officer in *United States v. David Hicks*, Colonel Peter Brownback, who stated that "*the President* has decided that *the commission* will decide all questions of law and fact. You are not bound to accept the laws as given to you by me." *United States v. David Hicks*, ROT at 114, available at http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf (emphasis added). Colonel Brownback did not cite to MCO No. 1 or to any ruling or order of the Secretary of Defense or the Appointing Authority – he cited, correctly, to the President.

This is also the conclusion reached by the Legal Advisor to the Appointing Authority, who stated in a formal opinion that "[t]he PMO identifies *only one instance* in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission." Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages) (emphasis added). Again, he refers (quite properly) to the PMO as the controlling source of authority. The Legal Advisor (Brigadier General Hemingway) eloquently stated the plain meaning of the PMO: "The 'Commission' is a body, not a proceeding, in and of itself. Each Military Commission, comprised of

members, *collectively* has jurisdiction over violations of the laws of war and all other offenses triable by military commission." *Id.* (emphasis added).

As if there were any further doubt, the newly-reissued MCO No. 1 contains clear guidance on how to resolve inconsistencies between it and the PMO: "[i]n the event of *any* inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military Order shall govern." MCO. No. 1 at § 7.B. (emphasis added). The Secretary appears to have contemplated the possibility that the MCO could be in-artfully drafted to be inconsistent with the PMO, or that the PMO could be wrongly interpreted, and has provided us guidance on what to do in that event: defer to the PMO. This same guidance is contained in every single Military Commissions Order issued by the Secretary of Defense.

C. Military Commission Proceedings Cannot Occur Until Either the PMO or MCO No. 1 is Amended

Since MCO No. 1 violates the PMO and is therefore invalid, the proceedings of this Military Commission must be abated until such time as the PMO is amended or the MCO is re-drafted to bring it into compliance with the PMO. It is not possible to continue these proceedings without applicable orders, because the PMO has made it mandatory for the Secretary of Defense to issue such orders. "[T]he Secretary of Defense *shall* issue such orders and regulations . . . as may be necessary [for the conduct of Military Commissions in compliance with the PMO]." PMO at § 4 (b) (emphasis added). It does not say that the Secretary "may" issue such orders – the Secretary "shall" so do.

This, then, leaves the Executive Branch with a choice to make. On the one hand, the Secretary of Defense can promulgate a new Military Commission Order Number 1, which requires the entire Commission (Presiding Officer and other Members) to convene for each session, and which allows for the entire Commission (Presiding Officer and other Members) to sit as the triers of law and fact. In other words, MCO. No. 1 can be drafted such that it is fully consistent with the plain language and clear meaning of the PMO. On the other hand, the President can re-issue or amend his Presidential Military Order, and expressly authorize the Presiding Officer to convene sessions in the absence of other members, to rule on matters of law, and otherwise to perform functions similar to those of a judge in a civil or military court. Either of these would serve to cure the fatal inconsistency between the current PMO and MCO No. 1.

A third choice exists, of course – if the President or Secretary are intent upon ensuring that alleged Al Queda members are tried in some forum which includes a judge, then these detainees can be tried by court-martial pursuant to Article 18 of the UCMJ, or in Federal District Court. Either of those forums would include a judge sitting as the sole trier of law, and would allow for him to convene preliminary sessions and hold hearings in the absence of jurors or panel members. However, as long as the current PMO is in effect, Presiding Officers are decidedly *not* judges. There is nothing in the PMO to suggest that they should be given the powers of judges, and until that changes, Presiding Officers cannot convene sessions without the other Members, nor can they rule on matters of law. The defense objects to any characterization that the Presiding Officer is a judge.

7. **Oral Argument is requested.**

8. **Witnesses and Evidence.** Attachments A and B, listed below.

9. **Reservation.** O.K. is making this motion before the very forum that he contests as illegitimate: a Military Commission composed only of a Presiding Officer, in the absence of the other members, who is exercising his perceived power to rule on matters of law. O.K. does so only because there is currently no other forum before which to make this motion. By so doing, he does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to try him. Other Presiding Officers sitting over military commissions have received similar motions, and O.K. does not believe that making this motion constitutes consent to be tried in this forum.

10. **Attachments.** The following documents are attached and electronically merged into this motion:

A. *United States v. Hicks* Record of Trial at 114, available at http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf (in the Commissions Library)

B. Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages).

By: _____
JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law
[redacted]
Civilian Defense Counsel for Omar Ahmed Khadr

P (LtCol [redacted] No, sir.

PO: Okay. Members, I have been appointed as the presiding officer. On Monday you got all the commission orders, the directives, the instructions, except for MCI Number 8. Those instructions and references apply to all the cases in which you may be a commission member. I am charged with certain duties. I preside over the commission proceeding during open and closed sessions. As the only lawyer appointed to the commission, I will instruct you on the law.

However, the President has decided that the commission will decide all questions of law and fact. You are not bound to accept the laws as given to you by me. You can accept the law as argued to you by counsel, whether by briefs, or in motions, or attachments. It is also given to you by me in instructions. If you have questions on the law when we are sitting in the commission hearing, you may ask counsel questions about whatever it is they are arguing.

We are not going to discuss the cases with anyone including ourselves, including recesses or adjournments. When we are meeting in closed conference, then we will discuss it. We will only consider evidence properly admitted before the commission. You are not going to consider any other accounts or anything you may have learned in a past life.

You may not discuss the proceedings of this commission with anyone who is not a member of the panel. If anyone attempts to do it, tell them to stop, notify me; and I will make sure appropriate action is taken. When we are closed to deliberate, we alone will be present. Each of us has an equal voice and vote in deciding and discussing all issues submitted to us. As presiding officer, I will preside over the closed conference deliberations and I will speak for the commission in announcing results.

Outside influence from superiors in the governmental chain will not be tolerated. If anyone tries to influence you in any way, notify me immediately and appropriate action will be taken. No one in your chain, or in any other chain, can reprimand you or do anything to you for your actions on this commission. Some of you may serve as members, or alternate member, on more than

[redacted]

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

August 11, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. *See Section 4(c)(2).* The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3).*

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. 1 delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

- MCO No. 1, Section 4(A)(1) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."

- MCO No. 1, Section 4(A)(1) also requires that the alternate member or members *shall attend all sessions of the Commission. This requirement for alternate*

[redacted]

[redacted]

members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

- MCO No. 1, Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.

- MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.

Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor

[redacted]

UNITED STATES OF AMERICA	)	D 1 A
v.	)	Presiding Officer's Ruling on Defense Motion for a Continuance in Military Commission Proceedings Until Resolution of Accused's Request for Selected Detailed Defense Counsel
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	5 January 2006

1. The Presiding Officer received D 1, the Defense motion for a continuance, at 1704, 5 January 2006 Eastern Time. The initial session is scheduled for 11 January 2006. The Presiding Officer first announced his intent to schedule this session on 2 December 2005. *See* filing PO 1.

2. Given the timing of this motion, it will be decided without benefit of a response from the Prosecution. The Presiding Officer begins his travel to Guantanamo on 6 January, and the parties are in need of timely ruling so they may finalize their own travel arrangements. Thus, time is of the essence in deciding this issue.

3. One of the stated purposes of the scheduled session is to have the accused make a selection of counsel on the record. Given the Defense motion, it is possible that this issue might be further discussed or cause the government to act on the request for Lt. Col. Vokey.

4. Accordingly, the motion is DENIED.

5. This ruling extends only to the Defense request for a continuance. The extent to which other issues are addressed at the scheduled session will be resolved at that session. The Defense, however, will still be prepared to conduct *voir dire* of the Presiding Officer and take up the other issues as indicated in PO1.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, USMC
Presiding Officer

UNITED STATES OF AMERICA	)	D 2 A
v.	)	Presiding Officer's Ruling on Defense Motion to Abate Proceedings of the Military Commission due to MCO No. 1s Fatal Inconsistency with the President's Military Order
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	5 January 2006

1. The Presiding Officer received D 2, the Defense motion to abate the proceedings, at 1705, 5 January 2006, Eastern Time. The initial session – with no members except the Presiding Officer to be present - is scheduled for 11 January 2006. The Presiding Officer first announced his intent to schedule this session on 2 December 2005. *See* filing PO 1.

2. Given the timing of this motion, it will be decided without benefit of a response from the Prosecution. The Presiding Officer begins his travel to Guantanamo on 6 January, and the parties are in need of timely ruling so they may finalize their own travel arrangements. Thus, time is of the essence in deciding this issue.

3. The Defense motion to abate the Proceedings is DENIED.

4. The Defense has not asked for a ruling from the Presiding Officer on the legality of Commission procedures as established in MCO #1. Accordingly, this ruling is limited only to the issue of abatement. Should the defense desire to raise the issue of the legitimacy of the procedures established in the MCOs and MCIs vis-à-vis a fatal inconsistency with the PMO, they will comply with POM procedures and a hearing will be held to litigate that motion in accordance with Commission Law.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

UNITED STATES OF AMERICA	DEFENSE
v.	Motion in Opposition to the Presiding Officer's Order to Counsel to Appear at an Off-the-Record Conference Pursuant to MCI No. 8, Paragraph 5
OMAR AHMED KHADR	9 January 2006

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr*.

2. **Relief Requested.** The defense objects to appearing at an off-the-record conference pursuant to MCI No.8, para. 5 (hereinafter "8-5").

3. **Synopsis.** An 8-5 is modeled on the conference process established by R.C.M. 802, and is defined under the "implied duties of the Presiding Officer." MCI No. 8, para. 5. The stated purpose of these *in camera* sessions is to "facilitate efficient trial proceedings." *Id.* The defense is unaware of the purpose of the 8-5 scheduled for 10 January 2006, but an email from the Assistant to the Presiding Officer on 30 December 2005 indicated that one of the purposes of the 8-5 would be to discuss the proposed protective orders submitted by the prosecution. This does not fall under the purview of "facilitat[ing] efficient trial proceedings." As the defense is unaware of any need for a pre-trial 8-5 session, it objects to holding one.

4. **Burden of Proof and Persuasion.** The Constitutional right to a public trial extends to military proceedings. *United States v. Grunden*, 2 M.J. 116 (C.M.A.1977). Therefore, the burden of proof should be on the prosecution to show that an 8-5 session is warranted and will not compromise the accused's 6th Amendment right to a public trial.

5. **Facts.** The defense submits the following facts with respect to this issue:

A. On 28 December 2005, the prosecution submitted three proposed protective orders for consideration by the Presiding Officer. In response to that, the Assistant to the Providing Officer emailed all counsel on 30 December 2005 and suggested that differences between the parties regarding the contents of the protective orders should be addressed at an 8-5 session. The defense objected in an email response.

B. On 9 January 2006, the Assistant to the Presiding Officer again emailed all counsel to inform them that the Presiding Officer requested their presence in an 8-5 session on 10 January 2006. No reason was stated for this conference.

6. **Argument.**

Holding an 8-5 session on this matter, or on any matter other than purely administrative issues, risks creating significant gaps in the record of trial. "The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). "A

substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Id.* at 111.

The issues proposed to be discussed at this 8-5 session fall outside those provided for in the MCI paragraph at issue, and the courts have told us that this is to be avoided whenever possible. *United States v. Garcia*, 24 M.J. 518, 519-20 (A.F.C.M.R. 1987). Protective orders are a significant matter, not a purely administrative matter, and they directly affect the openness of the proceeding and the accused's right to a public trial. As the Air Force Court has observed, R.C.M. 802 "has occasionally misled judges into allowing substantive portions of the trial to go unrecorded." *Id.*, at 519

Extensive use of 8-5 conferences outside of public scrutiny also creates an image of "backroom justice" that undermines the appearance of integrity and fairness, especially in the context of a Military Commissions case that already allows for substantial portions of the trial to be held outside the view of the public, of civilian defense counsel, and even of the accused. "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Ex parte McCarthy*, 1 K. B. 256, 259 (1924).

Finally, the discussion R.C.M. 802 suggests that it would be inappropriate to hold an 8-5 at this time. "Occasionally it may be appropriate to resolve certain issues in addition to routine or administrative matters, *if this can be done with the consent of the parties*." R.C.M. 802, discussion. The defense does not consent to resolving or discussing any substantive matters at an 8-5 session.

For the foregoing reasons, the defense objects to an 8-5 session before the opening of proceedings in this case, and reserves the right to object to any other 8-5 sessions proposed by any party.

7. Oral Argument is requested.

8. Witnesses and Evidence. Attachments A. through C., below.

9. Attachments. The following attachments have been electronically merged with, and incorporated into, this motion:

A. Email from the Assistant to the Presiding Officer, SUBJECT: ProOrd 1: Request for Protective Order – Protection of Identities of Investigators and Interrogators (30 December 2005) (2 pages).

B. Email from Detailed Defense Counsel, SUBJECT: Defense Objections to Protective Orders (4 January 2006) (3 pages).

C. Email from the Assistant to the Presiding Officer, SUBJECT: Conference - al Bahlul and Khadr - 10 Jun 05 (9 January 2006) (1 page).

By: _____
JOHN F. MERRIAM
CPT, JA
Detailed Defense Counsel

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law

Civilian Defense Counsel for Omar Ahmed Khadr

From: Hodges, Keith [redacted]
Sent: Friday, December 30, 2005 8:19 AM
To: [redacted]
Cc: [redacted]

Subject: ProOrd 1; Request for Protective Order - Protection of Identities of Investigators and Interrogators - U.S. v. Khadr

Attachments: Protective Order # 1 Khadr (Prosecution first Draft).doc

1. The below email and the attachment sent with the original email (copy attached), and this email, will be added to the filings inventory as ProOrd 1.

2. It appears that the Prosecution has complied with paragraphs 4a and b, POM 9-1.

3. The defense will respond by email NLT COB 4 January 2006 noting any objections to the proposed Protective Order and the reasons therefore. The Defense is welcome to edit and send the proposed Order showing additions or deletions - but do NOT use the Word "track changes" feature to accomplish this. All email traffic and other submissions should identify the correspondence as ProOrd 1.

4. The Presiding Officer will set a session for an 8-6 conference at GTMO to discuss these orders. Counsel should be prepared - through further discussions among counsel if possible - to fine-tune the language in the order so it meets the needs of the parties. At the aforementioned session, counsel will be prepared to make specific recommendations as to the wording of any proposed order.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: [redacted]
Sent: Wednesday, December 28, 2005 6:01 PM
To: [redacted]
Cc: [redacted]

Subject: Request for Protective Order - Protection of Identities of Investigators and Interrogators - U.S. v. Khadr

Colonel Chester,

The Prosecution requests the Presiding Officer issue the attached Protective Order.

(1) The proposed protective order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of the government who participated in the investigation of the accused.

(2) This Protective Order is necessary to protect the identities of all investigators and interrogators from disclosure to the public. The comprising of their identities, especially since the war against al Qaida is still ongoing could; 1) compromise their ability to continue their service in furtherance of the prosecution of that war; 2) place their lives in jeopardy; and, 3) place the lives of their families in jeopardy.

(3) The Prosecution sent the proposed protective order to the Defense on 9 December 2006, and discussed the order with Captain Morrison later that afternoon. Defense Counsel advised that he would like to review further and provided comments to the Prosecution on 18 December. I replied to those comments on 19 December.
We have since communicated via email; however, despite our efforts, we have not agreed on language for the Protective Order. Captain Morrison's primary objection was that he believed the order as written would prohibit showing the accused photos of interrogators and telling him what a certain interrogator was saying about him. I disagree. I don't believe the current order would prohibit showing the accused photos of his interrogators and telling him know what their statements say. I do not think that an investigator or interrogator's name or other identifying information should be given to the accused under any circumstances.

I request that the order be issued as soon as possible. Issuance of the Protective Order will allow the Prosecution to provide discovery materials to the Defense containing protected information.

V/R,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: Merriam, John J CPT (PK1[redacted]
Sent: Wednesday, January 04, 2006 2:50 PM
To:[redacted]
Cc:[redacted]
Sullivan, Dwight, COL, DoD OGC
Subject: Defense Objections to Protective Orders

Attachments: Protective Order # 1 Khadr (Defense Revisions).doc; Protective Order # 2 Khadr (Defense Revisions).doc

Mr. Hodges:
Please find attached modified versions of Protective Order #1 and Protective Order #2. They have been re-named "Defense Revisions" in lieu of "Prosecution First Draft" for clarity's sake.

The defense respectfully makes the following objections to the prosecution's proposed Protective Orders, and, where applicable, has made the following revisions to the versions attached to this email:

Protective Order #1

1. The defense objects to the current language, which (if literally read) apparently would prevent us from consulting the accused in his own defense. The defense has added a proposed paragraph 3.d. that explicitly allows us to show photographs of investigators and interrogators to the accused. This is essential in order to achieve the assistance of the accused in his defense. The Prosecutor, [redacted] has indicated that he did not oppose this, though he has not specifically consented to the proposed language shown here.
2. In the same paragraph, the defense also adds language allowing us to use nicknames, false names, or even real names if those names have already been made known to, or used in the presence of, the accused. For example, if Mr. Khadr is routinely interrogated by a woman who calls herself "Michelle," then there should be no prohibition on us calling her Michelle - whether that is her actual name or not.

Protective Order #2

1. Paragraph 2 has been modified to add a definition of the term "Prosecution." This is essential for the other modifications.
2. Paragraph 6 has been modified to add the Prosecution to the group of people restricted from divulging information relating to military commissions proceedings. The defense objects to the fact that this order forbids only defense counsel from divulging information. There does not appear to be any good reason to not also include the Prosecution.
3. The word "experiences" has been deleted from Paragraph 6. This is overbroad and vague.
4. The phrase "in the course of representation of the accused" has been added to; it now reads "in the course of representation of the accused in military commission proceedings." The defense objects to the prosecution's proposed language, which would cover representation in other forums (such as habeas litigation in

federal court) that are not properly the concern of this commission. The defense notes that habeas litigation is already covered by separate protective orders, and so there is no need for the redundancy of an additional order from this commission.

Protective Order #3

1. The defense objects to this entire order as overbroad and not ripe. The order, as written, will apparently prohibit the defense from informing Mr. Khadr of any witness, either for or against him. This would have a detrimental impact on our ability to prepare a full and vigorous defense.
2. Moreover, the order as written fails to account for the fact that many witnesses who may testify in commission proceedings have already made themselves available to the media or are properly within the public domain. For example, Lane Morris has appeared on both Canadian and American television and radio interviews; it is not unreasonable to expect that he would be called by the government to testify. SFC Speer's family has filed a lawsuit against the Khadr family; it is not unreasonable to expect that family members may be called by the government to testify.
3. Finally, this order does not take into account the testimony of expert witnesses called by either party, who may include eminent and widely-known lawyers or other professionals. For example, if the world's leading scholar on war crimes agreed to testify on behalf of the defense, suppression of his name would deprive the public of an understanding of just how powerful that testimony was. Given what has already occurred in other commissions cases, it is not at all unreasonable to expect expert witnesses to testify in commission proceedings.
4. The defense respectfully suggests that the need for this order has not been demonstrated, and is not ripe. A better solution, and one that is more in keeping with the Secretary of Defense's guidance (in MCO No. 1) to close proceedings only when required to actually protect information, physical safety, etc., would be to have the government move to protect names of witnesses on a case-by-case basis. Both the accused and the public have the right to proceedings that are as open and transparent as the national security will allow.

Finally, the defense wishes to state its objection to resolving any outstanding issues regarding these protective orders in an 8-5 session. MCI 8, Section 5 does contemplate that the Presiding Officer may need to hold "in camera meetings to facilitate efficient trial proceedings." However, the contemplated issuance of a court order is hardly the "facilitation" of efficient trial proceedings. The defense believes that this is something properly discussed only on the record. MCO No. 1, at Section 6.B(3), allows for the closure of proceedings when necessary to protect information, but that does not seem to extend to holding closed, in camera hearings about whether or not to protect information.

The defense position is well-supported by case law in the military justice system, which cautions against use of RCM 802 conferences for matters properly addressed on the record (8-5 conferences in the commissions process are substantially similar to RCM 802 sessions). See, e.g., *United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990); *United States v. Garcia*, 24 M.J. 518, 519 (A.F.C.M.R. 1987). The defense believes that any discussion of protective orders should occur on the record. The defense will submit a written motion on this matter.

Respectfully submitted,
<<Protective Order # 1 Khadr (Defense Revisions).doc>> <<Protective Order # 2 Khadr (Defense Revisions).doc>>

John J. Merriam
CPT, JA
Trial Defense Attorney

Merriam, John J CPT JTFGTMO OMC (L)

From: Hodges, Keith H. CTR (L)
Sent: Monday, January 09, 2006 8:28 PM
To: [redacted]
Cc:
Subject: Conference - al Bahlul and Khadr - 10 Jan 06

All counsel advise of receipt of this email.

COL Brownback requests that all counsel in US v. al Bahlul meet in the Presiding Officer's office at 1300, 10 Jan 06.

COL Chester requests that all counsel in US v. Khadr meet in the Presiding Officer's office at 1430, 10 Jan 06.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers

[redacted]

1

Merriam, John J CPT JTF/GTMO OMC (L)

From: Hodges, Keith H. CTR (L)
Sent: Monday, January 09, 2006 8:28 PM
To: [redacted]on
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BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
[redacted]

Hodges, Keith H. CTR (L)

From: Hodges, Keith H. CTR (L)
Sent: Tuesday, January 10, 2006 10:02 AM
To: Merriam, John J CPT JTFGTMO OMC (L); Dalva, Morris D Col JTFGTMO OMC Prosecution (L)
Cc: [redacted]
Subject: D 3, and D 3 A. Khadr - 805 Motion

1. The below email and the attachment thereto will be placed on the filings inventory as D-3. This email will be added to the filings inventory as D 3 A.

2. The Presiding Officer has determined that an 8-5 conference is necessary to meet, and to meet with the parties to facilitate efficient trial proceedings. The Presiding Officer does not intend to do anything outside the scope of an 8-5 conference.

3. The Presiding Officer understands that the defense had previously made an engagement for the morning of 10 Jan 2005, and had additionally made arrangements to meet with the accused this afternoon. Accordingly, as soon as possible the prosecution and defense will provide recommended times when they can meet with the Presiding Officer on 10 Jan 06. If the parties cannot agree on a time, the 8-5 conference will be held at 1900, 10 Jan 06 to ensure that the defense has sufficient time to return from their afternoon appointment.

4. The defense motion is DENIED. If matters are discussed that are, in the opinion of a party, beyond the scope of an 8-5 conference, the defense may make a specific motion on the matter.

5. The Defense will arrange with the Assistant to electronically deliver the attachments the motion states are electronically embedded but would be provided at a later date.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

---Original Message---
From: Merriam, John J CPT JTFGTMO OMC (L)
Sent: Tuesday, January 10, 2006 12:35 AM
To: Hodges, Keith H. CTR (L); Dalva, Morris D Col JTFGTMO OMC Prosecution (L)
Cc: [redacted]
Subject: RE: Conference - al Bahlul and Khadr - 10 Jan 06

Sir:
<< File: Motion Opposing 8-5.doc >>
Acknowledge receipt of this email. Attached, please find Defense Motion Opposing 8-5 Session. Due to technical difficulties which we will try to resolve on 10 Jan., I could not scan a signed copy. I am therefore attaching the motion in word form, and will serve signed copies with attachments on 10 January to all parties.

v/r,

John J. Merriam
CPT, JA
Detailed Defense Counsel

-----Original Message-----
From: Hodges, Keith H. CTR (L)
Sent: Monday, January 09, 2006 8:28 PM
To: [redacted]
Cc:
Subject: Conference - al Bahlul and Khadr - 10 Jan 06

All counsel advise of receipt of this email.

COL Brownback requests that all counsel in US v. al Bahlul meet in the Presiding Officer's office at 1300, 10 Jan 05.

COL Chester requests that all counsel in US v. Khadr meet in the Presiding Officer's office at 1430, 10 Jan 06.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
[redacted]

الولايات المتحدة الأمريكية	)	الاتهامات:
	)	التآمر؛
ضد	)	القتل عن طريق المحارب غير الحاصل على الامتياز؛
عمر أحمد خضر	)	محاولة القتل عن طريق المحارب غير الحاصل على الامتياز؛
المعروف أيضاً باسم أخبار فرهاد	)	مساعدة العدو
المعروف أيضاً باسم أخبار فرناد	)	

الاختصاص القضائي

1. تحصل اللجنة العسكرية على الاختصاص القضائي من خلال تقرير الرئيس بتاريخ 30 يونيو تموز 2005 القاضي بأن عمر أحمد خضر (المعروف أيضاً باسم أخبار فارهاد، والمعروف أيضاً باسم أخبار فارناد، المشار إليه لاحقاً باسم خضر) يخضع لأمره العسكري الصادر بتاريخ 13 نوفمبر تشرين الثاني 2001.

2. يخضع التصرف الذي يتهم به خضر لمحاكمة اللجنة العسكرية.

الادعاءات العامة (القاعدة)

3. قام أسامة بن لادن وآخرون بإنشاء تنظيم القاعدة في عام 1989 أو في فترة قريبة من ذلك التاريخ وذلك من أجل مواجهة بعض الحكومات والمسؤولين باستخدام القوة والعنف.

4. يعرف أسامة بن لادن بأنه أمير القاعدة.

5 أحد أهداف القاعدة، كما يذكره أسامة بن لادن وآخرون من زعماء القاعدة، هو دعم الهجمات العنيفة على الأملاك الأمريكية والمواطنين الأمريكيين (العسكريين والمدنيين) حتى تقوم الولايات المتحدة بسحب قواتها من شبه الجزيرة العربية انتقاماً لدعم الولايات المتحدة لإسرائيل.

6. يقوم مجلس الشورى بتوجيه عمليات وأنشطة القاعدة. ويتكون هذا المجلس من لجان ومنها لجنة سياسية ولجنة عسكرية ولجنة أمنية ولجنة مالية ولجنة إعلامية ولجنة دينية/قانونية.

7. في الفترة ما بين 1989 حتى 2001، قامت القاعدة بتأسيس معسكرات تدريب ومنازل ضيافة وأنشطة أعمال تجارية في أفغانستان وباكستان ودول أخرى من أجل تدريب ودعم الهجمات العنيفة على الأملاك والمواطنين الأمريكيين وغير الأمريكيين (العسكريين والمدنيين).

8. في أغسطس آب 1996 قام أسامة بن لادن بإصدار *"إعلان عام للجهاد ضد الأمريكيين"* دعا فيه لقتل العسكريين الأمريكيين العاملين في شبه الجزيرة العربية.

9. في فبراير شباط 1998، قام أسامة بن لادن وأيمن الظواهري وآخرون بإصدار فتوى تحت لواء "الجبهة الإسلامية الدولية لمحاربة اليهود والصليبيين"، وطالبت الفتوى من جميع المسلمين القادرين العمل بذلك على قتل الأمريكيين سواء مدنيين أو عسكريين أينما كانوا وأن يقوموا "بنهب أموالهم".

10. وفي 29 مايو أيار 1998 أو في تاريخ مقارب قام أسامة بن لادن بإصدار بيان بعنوان "القنبلة النووية الإسلامية" تحت لواء "الجبهة الإسلامية الدولية لمحاربة اليهود والصليبيين"، حيث صرح بأنه "من واجب المسلمين إعداد ما استطاعوا من قوة لإرهاب أعداء الله".

11. ومنذ 1989 قام أعضاء وشركاء القاعدة المعروفين وغير المعروفين بشن العديد من الهجمات الإرهابية مثل – على سبيل المثال لا الحصر – الهجمات على السفارات الأمريكية في كينيا وتنزانيا في أغسطس آب 1998 والهجمات على السفينة الحربية الأمريكية يو إس إس كول في أكتوبر تشرين الأول 2000 والهجمات على الولايات المتحدة في 11 سبتمبر أيلول 2001.

خلفية

12. ولد خضر في 19 سبتمبر أيلول 1986 في تورنتو بكندا. وفي عام 1990 انتقل خضر بصحبة عائلته من كندا إلى بيشاور في باكستان.

13. وكان والد خضر، أحمد سعيد خضر (المعروف أيضا باسم أحمد خضر والمعروف أيضا باسم عبد الرحمن الكندي، والمشار إليه لاحقا باسم أحمد خضر)، قد اشترك في تأسيس المشروع الدولي للصحة والتعليم بكندا (HEPIC) وعمل به، وهي منظمة عملت – على الرغم من أهدافها المعلنة الخاصة بتوفير الإغاثة الإنسانية ليتامى أفغانستان – في توفير الدعم المالي للقاعدة من أجل دعم معسكرات التدريب للإرهابيين في أفغانستان. وكان أحمد خضر من كبار أعضاء القاعدة ومن أقرب شركاء أسامة بن لادن والعديد من كبار أعضاء القاعدة.

14. في أواخر عام 1994 تم اعتقال أحمد خضر بواسطة السلطات الباكستانية بسبب توفير المال لدعم تفجير السفارة المصرية في باكستان. وبينما كان أحمد خضر قيد الاعتقال عاد عمر خضر مع أشقائه إلى كندا للإقامة مع جدوده. وقد التحق خضر بالمدرسة في كندا لمدة سنة واحدة بينما كان والده مسجونا في باكستان قبل العودة إلى باكستان في 1995.

15. وفي 1996 انتقل خضر مع عائلته من باكستان إلى جلال أباد بأفغانستان.

16. من عام 1996 حتى عام 2001 تنقلت عائلة خضر في أرجاء أفغانستان وباكستان بما في ذلك رحلات سنوية إلى مجمع أسامة بن لادن في جلال أباد من أجل الاحتفال بعيد الفطر. وبينما كان يقوم بالسفر برفقة والده رأى عمر خضر أو قابل قادة القاعدة البارزين بما في ذلك أسامة بن لادن والدكتور أيمن الظواهري ومحمد عاطف (المعروف أيضا باسم أبو حفص المصري) وسيف العدل. وقد قام خضر أيضا بزيارة العديد من معسكرات التدريب ومنازل الضيافة التابعة للقاعدة.

17. عقب وقوع الهجمات الإرهابية للقاعدة على الولايات المتحدة في 11 سبتمبر أيلول 2001 انتقلت عائلة خضر بشكل متكرر عبر أفغانستان.

18. وفي صيف 2002 تلقى خضر تدريب أساسي شخصي وخاص لدى القاعدة. وشمل التدريب استخدام القذائف التي تطلق عن طريق الصواريخ والبنادق والمسدسات والقذائف اليدوية والمتفجرات.

19. وعقب استكمال تدريبه التحق خضر بفريق منفذي عمليات آخرين في القاعدة وقام بتحويل الألغام الأرضية إلى أجهزة تفجير متطورة عن بعد، وقام بزرعها بعد ذلك في منطقة كان من المعروف أن قوات الولايات المتحدة تمر بها.

20. قامت قوات الولايات المتحدة بإلقاء القبض على خضر في 27 يوليو تموز 2002 عقب تبادل لإطلاق النيران نتج عنه وفاة أحد المجندين الأمريكيين.

الاتهام الأول: التآمر

21. قام عمر أحمد خضر في أفغانستان وفي مناطق محيطة بها في الفترة ما بين يونيو حزيران 2002 و27 يوليو تموز 2002 أو في فترة قريبة من هذه التواريخ عن علم وقصد بالاشتراك في تنظيم مكون من مجموعة أشخاص أصحاب أهداف إجرامية مشتركة وتآمروا واتفقوا مع أسامة بن لادن وأيمن الظواهري والشيخ سيد المصري ومحمد عاطف (المعروف أيضاً باسم أبو حفص المصري) وسيف العدل وأحمد سعيد خضر (المعروف أيضاً باسم عبد الرحمن الكندي) وشتى أعضاء آخرين بتنظيم القاعدة معروفين وغير معروفين باقتراف الجرائم التالية التي تستوجب المحاكمة بواسطة اللجنة العسكرية: مهاجمة المدنيين ومهاجمة أهداف مدنية والقتل العمدي بواسطة المقاتل غير الحاصل على الامتياز وتدمير الأملاك بواسطة المقاتل غير الحاصل على الامتياز والإرهاب.

22. ولتعزيز هذه المشروعات والمؤامرات قام الخضر وأعضاء آخرين تابعين للقاعدة بارتكاب الأعمال السافرة التالية:

أ. في أو في فترة قريبة من يونيو حزيران 2002 تلقى خضر فترة شهر من تدريبات القاعدة الشخصية الخاصة على يد أحد أعضاء القاعدة الذي يدعى "أبو حدي". وقد قام والد عمر خضر المدعو أحمد سعيد خضر بإعداد هذا التدريب والذي تكون من التدريب على استخدام القذائف التي تطلق عبر الصواريخ والبنادق والمسدسات والقذائف اليدوية والمتفجرات.

ب. في أو في فترة قريبة من يونيو حزيران 2002 قام خضر بإجراء عمليات مسح واستطلاع للجيش الأمريكي. وقد توجه خضر لإحدى المطارات بجوار خوست في أفغانستان وقام بمراقبة المواكب الأمريكية لدعم الهجمات المستقبلية ضد الجيش الأمريكي.

ج. في أو في فترة قريبة من يوليو تموز 2002 تلقى خضر تدريب لمدة شهر على الألغام الأرضية.

د. في أو في فترة قريبة من يوليو تموز 2002 التحق خضر بمجموعة من منفذي العمليات في القاعدة وقام بتحويل الألغام الأرضية إلى أجهزة تفجيرات مطورة وقام بزرعها في منطقة كشفت عمليات المسح السابقة أن قوات الولايات المتحدة مرجح أن تعبرها.

ه. وفي أو في فترة قريبة من 27 يوليو تموز 2002 اشتبك خضر وأعضاء آخرين في القاعدة مع قوات عسكرية أمريكية عندما قام أعضاء من العسكر بإحاطة مجمعهم. وخلال إطلاق النار قام خضر بإلقاء قذيفة أدت إلى قتل الرقيب الأول

RE 42 (Khadr)
Page 3 of 4

كريستوفر سبير. وبالإضافة إلى قتل الرقيب أول سبير تم إطلاق النار على اثنان من أعضاء قوات ميليشيا الأفغان الذين كانوا يرافقون القوات الأمريكية مما أدى إلى قتلهم. وقد جرح أيضاً العديد من الجنود الأمريكيين.

الاتهام الثاني: القتل العمد عن طريق المحارب غير الحاصل على الامتياز

23. قام عمر أحمد خضر في أفغانستان في 27 يوليو تموز 2002 أو فترة قريبة من هذا التاريخ بقتل عمدا الرقيب الأول كريستوفر سبير من الجيش الأمريكي في نطاق وسياق نزاع عسكري وبدون التمتع بحصانة المقاتل وذلك من خلال إلقاء قذيفة يدوية تسببت في مقتل الرقيب الأول كريستوفر سبير.

الاتهام الثالث: محاولة القتل عن طريق المحارب غير الحاصل على الامتياز

24. قام عمر أحمد خضر في أفغانستان في الفترة ما بين 1 يونيو حزيران 2002 و27 يوليو تموز 2002 أو في فترة قريبة من هذه التواريخ بمحاولة قتل عمدا أشخاص متعددين في نطاق وسياق نزاع عسكري وبدون التمتع بحصانة المقاتل من خلال تحويل الألغام الأرضية إلى أجهزة تفجيرات مطورة وزرعها في الأرض في منطقة كشفت عملية المسح السابعة أن قوات الولايات المتحدة مرجح أن تعبرها.

الاتهام الرابع: مساعدة العدو

25. قام عمر أحمد خضر في أفغانستان في العديد من المناسبات خلال الفترة ما بين 1 يونيو حزيران 2002 و27 يوليو تموز 2002 أو في فترة قريبة من هذه التواريخ في سياق ونطاق نزاع عسكري بمساعدة بشكل مفتعل العدو، أي القاعدة.

Filings Inventory - US v. Khadr v5

PUBLISHED: 11 Jan 06

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
				•	
				•	
				•	
				•	
				•	
				•	
				•	

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 - Scheduling and Docketing	• Email of 2 Dec announcing first session of week of 9 Jan, 2 Dec 05 • A. Email to remind counsel to respond to PO 1, 7 Dec 05 • B. CPT Merriam's response to PO 1 and POs reply, 8 Dec 05. • C. Prof Wilson's Response to PO 1, 8 Dec. • D. Prof Ahmad's Response to PO 1, 8 Dec • E. Prof Ahmad's email for clarification and PO response, 9 Dec • F. Announcement of specific Jan 06 session times, 9 Dec 05. • G POs bio summary for voir dire, 9 Dec 05. • H. Excusing counsel from sessions at GTMO 16 Dec 05	OR - 1 A - 2 B - 13 C - 14 D - 15 E - 16 F - 17 G - 18 H - 19
PO 2 - Discovery	• Discovery Order filed with counsel, 19 Dec 05	OR - 20
	•	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
1	NA	NA	20 Dec 05	Email to counsel to send active protective orders or to request same.	24
3				• Prosecution Request - FOUO - Law Enforcement sensitive • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) •	ORIG – 27 A - 32

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes OR = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1 - Motion for Continuance Based on SDDC Request (5 Jan 06)	5 Jan 06	XXXX	XXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 36 A – 38
D 2 - Motion to Abate Proceedings of the Military Commission due to MCO No. 1s Fatal Inconsistency with the President's Military Order	5 Jan 06	XXXX	XXXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 37 A - 39
D 3 – Motion in Opposition to the Presiding Officer's Order to Counsel to Appear at an Off-the-Record Conference Pursuant to MCI No. 8, Paragraph 5	10 Jan 06	XXXXX	XXXXX	• Motion filed 10 Jan and denied. Defense to provide APO with missing attachments. • A. Motion denied by PO	OR – 40 A - 41
				•	
				•	
				•	

Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
2	Protective Order 1	1	11 Jan 06	• Prosecution Request - Protection of Identities of Investigators and Interrogators. • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed	ORIG – 26 A – 33 B - 45
4	Protective Order 2	2	11 Jan 06	• Prosecution Request - Protection of Identities of all witnesses • A. Defense objection to issuing order at all. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed	ORIG – 28 A – 34 B - 46

Index of Current POMs – November 12, 2005

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005

* - Also a joint document issued with the Chief Clerk for Military Commissions.

Office of the Presiding Officer
Military Commission

14 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 1-2 - Presiding Officers Memoranda

This POM supercedes POM # 1-1 dated 12 August 2004

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer has established Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and others concerned within the Office for Military Commissions. In general, these POMs are issued to assist the Commission and its participants, to include the Presiding Officer, in preparing for and providing a full and fair trial under the provisions of Commission Law as defined below.

2. POMs, communications with counsel, and courtroom proceedings may use the term "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.

3. Numbering and effective dates of POMs.

a. Each POM will be limited to a single, general subject.

b. Changes to POMs will be in the form of rescinding a previous POM and reissuing a complete revision. Revised POMs will carry a number with a hyphen. *Example*: POM 15 is the first POM on a topic. If that POM is changed, the new POM will be numbered 15-1. A subsequent change would be POM 15-2.

c. A POM is effective on the date of the POM unless otherwise indicated.

d. References to superseded POMs. In some cases, one POM may refer to another, but the reference is out of date. References to superseded POMs will be read to refer to the current POM in the series. *Example:* POM 15 refers to POM 4-1. Later, POM 4-2 is issued but the reference in POM 15 is not changed immediately. Though the reference in POM 15 is no longer current, POM 4-2 (and not POM 4-1) is still in effect. Furthermore, POM 15 shall be read to refer to POM 4-2 because POM 4-2 is the current one in the POM 4 series.

4. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

5. Some POMs may be issued in conjunction with the Chief Clerk for Military Commissions when there may be shared responsibility among or between the Presiding Officer, the Assistant to the Presiding Officers and the Chief Clerk.

Signed by:

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

Office of the Presiding Officer
Military Commission

September 14, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 2-2 Appointment and Role of the Assistant to the Presiding Officers

This POM supersedes POM # 2-1, dated September 16, 2004

1. Pursuant to Military Commission Order No. 1, and Military Commission Instruction No. 6, an Assistant to the Presiding Officers has been detailed and shall report to the Presiding Officer and work under his supervision to provide advice in the performance of the Presiding Officer's adjudicative and administrative functions. The Assistant may act on behalf of the Presiding Officer. The Assistant does not act, and does not have authority to act, on any matter or in any manner, on behalf of the Appointing Authority. (See Appointing Authority Memorandum, SUBJECT Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions, 19 Aug 2004 - Enclosure 1.)

2. The current Assistant to the Presiding Officers is Mr. Keith Hodges who has been detailed by the Department of Homeland Security. The Assistant to the Presiding Officers is also referred to as the Commission Trial Clerk. His duties are:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on substantive legal, procedural, logistical, and administrative matters and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officers of the Military Commissions, which may require legal or other analysis of substantive legal, procedural, logistical, and administrative matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers, to include providing advice to the Presiding Officers in connection with their performance of adjudicative functions, *ex parte* if required, with respect to substantive legal, administrative, logistical, and procedural matters. (See ABA Model Code of Judicial Conduct Canon 3B(7)).

d. Act on the Presiding Officer's behalf to make logistical and administrative arrangements.

e. Draft, coordinate, staff, and publish guidelines for Commission Proceedings to include Presiding Officer Memoranda (POM). (POMs must be personally approved by the Presiding Officer.)

f. Process and manage policy, procedure, and similar actions and activities designed to contribute to the efficient operation of the Commission - both current and future operations.

g. Coordinate the integration of operations that affect in-court proceedings with OMC and JTF, Guantanamo Bay, and other support personnel - to include the bailiff, security personnel, and court reporters - in providing services to the Commission.

h. To sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, or does direct, except those that under Commission Law or a POM can only be performed personally by the Presiding Officer.

i. Other duties not listed above which are consistent with improving the processes, procedures, administration, and logistics of the Office of the Presiding Officer and the Commissions and which are not inconsistent with paragraph 3 below.

3. The Assistant is *not* authorized to:

a. Communicate or discuss any matter with any Commission member or alternate member (except the Presiding Officer) other than to arrange for their administrative and logistical needs.

b. Be present during any closed conference or session of the members.

c. Advise the Presiding Officer concerning the decision on any matter that requires the vote of the entire Commission, including the Presiding Officer; however, the Assistant may prepare any documents and drafts necessary or required to *process, record, and disseminate* any decision by the Commission.

d. Provide any substantive advice to the Presiding Officer on any matter that, at the time the substantive advice would be offered, requires a vote or decision by the entire Commission, including the Presiding Officer.

4. Except as approved in advance in writing by the Presiding Officer, Mr. Hodges is not permitted to perform any duties for the Department of Homeland Security that involve: advice to law enforcement concerning an active case or investigation; advice on how to detect, investigate, or prosecute alleged acts of terrorism or violations of international law; or any other matter that would create a perception in the minds of a reasonable person that the Assistant's home agency (Department of Homeland Security) has any part in the Commission process through the actions of the Assistant.

5. Any email which is sent to the Presiding Officer will be CC to the Assistant to the Presiding Officers. If counsel believe there is a legal reason not to CC the Assistant to the Presiding Officers, counsel shall include that reason in the email to the Presiding Officer.

Signed by:

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

1 Enclosure
As stated

[redacted]

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

19 August, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions

This memorandum sets forth the reporting relationships and levels of authority for persons assigned as Assistant to the Presiding Officer.

Pursuant to Section 4(D), Military Commission Order No. 1 and Paragraph 3(B)(11), Military Commission Instruction No. 6, an Assistant to the Presiding Officer shall report to the Presiding Officer. The Assistant to the Presiding Officer will work under the supervision of the Presiding Officer and provide advice in the performance of the Presiding Officer's adjudicative functions. The Assistant to the Presiding Officer will act on behalf of the Presiding Officer.

The Assistant to the Presiding Officer does not act, and does not have authority to act, on any manner on behalf of the Appointing Authority.

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

cc: Chief Prosecutor
Chief Defense Counsel

[redacted]

Office of the Presiding Officer
Military Commission

8 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 3-1: Communications, Contact, and Problem Solving

This POM supersedes POM # 3 dated July 19, 2004

1. This POM establishes general procedures for communications among counsel, the Presiding Officer, and the Assistant to the Presiding Officers. These procedures are designed to avoid *ex parte* communications, to ensure the accused receives a full and fair trial, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications.

2. The preferred, and most reliable, method of communication among the Presiding Officer and counsel is email with CCs to opposing counsel and the Assistant. The following email conventions will be followed. Counsel should review the enclosure on the benefits of email communications.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject.

c. Use a descriptive subject line in the email. If the email concerns an item that has a filings inventory number, the subject line *must* include that number.

d. Identify, in the body of the email, each attachment being sent.

e. When sending a document that has an attachment, send all the attachments in the same email as the document to which it is an attachment. (The exception would be if such an email would exceed the capabilities of the LAN.) Parties are welcome to make a filing with all the attachments merged into a single document. Legal NCOs are adept at this.

f. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF).

g. Save all emails you send for your record copy of the communication. Remember that all filings that are before the Commission will be listed on the filings inventory, and it is the responsibility of counsel to compare what they think has been properly filed with the filings inventory.

g. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

h. Avoid archiving (WinZip.) Before sending an archived file, get permission from the PO or APO.

i. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

j. Given the number of counsel and the changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email and advise the sender of the failure to include the person.

k. Counsel are encouraged to CC their own Legal NCOs and the Legal NCOs of opposing counsel. These NCOs have a measurably positive impact on the efficiency and reliability of the system.

3. Because of frequent changes to the composition of trial teams, the Assistant and/or the Presiding Officer may elect to send an email to the Chief Defense Counsel or Prosecutor, and their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. When the Presiding Officer or the Assistant uses this method, the Chief Legal NCO will CC the Assistant with a copy of the email that the Chief legal NCO sends to the counsel.

4. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

5. The Presiding Officer is responsible for insuring that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not, in her/his opinion, being satisfactorily addressed must present the problem to the Presiding Officer if s/he wants the Presiding Officer to take some action. That request may trigger the need to use procedures set forth in another POM.

Signed by:

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

1 Enclosure

Enclosure to POM # 3-1

This enclosure comes from part of an email the Presiding Officer sent on August 4, 2004

To All Counsel,

1. I received an email from a counsel today asking that a particular "e-mail and (counsel's) response be made part of the record of proceedings and published to the public in keeping with the (accused's) right to a public hearing." I thought it would be beneficial to provide a reply that might assist all.

2. In case some of you missed my thoughts on this matter, let me share with you a portion (slightly edited) of an email I sent recently on the general topic of using email in preparing cases for trial.

Most lawyers and judges find email presents a fast, inexpensive, world-wide accessible, and reliable system to share information among multiple parties. It is, in my opinion, far more reliable, faster, and efficient than multiple mailings, multiple fax transmissions, and tracking down people for conference calls. It provides a record that a document was sent and received, and a record of what was done. For those who travel a lot and who are unsure where they will be, one can check an email account, 24 hours a day, in almost any city in the world. I also believe that email is an excellent way of preserving what has transpired - that is, in fact, one of the reasons I chose this method. If there is a question of what communications were made, and the content of those communications, forwarding a previously sent or received email is easy, and any email can be printed and appended to the record. With many lawyers in different parts of the country, email seems smart, in keeping with the technology of today, and mirroring what is being done in State and Federal courts with electronic filings and the like. While a trial cannot and will not be conducted by email, it works for the purposes I have outlined.

3. Everything which is emailed to me or Mr. Hodges is retained, and I feel certain that counsel have kept and will keep copies as well -- both for their own records and in case one of us misses something.

4. A record of trial will be prepared in this case and will consist of many things we are all familiar with, primarily testimony and exhibits. One type of exhibit - referred to as an Appellate Exhibit in military practice - will be Review Exhibits. I expect that those items or matters which are denominated as Appellate Exhibits in military practice - generally speaking items to complete the record, but which are not used as evidence on the merits or sentencing - will be Review Exhibits for Commission proceedings.

5. I would expect that if there is a dispute on a matter, or if an email or other writing is part of what counsel wants to offer in motions practice, any party may ask that the item be marked as an RE or offer it as an attachment to an RE. It would probably be unwise to mark every email or writing exchanged between the parties because of the volume involved, but if a counsel thinks it is necessary that an item be marked as an RE, it will be so marked and appended.

6. As to the reference to the emails being "published," I'm not sure of the meaning of that term in this context. After a case is completed, a record of the proceedings will be prepared and forwarded to the Appointing Authority for his action. That is the extent of my publication of documents in this case. As to being published to the public, there is Commission Law on how matters are provided to the public and the role of Public Affairs in that regard. If I missed the meaning, let me suggest counsel wait until we are together in session to discuss it.

7. Incidentally, to assist counsel in identifying and pre-marking trial exhibits, to include REs, I am preparing a POM on that matter (*subsequently issued as POM # 8.*) For those who have problems with Roman numerals (a group which includes the Presiding Officer), you should be pleased to learn that Roman numerals will not be used for REs.

COL Brownback

Office of the Presiding Officer
Military Commission

20 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 4-3: Motions Practice

This POM supersedes POM # 4-2 issued 7 Oct 2004

1. Purpose. This POM establishes the procedures for motions practice before Military Commissions. If a party wishes the Presiding Officer to take action on a matter, it must be presented to the Presiding Officer in accordance with this Memorandum.

2. This POM does not apply to:

a. Service upon anyone other than the Presiding Officer or opposing counsel. As this POM applies only to service of a filing to the Presiding Officer and opposing counsel as to matters to be resolved by the Presiding Officer, it does not constitute service upon the Appointing Authority, the Department of Defense, the Office of General Counsel, the Office of Military Commissions, or any other person or entity other than the Presiding Officer and opposing counsel. With respect to service upon opposing counsel, service is effective only with respect to matters to be resolved by the Commission and the Presiding Officer, and does not constitute service for any other purpose such as to present matters to the Appointing Authority or others for resolution or attention.

b. Formatting filings with respect to witness requests. *See* POM # 10-1.

c. Formatting filings with respect to Access to Evidence, Discovery, and Notice Provisions. *See* POM # 7-1.

d. Formatting filings with respect to Requesting Conclusive Notice to be Taken. *See* POM # 6-2.

e. Wherever another POM specifically provides that this POM, or portions thereof, do not apply.

f. Requests to the entire Commission on the admissibility of evidence as provided in paragraph 6D(1), MCO # 1.

g. Briefs directed by the Presiding Officer. In the Order directing the brief, the Presiding Officer will specify which, if any, provisions of this POM apply.

h. Formatting filings with respect to Requests for Protective Orders or Limited Disclosure. *See* POM # 9-1.

3. Definitions.

a. A "motion," as used in this POM, is the original request from the moving party (the party requesting relief) to the Presiding Officer for any type of relief, or for the Presiding Officer to direct another to perform, or not perform, a specific act.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

c. A "response" is the opposing party's answer to a motion.

d. A "reply" is the moving party's answer to a response.

e. A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when sent via email to the correct email address of the recipient(s). If there is a legitimate question whether the email system functioned correctly (bounced email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received. *See* POM # 12 and paragraph 3g(2) below concerning whether a filing is before the Presiding Officer for decision.

g. Receiving filings.

(1) A filing is "received" by the opposing party when it is sent to the proper parties per paragraph 5 below - with the following exceptions:

(a) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(b) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(c) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Chief Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed. *See* paragraph 13b.

(2) A filing is not received, in terms of being before the Presiding Officer for resolution, unless it has been placed in the filings inventory as an active filing. *See* POM # 12.

4. Managing motions practice. The Assistant to the Presiding Officer may not resolve motions or grant extensions, but the Assistant is authorized to manage the processing of motions and other filings and to direct compliance with this POM to include both matters of form and content, without referral of the matter to the Presiding Officer. Only the Presiding Officer may grant a delay or departure from the time required for a filing; however, the Presiding Officer's decision on such matters may be announced to the parties by the Assistant.

5. Sending, serving, and formatting filings. Enclosures 1-3 provide samples of a motion, response, and reply. In addition, as to every filing, unless this POM or another POM specifically provides otherwise:

a. The filing will be sent by email as an attachment, and will be in Microsoft Word or PDF. If a recipient does not have these programs, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. Attachments will not be in "track changes" or "mark-up" format. The pages will be numbered, and the footer will also indicate the number of pages.

b. All emails to the Presiding Officer and the Assistant will be on a single topic. *See* POM # 3-1. In motions practice, a single email will not address or contain more than one filing.

c. The filing will carry the caption of the case on the top left of the first page, and the subject of filing on the right top. (*See* the samples at the enclosures.) The subject shall be usefully descriptive containing the name of the party (prosecution/defense) filing it, the type of filing (motion, response etc.) and a unique and descriptive name of the filing. Generic or non-descriptive subject lines (such as Motion to Dismiss, or Motion for Appropriate Relief) are not helpful and will not be used. Documents received with non-descriptive or unhelpful subject lines will be returned by the Presiding Officer or the Assistant for compliance with this POM. If a filings inventory number has been assigned, it will be on the first line of the subject. Example: A response to P2 in *US v Jones* should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."*

d. The subject line of the email to which the filing is attached will follow the same guidance as paragraph 5c above to assist the parties in managing email files. If a filings inventory number has been assigned, it will be at the beginning of the subject line.

e. The names given to matters that may appear in the filings inventory may not be classified or otherwise protected as the filings inventory is intended to be transmitted through unsecured networks. Accordingly, counsel must therefore ensure that the names of their filings are not in themselves classified or protected.

f. The email and the filing in the form of an attachment will be sent to all opposing counsel, the Presiding Officer, the Chief Prosecutor and their Deputies, the Chief Legal NCOs for the prosecution and defense, and the Assistant. Once filings have been assigned a filings inventory number, the Assistant will send them to the Chief Clerk of Military Commissions (CCMC.)

g. Emails sending a filing and acknowledgement that the filing was received shall be maintained by both senders and receivers. Note, however, that verification that a filing has been filed with the Commission will be as provided by the Filings Inventory as established by POM # 12.

h. Upon receiving a filing counsel shall immediately:

(1) Examine the address lines to ensure that all counsel concerned have been sent the filing. If not, the sender of the email will be immediately notified.

(2) Examine the contents and all attachments to ensure it is complete (such as in the case where one fails to insert an attachment, or the wrong attachment is included.)

(3) Counsel receiving a filing will reply by email, *only to the sender*, acknowledging receipt.

i. Citations to authority in filings.

(1) Counsel may, and in many cases must, cite authority or references in their filings. The "Blue Book" (Uniform Citations) shall be used.

(2) A web URL (web page address) is NOT acceptable as a citation because a web site can change, or the web page can become unavailable.

(a) *Exception 1:* A web URL may be included as a citation in a filing provided that the document associated with the web URL is contained in the Commissions Library. In such cases, the URL citation shall be immediately followed with an annotation as follows (contained in the Commissions Library.) Filings with this statement will be returned by the Assistant with compliance with this POM if the document is not, in fact, in the Commissions Library. *See* POM # 14-1 on having items placed into the Commissions Library.

(b) *Exception 2:* A web URL may be included as a citation in a filing if the document associated with the web URL is provided as an electronic attachment. In such cases, the URL will be followed with the annotation (___ pages attached as attachment ___.). Filings with this statement will be returned by the Assistant for compliance with this POM if the document is not, in fact, attached. *See* paragraph 6 below for more information about attachments, their form, and how they are attached and transmitted.

6. Attachments to filings.

a. Counsel may find it beneficial to include attachments to their filings.

b. Attachments are required for any matter that the filing party wishes the Presiding Officer to consider in deciding the matter except:

(1) For items in the Commissions Library.

(2) For reported cases and other legal authority available through Lexis-Nexis or West Law.

(3) If the item has been previously provided in the form of an attachment by either party in any filing with respect to the *same* series of filings to which a response, reply, or supplement is being filed. Required attachments filed in different motions shall be attached again.

(4) If the matter has already been marked as an exhibit in a Commissions trial proceeding held on or after Sept 1, 2005.

c. All attachments to a filing will be sent in the same email as the filing. As an exception, if such an email would exceed the capabilities of the LAN, addressees of the email should be advised that an attachment will be sent by separate email. This practice will be used judiciously. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM. Parties are welcome to make a filing with all the attachments to the filing merged into a single document.

d. Text attachments to filings will be in Microsoft Word, HTM/HTML, or RTF. Attachments will not be in "track changes" or "mark-up" format. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

e. Before sending an archived file (such as WinZip), get permission from the Assistant or the Presiding Officer.

f. Listing attachments.

(1) The last paragraph of any filing that includes attachments shall state in separate sub-paragraphs the name of the attachment, the number of pages, and that it is part of the email sending the filing. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM.

(2) If a filing is sent that has all attachments merged into a single document (*See* paragraph 6(c) above), the last paragraph of the filing shall indicate that "the following attachments are electronically merged into this filing" and then list all such attachments and the number of pages of each individual attachment in separate sub-paragraphs.

7. Notice of motions.

a. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion using the provisions in paragraphs 5 and 6 above. The notice, contained in an attachment, shall state the specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

b. As an exception to paragraph 7a, a notice of a motion is not required if the party who is required to provide notice is able to file a motion within three duty days of when a notice of motions would ordinarily be due.

c. A notice of motion is not a motion, and it does not place an issue or matter before the Presiding Officer for decision. If a party files a notice of motion but does not file a motion, the Presiding Officer will not take any action on the underlying issue for which notice has been given. *See* also POM # 12, Filings Inventory.

d. Failure to provide timely Notice of Motion under this paragraph may result in waiver of the ability to file a motion. Requests for exceptions to waiver must be made to the Presiding Officer with specific reasons for failure to provide Notice of Motion in a timely fashion.

8. Motions.

a. Timing. Ordinarily the Presiding Officer will establish a deadline for the filing of motions by way of an Order.

b. Format of a motion: *See* enclosure 1.

c. Waiver. Motions which are not made in a timely fashion shall be waived. Requests for exceptions to waiver must be addressed to the Presiding Officer with motion-specific reasons for failure to make the motion in a timely fashion.

9. Responses.

a. **Timing.** Unless the Presiding Officer provides otherwise, a response is due within 7 calendar days after a motion is received.

b. **Format of a response:** *See* enclosure 2.

10. Replies.

a. Counsel may submit a reply to a response, however they must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

b. **Timing:** Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

c. **Format for a reply:** *See* enclosure 3.

11. Supplements to filings.

a. Supplements may be filed for any reason *provided however*, that a party wishing to file a supplement must first obtain permission from the Presiding Officer briefly stating the reason why a supplement is necessary. Supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. A request to file a supplement is a special request for relief. *See* para 12 below. All the provisions of paragraphs 5 and 6 apply, except that the request may be contained in the body of an email. The request shall briefly state the reason why a supplement is necessary.

c. If the Presiding Officer authorizes a supplement to be filed and one is filed, all the provisions of paragraphs 5 and 6 shall apply in the manner and form (attachment) in which the supplement is sent. The supplement itself shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. Common special requests for relief could address, for example, requests to: supplement a filing, for extension to submit a filing, for an extension of a POM timing requirement, to adjust the "received" date of a filing, to append or attach documents to a previously made filing, an exception to a requirement to digitize attachments, or like matters that do not require involved questions of law or fact. A motion in the form of a special request for relief relieves counsel of the specialized format for filings generally.

b. A motion in the form of a special request for relief will be filed following the requirements of paragraph 5 above except the request may be in the body of an email.

c. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the Presiding Officer.

d. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, because the time for a notice of motion or other filing has passed, or solely to avoid the formatting requirements of paragraph 8b and enclosure 1.

e. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority if any, and why the relief is necessary.

13. Request for extensions of time.

a. Requests to extend the time provisions in this POM shall be in the form of a special request for relief. The request itself may be contained in the body of an email. The provisions of paragraphs 5 and 6 apply.

b. The request may be made by any counsel on the case. It may also be made by the Chief or Deputy Chief Prosecutor, or the Chief or Deputy Chief Defense Counsel, if detailed or civilian counsel on the case are unavailable to receive service of a filing, is unavailable, or otherwise is unable to request an extension.

14. Burdens of proof and persuasion. As a general rule, the burden of proof (production of evidence) and the burden of persuasion in motions practice is on the moving party. In any motion in which the moving party does not believe that the general rule should apply or believes that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide:

a. A statement of the burden of proof (production of evidence) in the particular motion,

b. A statement of the burden of persuasion in the particular motion,

c. The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party, and

d. The legal argument in support of the statement, particularly focusing on Commission Law.

15. Security considerations and exceptions.

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. No party may send any classified or other protected material to the Presiding Officer or the Assistant by email. If there is a need to transmit classified or protected material to the Presiding

Officer or the Assistant, counsel will so advise the Assistant. The Assistant will provide transmission protocols.

c. Filings that contain classified or other protected information. In the event that a motion or filing contains classified or other protected information, the person preparing the filing will send a notice of motion in accordance with paragraph 7 above sufficiently detailed - consistent with not revealing classified or other protected information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

16. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts, that are necessary to resolution of the motion, are in dispute which requires the taking of evidence, or

b. A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Presiding Officer from ruling on the filings alone.

c. The Presiding Officer, in his sole discretion, determines that oral argument is necessary to provide a full and fair trial.

17. Nothing in this POM should be construed to dissuade counsel from an early sharing of information, to include motions and other filings, to ensure a full and fair trial.

Original signed by:

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

3 Enclosures
1. Format for Motion
2. Format for Response
3. Format for Reply

Enclosure 1 to POM # 4-3, Format for a Motion

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	*Note: A filings inventory number is not usually available for the first motion or filing in a series. It will be added by the APO when the filing is received, and included in responses and replies.* **Defense Motion** **to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones** **[Date motion filed]** *Note: Use bold as shown above.*

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer or a statement of the reason why it is not.

2. A concise statement of the relief sought.

3. (Optional): An overview of the substance of the motion.

4 (May be required.) Statement concerning burden of proof. *See* paragraph 14 of this POM.

5. The facts, and the source of those facts (witness, document, physical exhibit, etc). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are or the identity of the source is protected or classified, that status will be noted.

6. Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.

7. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.

8. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. (Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.

9. Additional information not required to be set forth as above.

10. A list of attachments. (*See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.)

(Note: a size 11 font was used to provide this information on a single page. Please use a 13 or 14 font.)

Enclosure 2 to POM # 4-3. Format for a Response

UNITED STATES OF AMERICA	D 104 [Name of Accused]
v.	**Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones
[Name of Accused]	
[aka if any; not required]	[Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit what relief, if any, the responding party believes should be granted.

3. Overview - Only if the motion contains an overview paragraph. This paragraph is not required even if the motion had an overview paragraph.

4. Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. These will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is Protected or classified, that status will be noted. These will correspond to the subparagraph in the motion containing the facts involved.

6. Why the law does not require or permit the relief sought in light of the facts alleged including proper citations to authority relied upon. (*See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.)

7. (May be required): Address this POM's paragraph14 issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.

8. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.

9. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. See POM # 9-1.

10. Additional information not required to be set forth as above.

11. A list of attachments. See paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.

(Note: a size 11 font was used to provide this information on a single page. Please use a 12 font in the filing.)

Enclosure 3 to POM # 4-3. Format for a Reply

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	D 104 [Name of Accused] Defense Reply to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.

3. Citations to additional authority if necessary. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.

4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.

5. Additional information not required to be set forth as above.

6. A list of any additional attachments. *See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.

Office of the Presiding Officer
Military Commission

September 19, 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

SUBJECT: Presiding Officers Memorandum (POM) # 5-1 - Spectators at Military Commissions

This POM supersedes POM # 5 dated 2 Aug 2004.

1. Commission Law provides for open Commission proceedings except when the Presiding Officer determines otherwise. Commission Law also charges the Presiding Officer to maintain the decorum and dignity of all Commission proceedings.

2. The enclosed document, "Decorum for Spectators Attending Military Commissions," shall be in force whenever the Commission holds proceedings open to spectators. The enclosure may be used by bailiffs, security personnel, those with Public Affairs responsibilities, and other Commission personnel to inform spectators and potential spectators of the conduct and attire expected.

3. There are other rules that pertain to media personnel that have been prepared and disseminated by Public Affairs representatives. The enclosure does not limit or change those rules.

4. In conjunction with the Joint Task Force Guantanamo Bay, Office of Military Commissions, the responsible Public Affairs Office, security personnel, the Chief Prosecutor, the Chief Defense Counsel, and the Assistant to the Presiding Officer, the Chief Clerk for Military Commissions (CCMC) will be responsible for preparing and issuing spectator seating charts. To the extent possible, the CCMC will allocate specific areas in the courtroom where different persons and entities may sit, and issue passes to designated personnel who may in turn issue the passes to spectators. The Assistant to the Presiding Officer will assist the CCMC as needed in working with in-court security personnel to resolve spectator issues.

Approved by:

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

M. Harvey
Chief Clerk of Military Commissions

1 Enclosure

Decorum for Spectators Attending Military Commissions
(Enclosure to POM 5-1)

The decorum and dignity to be observed by all at the proceedings of this Military Commission will be the same as that observed in military and federal courts of the United States.

Spectators, including members of the media, are encouraged to attend all open Commission proceedings. The proceedings may be closed by the Presiding Officer for security or other reasons.

The following rules apply to all persons, to include spectators, observers, and trial participants, in the courtroom. Failure to follow these rules may result in being denied access to the courtroom, and could result in a charge of contempt of court and expulsion from commission-related activities at Guantanamo Bay, Cuba. Nothing in this POM, however, prohibits properly appointed JTF security forces from bringing into the courtroom those items, or that equipment, needed in the official performance of their duties as authorized by security plans approved by the Commanding Officer, JTF Guantanamo Bay.

a. All military commission spectators must wear appropriate attire. Generally, casual business attire is appropriate for civilians. Examples of acceptable casual business attire include: long-pants, knee-length skirts, and collared shirts with sleeves. Inappropriate attire would include, but is not limited to, the following: shorts, sleeveless shirts (tank tops, halter tops, etc.), denim jeans, T-shirts, mini skirts, and any accessories or other attire with political slogans. Individuals wearing inappropriate attire will not be permitted to observe courtroom proceedings in the courtroom.

b. All persons and all items entering or present in the courtroom are subject to inspection at any time for contraband or items that are, or could be used as, a weapon or that could pose a security risk.

c. No distractions are permitted during court sessions to include, but not limited to: talking, eating, drinking, chewing gum, standing and stretching, sleeping, using tobacco products, or other disruptions. Due to the hot and humid environment in Guantanamo Bay, clear bottled water with a re-closable lid will be permitted in the courtroom and may be consumed therein. No other beverages or food are permitted in the courtroom while commissions are in session.

d. Spectators are not permitted to interact with trial participants either during sessions or breaks in the proceedings. Trial participants include: the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, and other personnel assisting in the conduct of military commissions. Spectators are also expected to respect the privacy of other spectators during trial recesses and not press for unsolicited interactions.

e. Sketching or artistic renditions in the courtroom while court is in session are not allowed except for that pool sketch artist as arranged through the Public Affairs Office.

f. It is improper for anyone to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. For the same reason, signs, placards, leaflets, brochures, clothing, or similar items that could convey a message about the proceedings are also not allowed in the courtroom or in the courtroom's vicinity.

g. As is customary in court proceedings, spectators will rise when the bailiff announces "All rise."

h. The following items may not be present or brought into the courtroom during any session:

1. Computers, laptops, PDIs, PDAs, pagers, cell phones, tape/CD/ MP3 players, audio recorders, video recorders, cameras, and any and all other types of electronic or battery-operated devices. Not only can these devices be distracting to others in the courtroom, but they pose a substantial security risk. Counsel and their trial assistants, court reporters, and the Closed Circuit TV operator may have computers. The court reporter, the Closed Circuit TV operator and Commission translators may have cameras and audio recorders to be used in the performance of their official duties.

2. Weapons or items that can be used as a weapon to include firearms, knives, explosives of any kind, staplers, letter openers, scissors, and the like.

i. Spectators may bring the following into the courtroom:

1. Legal or writing pads (long or short) with or without pocket covers or portfolios. (Ring binders of any size are not permitted.)
2. Manila folders containing papers.
3. Cardboard accordion folders containing papers.
4. Plastic Velcro-type binders containing bound papers or documents.
5. Pens, pencils, and highlighters.
6. Purses not to exceed 5" X 8" X 3" in size, with or without a carrying strap, containing personal items.

j. Entering and exiting the courtroom will be only through the south entrance. Leaving the courtroom once a session has begun will be limited to extreme emergencies, and every attempt should be made to take comfort breaks during court recesses.

k. Members of the media are reminded they have agreed to certain rules established by Pubic Affairs representatives.

I. Properly-badged Commissions staff personnel participating in a session of the Commission (counsel, translators, paralegals, reporters, and others designated by the JTF Commander, the Assistant, the Presiding Officer, or the Chief Clerk for Military Commissions) will abide by the above guidance with the following exceptions:

1. Papers, documents, exhibits, file folders, file boxes, and other items necessary to presenting or conducting the case may be brought into the courtroom in any container so long as the container or item does not present a security risk as determined by the Assistant in consultation with JTF security personnel. These items are subject to inspection. When inspecting items brought into the courtroom by counsel for the Prosecution or Defense to include their trial assistants, care will be taken to avoid reading or disclosing attorney-client privileged information.

2. Items that are necessary for conducting the trial but might be used as a weapon (scissors, staplers, rulers or the like) will not be brought into the courtroom except as approved *in advance* by the Assistant in consultation with JTF security personnel.

3. Properly-badged Commissions personnel may use the north entrance and enter and leave during recesses. When operationally necessary, and when done in a manner that will not disturb the proceedings, properly-badged Commissions personnel may enter and leave through the north entrance while the Commission is in session.

Commission officials know that spectators appreciate the need for security in any public building, and we ask that you cooperate with security personnel when they screen spectators, and their property.

BY DIRECTION OF THE PRESIDING OFFICER, MILITARY COMMISSION

Office of the Presiding Officer
Military Commission

September 9, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 6-2, Requesting Conclusive Notice to be Taken

This POM supersedes POM # 6-1 dated 31 August 2004

1. Military Commission Order 1 authorizes the Presiding Officer to take conclusive notice of facts that are not subject to reasonable dispute. This POM establishes the process for such requests.

2. When counsel are aware they will request that the Presiding Officer take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Presiding Officer's taking conclusive notice of a certain fact or facts. It is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.

3. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Presiding Officer on motions or the entire Commission on merits or sentencing.

4. If counsel have agreed that conclusive notice should be taken (or have entered into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, the Presiding Officer, and the Assistant. At the point in the proceedings where the conclusive notice (or stipulation) is to be used, the counsel offering the conclusive notice (or stipulation) is responsible for presenting the conclusive notice (or stipulation) to the Presiding Officer or the Commission.

5. The requirements of POM 4-2 do not apply to requests to take conclusive notice. Therefore, if a counsel wants the Presiding Officer to take conclusive notice, but s/he is unable to obtain the agreement of opposing counsel, the counsel desiring that conclusive notice be taken shall:

a. Send an email with an attachment to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel,

b. The attachment shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject: (Matter of the Facts to be Noticed)]. The subject line of the email shall be the same as the title of the attachment.

c. The attachment shall contain the following matters in separately numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested, and the stage(s) of the proceedings to which the request pertains. See paragraph 3 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Presiding Officer in resolving the matter.

6. Counsel receiving a request as stated in paragraph 5.

a. Within three duty days of receiving the request, counsel shall prepare an attachment in reply. This reply will be sent to opposing counsel, the Presiding Officer and the Assistant. The format will be as shown below in separately numbered paragraphs, using the same styling and appropriate subject as provided in paragraph 5b:

(1). That the responding counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the counsel disagrees:
(a). The reasons therefore.
(b). Any contrary sources not cited by the requesting counsel.
(c). Other information to assist the Presiding Officer in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless responding counsel asserts a legal basis why the Presiding Officer should reserve decision on the matter until oral argument can be heard.

7. Replies by the requesting party. The counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 6 above, unless it is to withdraw the request for conclusive notice. If additional information is needed, the Presiding Officer will request it.

8. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to counsel that a party will not agree to a request that conclusive notice be taken, that counsel shall send a request as provided in paragraph 5 above.

c. If counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 5 above.

9. Stipulations of fact. While counsel are free to use stipulations of fact in lieu of agreeing to the taking of conclusive notice, the Presiding Officer has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

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

Office of the Presiding Officer
Military Commission

8 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 7-1 Access to Evidence, Discovery, and Notice Provisions

This POM supersedes POM 7 dated 12 August 2004. POM 7 was titled "Access to Evidence and Notice Provisions"

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain adequate and timely access to evidence; which flows from compliance with notice requirements of Commission Law and compliance with discovery and other orders from the Presiding Officer.. Failure to comply with notice requirements and orders can result in parties being unable to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer.

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law; parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing party has not complied with discovery, notice or an access to evidence requirement.

b. Does not address requests for witnesses (See POM # 10) or "investigative or other resources" as that term is used in Military Commission Order # 1.

c. Does not modify those procedures established by Commission Law with respect to Protected Information.

d. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. **Discovery Orders.** At the appropriate time in the trial process, the Presiding Officer will issue a Discovery Order. A sample is enclosed which will be modified to fit each particular case. Such an order may be issued even though discovery and access to evidence may already be underway.

4. Basic principles:

a. When parties comply with discovery orders and notice and access to evidence requirements, the discovery, notice, and access to evidence process will not ordinarily require the Presiding Officer's involvement.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with discovery orders or notice or access to evidence requirements. The parties should provide such access, evidence or notice in the manner required, and at the time required, as set out in Commission Law, POMs, discovery orders, or other orders of the Presiding Officer. There is ordinarily no reason for the Presiding Officer or the Assistant to receive copies of information that is the subject of discovery, notice, or access to evidence requirements, unless a dispute arises as to whether a party is entitled to discovery, notice, or access.

c. To avoid unnecessary disputes at trial concerning whether discovery has been complied with or access or required notice has been given, the parties should have procedures to ensure they are able to demonstrate compliance with those requirements. It is advisable for the parties to prepare lists of what is or already has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for discovery, access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, discovery orders, or other orders of the Presiding Officer. In the absence of orders by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence, discovery, and required notice issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example, in the case of a request for information, access to evidence, or missed notification, it is professionally courteous to ask opposing counsel to provide the evidence, access or notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that will be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

(4). A party failed to provide information or access required by a discovery order despite a reminder.

c. When any of the situations listed in paragraph 7b, or other issues involving discovery, required notice, or access to evidence arise, the party will prepare a special request for relief using the procedures established in POM # 4-2 but using format as below for the attachment. The email request to the Presiding Officer, cc'ing the Assistant, all opposing counsel, and the Chief Prosecution and Defense Counsel shall contain the information in the format below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum. Such requests will become part of the filings inventory.

(1). Style of the case and name of the request.

(2). One of the following as the case may be:

(a). If notice was due and not given, cite the requirement for the notice, when it was due, efforts to obtain notice, and that notice was not received when due.

(b). If an item, matter, or access was supposed to be provided pursuant to a discovery order, cite the specific provision in the discovery order requiring same, that access or the matter was not provided when due, and efforts to obtain compliance

(c). If a party was required to give access pursuant to Commission Law or other law or order (other than a discovery order) and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

(d). If counsel requested access (other than pursuant to a discovery order) and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

Original Signed by:

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

1 Enclosure

Enclosure 1 to POM 7-1, Sample Discovery Order

	)	
	)	
UNITED STATES OF AMERICA	)	**ORDER**
	)	
	)	
v.	)	**DATE**
	)	
	)	
_____	)	
	)	
	)	

I. The Presiding Officer is aware that the discovery process - though perhaps not by that name - has been ongoing since at least 2004; in other words, parties have been sharing matters that might be used to prepare for trial or at trial. The Presiding Officer finds that to ensure a full and fair trial and to ensure that certain matters are not overlooked while the parties continue to share information, the following ORDER is necessary.

II. This Order does not relieve any party of any requirement to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times frames earlier than Commission Law provides, the Presiding Officer has determined that earlier disclosure is necessary for a full and fair trial.

III. All requirements of this Order are continuing in nature. The time frames set forth below apply to that information known to exist, or reasonably believed to exist, at the time this Order is issued. If information subject to this Order later becomes available that was not known, the party will disclose it as soon as practicable but not later than three duty days from learning that the information exists. In those cases when the item, or knowledge, becomes known after the date of this Order and the party is unable to obtain or produce it, the party shall give written (email) notice to opposing counsel of the nature of the item or knowledge and the time frame when it will be produced.

IV. Items that have already been provided need not be provided again if only to comply with this Order.

V. Listing the name of a witness in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10.

VI. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced. If counsel believe there has not been compliance with this order, or requests that additional information be provided, counsel should use the procedures in POM 4-2 or POM 7-1, as appropriate.

VII. Objections to the wording of this Order, or the authority to issue this Order.

a. If counsel need clarification on the wording or wish to suggest minor fine tuning - neither of which challenges the Presiding Officer's authority to issue a discovery order - the party will send the Presiding Officer, the Assistant, and opposing counsel an email NLT _____ with the suggestions in the body of the email.

b. Counsel who object to the Presiding Officer's authority to issue a discovery order, or request modification other than clarification or fine-tuning, shall file a motion in accordance with POM 4-2 NLT _____.

VIII. Failure to adhere to the terms of this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary for a full and fair trial.

IX. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

X. Each of the disclosure requirements shall be interpreted as a requirement to provide the item, preferably in electronic form, to opposing counsel. When disclosure is impracticable because of the nature of the item (a physical object, for example) or is protected or classified so that transmission or delivery of the item is impractical or prohibited, the party shall permit the opposing counsel to inspect the item in lieu of providing it.

XI. A party complies with this order when the lead counsel for a party - or another counsel designated by the lead counsel - has been provided with the item or permitted to inspect it. Counsel may, but are not required to, provide more than one copy of the items required by this Order.

XII. As used in this order, the term "at trial" means during the party's case in chief, whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

XIII. Nothing in this Order shall be interpreted to require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's trial assistants.

XIV. With the exception of item XIVa, the prosecution shall provide to the defense the items listed below not later than _____ calendar days after the date of this Order.

a. Not later than 3 calendar days of the date of this Order, the name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Prosecution.

b. Evidence and copies of all information the prosecution intends to offer at trial.

c. The names and contact information of all witnesses the prosecution intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Evidence that tends to exculpate the accused, or which is directly relevant to the accused's receiving a lenient sentence should sentencing become necessary.

f. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Were sworn to, or written or signed by the accused whether or not to be offered at trial, that is relevant to any offense charged.

3. Were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial, that are relevant to any offense charged.

g. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

XV. With the exception of item XVa, the Defense shall provide to the Prosecution the items listed below not later than _____ calendar days after the date of this Order. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Not later than 3 calendar days of the date of this Order, The name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Defense.

b. Evidence and copies of all information the defense intends to offer at trial.

c. The names and contact information of all witnesses the defense intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

f. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, alibi, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any or a particular offense.

g. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

h. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

IT IS SO ORDERED.

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

Office of the Presiding Officer
Military Commission

September 21, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 8 - 1, Trial Exhibits

This POM supersedes POM 8 dated 12 AUG 04.

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials.

2. Definitions:

a. Exhibit:

(1) A document or object, appropriately marked, that is presented, given, mentioned, or shown to the Presiding Officer, any other Commission Member, or a witness during a session of the Commission.

(2) A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3) Other documents or objects that the Presiding Officer directs be marked as an exhibit or is marked with the Presiding Officer's permission.

b. Prosecution or Defense Exhibits *for identification* are exhibits sponsored by a party and

(1) Intended to be considered on the merits or sentencing, but either not offered into evidence, or offered into evidence and not received, or

(2) Not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing.

d. Review Exhibits are those exhibits:

(1) Presented for or used on a matter other than the issue of guilt or innocence, or a sentence. Motions, briefs, responses, replies, checklists, written instructions by the Presiding

Officer for the Commission members, findings and sentencing worksheets, and other writings used during motions practice are among the most common form of Review Exhibits.

(2) The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like. *See also* POM #4-3 concerning attachments, and POM #14-1 in regard to the Commissions Library.

e. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual use exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit. An exhibit may be used for a dual use only with the permission of the Presiding Officer, and the exhibit must be properly marked to show both uses.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any document or other piece of evidence present in the courtroom which is referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any document or other piece of evidence which is displayed for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record. The parties should be prepared, at trial, to provide hard (paper) copies of PowerPoint presentations and transcripts of audio or audio/video exhibits.

d. When a party marks or offers an exhibit that in its original state was in a language other than English, and the party marking or offering the exhibit has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also mark and provide to opposing counsel an exhibit containing the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form by which a tangible representation of the exhibit shall be included in the record.

f. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, it shall be first shown to the opposing

counsel so that opposing counsel knows the item and its marking, even if the counsel is certain opposing counsel is familiar with the exhibit and its marking.

4. How exhibits are to be marked. *See* enclosure 4.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session, except as directed by the Presiding Officer or the Assistant to the Presiding Officer.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That sequence *IS* permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: "Let the record reflect that the Prosecution marked, but did not offer, display, or mention, the following Prosecution Exhibits: 3, 6, and 11." The party will ensure that the reporter retains the marked exhibit, even though it has not been admitted into evidence.

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. Prosecution Exhibit 1 and 3 for Identification are not received. Prosecution Exhibit 2 for Identification is received. Once received, what was Prosecution Exhibit 2 for Identification is now "Prosecution Exhibit 2." The reporter will mark off the words "for Identification" on the exhibit.

d. Enclosure 4 is a guide for marking trial exhibits.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offers into evidence

what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of exhibits that have been marked, and in addition with respect to Prosecution and Defense Exhibits, an annotation showing whether an exhibit has been offered and/or received. Before departing the courtroom after the last session of every day, counsel for both sides shall confer with the court reporter to ensure the log is properly annotated, is correct, and that all exhibits are accounted for.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, the Presiding Officer, or other members of the Commission, all exhibits that have been marked shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer, as directed by the CCMC, shall secure all classified exhibits until the next session. As to unclassified exhibits, the court reporter will inventory all exhibits with the Assistant and turn over such exhibits to him until the next session. *See also* paragraph 7, POM #13-1 which also addresses safeguarding exhibits between sessions.

10. Sample forms.

a. Enclosure 1: Review Exhibits.
b. Enclosure 2: Prosecution Exhibits.
c. Enclosure 3: Defense Exhibits.

Signed by:

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

4 Enclosures

1. Review Exhibits Log
2. Prosecution Exhibits Log
3. Defense Exhibits Log
4. How to mark exhibits

Review Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Filings Inventory number (if applicable)

Prosecution Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Offered	Received

Defense Exhibits Log

US v. _____ Page ___ of ___ Pages

Letter	Description	Mark X if classified or protected	Offered	Received

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page, 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 *OR* RE 1	*First page*: RE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 *OR* Attachment A to RE 3	*First page*: Attachment 1 to RE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.
II. Classified Exhibits Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.		
III. Unclassified, Protected Exhibits Mark the same as I, adding the words on the first page or cover sheet "Protected Information."		

Office of the Presiding Officer
Military Commission

September 14, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 9-1 - Obtaining Protective Orders and Requests for Limited Disclosure

This POM supersedes POM 9 dated 4 October 2004

1. This POM addresses the methods by which counsel may obtain Protective Orders and Limited Disclosure from the Presiding Officer, as authorized by Section 6D(5), Military Commission Order No. 1.

2. **Protective Orders - generally.** As soon as practicable, counsel for either side will notify the Presiding Officer and the Assistant of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. **When counsel agree to a Protective Order.** Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done as an attachment to an email, or if during the course of a Commission session, in hard-copy. In preparing the request, counsel shall be attentive to paragraph 6 of this POM.

4. **When counsel do not agree to a Protective Order.** The procedures in POM # 4-2 do not apply, except where noted. If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order as an email attachment to the Presiding Officer (with a CC to the Assistant) for signature, along with the below information in the format specified below with each item in a separately numbered paragraph. The order shall be styled the same as a filing as provided in POM 4-2 with the name of the document "Protective Order [Subject matter sought to be protected]." The subject of the order shall not itself be protected as the subject will be placed in the filings inventory which is a public document. If necessary, the subject can be a unique number. In preparing the request, counsel shall be attentive to paragraph 6.

(1). The nature of the information sought to be protected. When such information is in document form, it shall be attached.

(2). Why the order is necessary.

(3). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the attachment to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the civilian defense counsel, prior to issuing or signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. Limited disclosure requests. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer and the Assistant an order for the Presiding Officer's signature directing limited disclosure. In preparing the request, counsel shall be attentive to paragraph 6. This order will contain the following in separately numbered paragraphs:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

6. Security considerations and exceptions.

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. No party may send any classified or other protected material to the Presiding Officer or the Assistant by email. If there is a need to transmit classified or protected material to the Presiding Officer or the Assistant, counsel will so advise the Assistant. The Assistant will provide transmission protocols.

c. In the case of orders under this POM that are to be requested or presented when at Guantanamo, the submission to the Presiding Officer may be done in hard copy. In such cases, the parties will consult the SSO and the Assistant as to the handling of the order, and whether it shall be reduced to electronic form.

Signed by:

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

Office of the Presiding Officer
Military Commission

September 30, 2005

SUBJECT: Presiding Officers Memorandum # 10 - 2, Presiding Officer Determinations on Defense Witness Requests

This POM supersedes POM #10-1, dated 20 September 2005.

1. This POM establishes the procedures for the defense to request that the Presiding Officer order the production of a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution. While this POM does not stipulate the format *for an initial request to the Prosecution*, it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Presiding Officer may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the prosecution solely because insufficient information was provided, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer.

2. A request, or noting that a particular witness is needed, in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary on a motion or other filing, not only should that be addressed in accordance with POM #4-3, but *the counsel is also required to file a request* in accordance with this POM.

3. Prosecution "denial" of defense requested witness.

a. If the defense requests, and the prosecution has denied, a defense witness request, the defense shall within 3 duty days of learning of the prosecution's denial - or when there has been prosecution inaction on the request for 3 duty days - submit a "Request for Witness." All the procedures of POM #4-3 shall apply to how this request is formatted, sent, the addressees, and responses and replies thereto except as otherwise provided in this POM (POM #10-2) and the contents of the request which is set forth in paragraph 3c below.

b. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request - [Name of Witness] - US. v. [Name of Case].

c. The heading for the request (attachment) will be as provided at enclosure 1 to POM # 4-3. Each of the below items shall be in a separate, numbered paragraph:

(1) Paragraph 1: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

(2) Paragraph 2: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1 for some suggestions.

(3) Paragraph 3: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated? For example, counsel might state, "On X September 2005, I interviewed the witness, and he personally provided the information in the synopsis."

(4) Paragraph 4: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

(5) Paragraph 5: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

(6) Paragraph 6: Whether the requestor would agree to an alternative to live testimony (See listing below.) to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable, citing to Commission Law. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

(a) Conclusive notice.

(b) Stipulation of fact.

(c) Stipulation of expected testimony.

(d) Telephonic.

(e) Audio-visual.

(f) Video-taped interview.

(g) Written statement.

(7) Paragraph 7: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

(8) Paragraph 8: If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by attaching a *curriculum vitae* to the request. *See* paragraph 6, POM #4-3. This paragraph must also include a statement of law as to why the expert is necessary or allowable on the matter in question.

(9) Paragraph 9: Other matters necessary to resolution of the request.

4. Action by the prosecution upon receipt of a request.

a. Production of the witness. If the Prosecution and Defense agree that the witness should be produced, the prosecution need not prepare a response to the request. The prosecution should provide a copy of all approved witness requests and lists to the Chief Clerk for Military Commissions to facilitate provision of translator and court reporter services (the court reporters need to accurately spell names in transcripts).

b. Agreement to an alternative to live testimony. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (*see* paragraph 3c(6)(a-g) above) the parties will immediately prepare the agreed upon writing. Once agreement has been reached on an alternative to live testimony and the writing or other matter to be used as an alternative, the prosecution shall notify the Presiding Officer and the Assistant that agreement has been reached, and provide a copy of the approved statement or stipulation to the Presiding Officer and the Assistant.

5. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or if the government and defense cannot agree on an alternative to live testimony or the wording of any writing that would be used as a substitute, the government will prepare and file a response, using the procedures in POM #4-3, within 3 duty days of receiving the request. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

6. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 calendar days before the session in which the witness is first needed to testify. Failure to make requests in a timely manner may cause the witness request to be disapproved by the Presiding Officer, despite other factors which might appear to require the witness' presence.

7. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

Signed by:

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

1 Enclosure
As stated

Enclosure 1 - POM 10

1. The drafting of an adequate synopsis is critical to resolve witness issues.

2. Paragraph 4c(2) of POM 10-1 states:

> {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

3. A proper synopsis serves many purposes:

a. It makes clear what the witness will say - not just the subject or topic of the witness's testimony.

b. It describes how the witness is necessary and how the offered testimony is relevant. The parties may agree concerning what a witness will say, but that doesn't mean that the witness is necessary or the testimony relevant. (Relevant being shorthand here for the reasonable person standard in the President's order.)

c. It permits a realistic opportunity to obtain a satisfactory alternative to the testimony. If the parties agree what a witness will say and that it is relevant, they may agree to a stipulation or other ways for the party to present the testimony. This could be a safeguard for a defense-requested witness who later becomes unavailable.

d. It ensures that the Presiding Officer has sufficient facts to make a decision. The PO knows nothing about the case.

4. Here are several examples to clarify the type of information required for an adequate synopsis:

EX 1. The witness will testify he is an expert in the area of fingerprint comparisons and how those comparisons are performed.
Problem: We know what he will testify *about* or the *subject*, but we do not know what he will *say*, and how his testimony is *relevant*.

EX2. Same as EX 1 above, but adding: The witness will further testify that a latent print found at the alleged crime scene was not that of the defendant.
Problem: OK, I know what he will say, but how is that relevant?

EX3. Same as EX2 above, but adding: The fingerprint was in the purported victim's blood, and there is no evidence that other than one person killed the purported victim.
No Problem: Got it. I know what he will say, and I know how it is relevant to the case. This is something upon which a decision can be made.

Another example.
EX1. The witness will testify that he is an expert in Arabic.
Problem: What is the relevance?

EX2. The witness will testify that he is an expert in the XYZ dialect of Arabic.
Problem: Still don't know the relevance.

EX3. The witness will testify that he is an expert in the XYZ dialect of Arabic, that the accused before the Commission is an XYZ speaker, and that the Prosecution-offered translation of the accused's statement is incorrect.
No Problem: Got it!

Office of the Presiding Officer
Military Commission

September 7, 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

Presiding Officers Memorandum (POM) # 11: Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation during Commission Trials

1. Translators/interpreters (hereafter translators) are present during Commission trial sessions to provide simultaneous translation for those participants who do not understand the language being used by the person speaking (Commission translators.) Additionally, the defense has been provided a translator to assist counsel in communicating with their clients (defense translators.) Despite these measures, there is always the possibility of an incorrect translation. While there may be disagreement among expert translators on the precise translation of a particular phrase or idiom, some translation errors may be significant enough to jeopardize the Commission's responsibility to provide an accused a full and fair trial. If significant translation errors are reported immediately, the mistake can be corrected in time to insure the fairness of the proceedings and the accuracy of the record of proceedings. This POM is designed to insure that:

a. The qualifications of Commission translators are made known to all parties before they perform translation duties;

b. Significant translation errors are identified as soon as possible so that counsel may bring them to the attention of the Presiding Officer and obtain relief, where warranted;

c. Participants know of the need to report significant translation errors; and,

d. The defense and prosecution are aware that a failure to report significant translation errors in a timely manner can result in waiver.

2. Obtaining Commission translators. Neither the Presiding Officer nor the Commission has the authority to procure translators. The Chief Clerk for Military Commissions (CCMC) is responsible for obtaining Commission translators on behalf of the Appointing Authority. The Chief Defense Counsel and detailed defense counsel are responsible for coordinating with the CCMC to arrange for qualified defense translators.

3. ***Curriculum vitae* of Commission translators.** In all Commission trial sessions in which a Commission translator is used, the CCMC will obtain a written *curriculum vitae* of all proposed Commission translators and provide the same to the Presiding Officer, the Assistant, and all counsel, not less than seven days before the first day of the session in which the Commission translator will be used. If any counsel has any objection to the qualifications of any Commission translator, they will provide that objection, and the basis for it in writing (email), to the CCMC, the Assistant, the Presiding Officer, and opposing counsel within 24 hours of receiving the *curriculum vitae*. During any Commission trial session in which a Commission translator is used, the detailed prosecutor is responsible for ensuring that the *curriculum vitae* of any Commission translators is marked as a Review Exhibit, and that the record reflects any changes in Commission translators.

4. **Timely reporting of significant translation errors.**

a. If any "participant to a Military Commission" has "any reason to suspect" that there has been a "significant translation error" made by a Commission translator, that participant will notify the Presiding Officer, the Assistant, the CCMC, and opposing counsel using the procedures and time frames established in paragraph 5.

b. "Participant to a Military Commission" means any Commission translator, any defense translator, any counsel detailed to the Commission, any civilian counsel for an accused at a session, the Presiding Officer, any Commission member, or any court reporter.

c. "Reason to suspect" means information that would lead a participant to suspect that a significant translation error occurred. The error may be personally known to the participant, or may have been learned through any other source or by any other means.

d. "Significant translation error" means an error made by a Commission translator that may affect:

(1) The correctness of a ruling on a motion or other request for relief;
(2) The rights of any party to the proceeding;
(3) The correctness of the verdict or sentence; or,
(4) The provision of a full and fair trial.

e. If a counsel, who is a participant as previously defined: (1) has reason to suspect that a significant translation error has occurred, and, (2) fails to make that reason and suspicion known to the Presiding Officer using the procedures and time frames established in paragraph 5, that failure will be considered in deciding whether the counsel, and the party the counsel represents, has waived the error.

5. How suspected significant translation errors are to be reported.

a. If discovered during a Commission trial session, the suspected error will be made known immediately -- interrupting the session to do so if necessary.

b. If discovered after a trial session has concluded, but before the parties have left Guantanamo, the suspected error will be immediately reported to the PO, the Assistant to the Presiding Officer, the CCMC, and opposing counsel in person.

c. If the error is not discovered by a counsel until only after receipt of a draft session transcript as that term is used in POM # 12, the procedures in POM # 12 will be used to document the error.

d. If the error is discovered at any other time, the notification will be made to the Presiding Officer, the Assistant, and the CCMC by the most expeditious means possible, and also by email, as soon as it is known.

6. Translation verification procedure.

a. This procedure will only be used when directed by the Presiding Officer.

b. When implemented by the Presiding Officer, the translation verification procedure will operate as below:

(1) The Presiding Officer will provide the report of the alleged error to the CCMC, all counsel on the case, and the court reporter for the session in question. The Presiding Officer will also direct which alleged errors shall be subject to the translation verification procedure.

(2) The court reporter for the session in question will provide the CCMC with a copy of the audio file for the session in question along with a transcript of the relevant portions of the record of trial.

(3) The CCMC shall obtain the services of a qualified translator. The translator may be a government employee, contractor, or other qualified person.

(4) The verification translator obtained per paragraph 6b(3) above will compare the audio recording and the transcript and note in writing any other-than-minor, insignificant errors in the matters specified by the Presiding Officer per paragraph 6b(1) above, and provide what is believed to be the correct translation. This work will be performed as quickly as possible and the results provided to the CCMC.

(5) The CCMC shall serve the writing prepared in accordance with paragraph 6b(4) above to the Presiding Officer, the Assistant, counsel for the case, and the Appointing Authority as soon as it is received.

(6) Within ten days of receiving the writing prepared in paragraph 6b(5) above, any counsel who wishes relief shall request it in writing to the Presiding Officer, with a copy to the Assistant, the CCMC and opposing counsel, noting what they believe to be a significant translation error, why it is a significant translation error, and how the error shall be corrected. A copy of the audio recording may be made available to the counsel to assist them in any submission.

(7) If, after receiving a writing per paragraph 6b(6) above, opposing counsel believes that there was not a significant translation error, that counsel shall provide such comment within 5 days of receiving the writing described in paragraph 6b(6) above to the Presiding Officer, the Assistant, the CCMC, and opposing counsel. Failure to provide such an answer, however, does not indicate that a significant translation error did occur.

(8) The Presiding Officer will determine the method by which conflicting views are resolved when such conflicts are brought to its attention.

7. Translation verification procedure for sessions held before the effective date of this POM.

a. If any counsel has reason to suspect there has been a significant translation error made during the sessions held in August 2004, they shall follow the procedures in paragraph 5 not later than 10 days from the effective date of this POM.

b. Translation verification procedure for sessions held in November 2004. During the processing of the transcripts for the November 2004 sessions in accordance with POM #13, the presiding officer directed counsel to note significant translation errors. None were noted by any counsel. Notwithstanding, for the November 2004 sessions, if counsel are aware of any significant translation error, they shall also follow the procedures in paragraph 5c not later than 10 days from the effective date of this POM.

c. The Presiding Officer may direct use of the procedures in paragraph 6.

8. Other instructions:

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. With respect to any audio recording of Commission proceeding, whether such recording contains classified or protected information or not, no person shall, with respect to a portion of an audio recording of a Commission proceeding, do any of the following unless directed or permitted by the Presiding Officer or the CCMC:

(1) Copy any portion of the audio recordings. Copying includes electronic, optical, or magnetic copying, transmitting, or moving data from one media to another. Examples of copying include, but are not limited to, placing any portion of the data onto

a network or the Internet, sending the file as an email attachment, or placing, copying, or moving any portion of the data onto any media (CD/DVD/floppy disk/USB storage device etc.)

(2) Permit or request another to make a copy - as that term is used above - of the audio recording or move any portion of the data.

(3) Request another to listen to, or permit another to listen to, any audio recording except for those persons identified in this POM as authorized to receive or listen to the recording.

c. Court reporters may make copies of audio recordings of Commission session as are necessary to perform their duties or in compliance with this POM.

d. Anyone with knowledge of a violation of paragraph 8(b) above, whether the violation was allegedly intentional or inadvertent, shall report it as soon as possible to the Presiding Officer and the CCMC.

Approved by:

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

M. Harvey
Chief Clerk for Military Commissions

Office of the Presiding Officer
Military Commission

September 29, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 12 - 1 Filings Inventory

This POM supersedes POM 12 dated 20 October 2004.

1. The Presiding Officer has adopted procedures to allow electronic filing of certain documents (e.g., motions, witness request, other filings, requests for access to evidence, requests for protective orders, requests for limited disclosure orders, and requesting conclusive notice to be taken.) *See* POMs 3-1, 4-3, 6-2, 7-1, and 10-1, current editions. The procedures were adopted because:

a. Most items filed with the Commission are prepared in electronic form.

b. Documents not in electronic form can be easily converted into an electronic file.

c. The counsel, Assistant, court reporters, Presiding Officer and those who need to file and receive filings are often in geographically diverse locations.

d. Electronic filing enables counsel anywhere in the world with email access (to include web based accounts) to make and receive filings.

e. Service of filings by mail or courier is slow and expensive. Some filings are made to and from Guantanamo Bay, Cuba, where service by mail is impractical.

f. Electronic filing is fast, reliable, efficient and creates an electronic file that can be efficiently and quickly shared with others.

g. Electronic filing creates and retains a precise record of the dates and times when filings were sent and received.

2. Electronic filing enables parties to send emails or "CC" (carbon copy) emails to anyone. If a filing is sent to many addressees, it is sometimes difficult to determine the intended or action recipient. In some instances, those who receive large numbers of emails may overlook an email which was intended for them specifically.

3. This POM establishes:

a. Requirements for the Assistant to maintain a "Filings Inventory". The purpose of the Filings Inventory is to set forth which filings and other matters are before the Presiding Officer.

b. Responsibilities for counsel to use filings designations once created and to check the accuracy of a filings inventory, upon receipt, so that counsel are certain of those matters before the Presiding Officer.

4. Establishing the Filings Inventory. The Assistant shall establish and maintain a Filings Inventory for each case referred to the Commission which reflects those filings pending before the Presiding Officer.

a. As soon as the first filing on an issue is received, the Assistant shall assign a *filing designation* using one of four categories below followed by a number: The terms filing number and filing designation may be used interchangeably.

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
PO for a filing or series of filings initiated/directed by the Presiding Officer.
Protective Order for protective orders issued by the Presiding Officer.

Other categories may be added at a later time.

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number *EX:* PE2, D4, PO1, Protective Order 3) shall be unique for each case and the designation shall not be reused.

c. To identify a specific document which has been filed, the filing designation may add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned by the Assistant, plus the name of the accused.

d. The Filings Inventory shall contain an Active Section which lists all filings currently before the Presiding Officer.

e. The Filings Inventory shall also contain a listing of all filings which are no longer before the Presiding Officer. These items shall be placed in the Inactive Section of the Filings Inventory.

5. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference. This includes adding the file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. (*See* also POM # 4-3.) Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."* The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."*

b. Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

c. The names given to matters that may appear on the filings inventory - such as the subject of a motion - will not be classified or otherwise protected as the filings inventory is intended to be transmitted through unsecured networks. Counsel must therefore ensure that the names of their filings are not in themselves classified. (*See* POM # 4-3.)

6. Distribution of the Filings Inventory.

a. As soon as practical after the Assistant receives a filing, the Assistant shall reply to the party making the filing, advising that the Filings Inventory has been annotated. In the case of a filing that initiates a new issue or motion, the reply from the Assistant shall also provide the filing designation.

b. At the request of any party or the Chief Clerk of Military Commissions (CCMC), the Assistant shall provide a copy of the current Filings Inventory as soon as practical.

c. The Assistant shall from time to time, or when directed by the Presiding Officer, distribute copies of the Filings Inventory to the Presiding Officer, all counsel on the case, the Chief Prosecutor and Chief Defense Counsel (and their Deputies and Chief Legal NCOs,) and the CCMC.

d. The Presiding Officer shall ensure that a copy of the current Filings Inventory is marked as a Review Exhibit at the beginning of each session of the Commission, so that parties are free to refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear concerning precisely which filing or issue is being addressed.

7. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure what filings have been received by the Presiding Officer, and what matters are before the Presiding Officer.

a. Counsel will examine each Filings Inventory as it is received and notify the Assistant, Presiding Officer, and opposing counsel of any discrepancies within one duty day. *See* paragraph 5, POM # 4-3 for additional responsibilities when receiving emails containing or referring to filings.

b. If counsel believe they have submitted a filing which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Assistant, Presiding Officer, and opposing counsel, noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above and in paragraph 8 below, the Presiding Officer may elect not to consider that filing.

8. Effect of omission in filings inventory.

a. If a filing or other matter is not on the Filings Inventory, it is not before the Presiding Officer for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the Assistant (*See* paragraph 7c, above.).

b. If counsel believe that a matter should be on the Filings Inventory and have made that known to the Assistant, and the Assistant does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Presiding Officer.

c. Failure to fulfill the responsibilities noted above constitute waiver should the Presiding Officer not address or rule upon a matter that is not on the Filings Inventory.

Original Signed by:

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

Office of the Presiding Officer
Military Commission

26 September 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk of Military Commissions in the form he deems appropriate.

SUBJECT: POM 13 - 1, Records of Trial and Session Transcripts

This POM supersedes POM #13 dated NOV 22, 2004.

1. References:

a. Military Commission Order #1, 30 August 2005.
b. Appointing Authority Memorandum, Subject: Duties and Responsibilities of Chief Clerk of Military Commission, 30 June 2005.
c. Appointing Authority Memorandum, Subject: Duties and Responsibilities of Chief Clerk of Military Commissions-Records, Proceedings and Allied Papers, September 20, 2005.
d. Presiding Officer Memoranda #14-1, Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials, current version.
e. Presiding Officer Memoranda #8-1, Trial Exhibits, current edition.

2. Definitions:

a. *Authenticated record of trial under the provisions of reference a, paragraph 6H(1).* Under reference 1a, the authenticated record of trial includes only the transcripts of the proceedings and exhibits admitted during the trial. A sample authentication page is attached as Enclosure 1.

b. *Record of Commission trial proceedings (Reference 1 c.)* A "record of Commission trial proceedings" consists of the record of trial plus additional exhibits to include all Review Exhibits marked by the Presiding Officer (or with his permission,) and prosecution and defense exhibits offered but not admitted. Under the provisions of reference c, the Chief Clerk of Military Commissions (CCMC) may supplement the record of proceedings with certain allied papers.

c. *Session record of proceedings, reference 1a, paragraph 4A(5)(f).* Transcripts of proceedings of individual or time-related sessions of a certain case, will be authenticated by the Presiding Officer and forwarded to the Appointing Authority as soon as possible upon the completion of a given session. A sample authentication page is attached as Enclosure 2.

d. *Authenticated record of a post-trial proceeding under the provisions of reference 1a, paragraph 6H(3).* A complete record of all proceedings, that have been authenticated by the Presiding Officer, of any Commission proceedings in the case that occurs after the Presiding Officer has authenticated the record of trial under the provisions of MCO #1, paragraph 6H(1).

e. *Session transcripts.* The transcript of a portion of an unauthenticated record of trial that reflects the proceedings of a session or sessions of the Commission. There are two types of session transcripts:

(1) *Draft session transcript.* A session transcript that has been reviewed by the Presiding Officer and offered to counsel for comment or correction in accordance with this POM.

(2) *Final session transcript.* A draft session transcript that has been reviewed by counsel within the time frames, and under the conditions, established by this POM, and the Presiding Officer has resolved errata and "significant translation errors (if any), submitted by counsel. This transcript will be authenticated by the Presiding Officer to create the session record of proceedings (Paragraph 1c, above).

f. *Commission translator.* A translator charged with the responsibility to translate into English what is said in another language for the benefit of Commission participants, or to translate for a non-English speaking Commission participant what is spoken in a language the defendant, witness, or other participant does not speak. *See* reference 1d.

g. *Significant translation error.* *See* the definition at paragraph 4d below, and reference 1d.

3. With the assistance of the CCMC, the Assistant will provide draft session transcripts to the Presiding Officer, the prosecution, the defense counsel, and the CCMC. Final session transcripts will be provided to the same persons as drafts were provided. Counsel will use these transcripts solely as an internal reference and to reflect errata and significant translation errors in accordance with this POM and references 1b and 1d. Counsel shall not loan, share, transmit, copy, or otherwise disclose or show to any other person or entity any portion of any draft or final session transcript for any other purpose. The CCMC is responsible for release of transcripts for posting on the Department of Defense website, and to other non-litigant requestors. *See* reference 1b.

4. Review of unclassified, draft session transcripts by counsel.

a. Within ten days of service of a draft session transcript where a Commission Translator was not used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number any significant errors in the draft session transcript. *See* enclosure 3 for the errata sheet to be used.

b. Within 15 days of service of a draft session transcript where a Commission Translator was used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall

provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number and using the errata sheet at enclosure 4:

(1) Any significant errors in the draft session transcript.

(2) Any significant translation errors, the correct translation, how and why the counsel believes the translation was in error, and the necessary relief or correction required, and

(3) A certificate by counsel that the significant translation error did not become known until obtaining the draft session transcript. If that is not the case, then counsel will state why the significant translation error was not raised at an earlier time as required by paragraphs 4 and 5, reference d.

c. Failure to provide an errata sheet, or obtain an extension of time to submit the same from the Presiding Officer, shall indicate that the counsel has no errata to offer and that there are no significant translation errors.

d. The Presiding Officer may use the translation verification procedure in paragraph 6, reference d when a significant translation error is noted.

e. Other duties, responsibilities, and procedures to report, document, and process significant translation errors as provided by reference d are incorporated herein.

5. Review of classified, draft session transcripts by counsel. Review of classified, draft session transcripts shall be done in the same fashion as unclassified draft session transcripts except the session transcript shall be served upon counsel in writing, and the errata or significant translation errors, if any, shall be provided to the Assistant and Presiding Officer in written form according to the instructions provided when a classified draft session transcript is served on counsel. The services of the CCMC may be used in such instances to serve such transcripts on counsel to ensure no breaches of security.

6. Electronic format for records and session transcripts.

a. Records and session transcripts shall be in the format established by reference c.

b. The pagination on draft session transcripts, final session transcripts, and the authenticated records may differ when transcripts are collated. When referring to a page or line number in a draft or final session transcript, counsel should be careful to indicate whether the transcript was a draft or final session transcript.

7. Custody and control of exhibits. During sessions of the Commission, unclassified exhibits shall be maintained for the Presiding Officer by the Commissions Trial Clerk in coordination with the CCMC. When the Commission is not in session, these exhibits shall be maintained for the Presiding Officer by the CCMC. Classified exhibits shall be maintained for the Presiding Officer by that person or those persons designated by the CCMC.

Approved by:

Peter E. Brownback III COL, JA, USA Presiding Officer	M. Harvey Chief Clerk of Military Commissions

4 Enclosures

1. Authentication page for ROT (see para 2a.)
2. Authentication page for draft session transcript per (see para 2e(1)).
3. Errata sheet – other than significant translation errors.
4. Format to submit significant translation errors.

AUTHENTICATION OF
COMMISSION TRIAL PROCEEDINGS

in the case of:

United States v. Tom Allen Smith
a/k/a Steven Allen Smith
a/k/a Robert Allen Smith

(as indicated on the Charge Sheet)

This is to certify that the Pages _____ through _____ are an accurate and verbatim transcript of the proceedings in the above styled case.

_____
Name
Rank
Presiding Officer

_____
Date

AUTHENTICATION OF
FINAL SESSION TRANSCRIPT

in the case of:

United States v. Tom Allen Smith
a/k/a Steven Allen Smith
a/k/a Robert Allen Smith

(as indicated on the Charge Sheet)

This is to certify that the Pages _____ through _____ are an accurate and verbatim transcript of the proceedings held in the above-styled case on _____.

_____
Name
Rank
Presiding Officer

_____
Date

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
Other than Significant Translation Errors

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	Line(s)	Change from	Change to	Approved	Not approved

ERRATA SHEET BY THE (PROSECUTION) (DEFENSE)
IF Significant Translation Errors.
(See POM# 11.)

US v. _____, Session Transcript of _____, Page ____ of ___ Pages

Counsel preparing this errata sheet: _____

				Action by the PO	
Page	Line(s)	Change from	Change to	Approved	Not approved
How does counsel know the translation was incorrect? (If the same source throughout this errata sheet, the source need only be stated once.)					
Relief requested other than to change the translation as shown above.					
How does counsel know the translation was incorrect? (If the same source throughout this errata sheet, the source need only be stated once.)					
Relief requested other than to change the translation as shown above.					
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How does counsel know the translation was incorrect? (If the same source throughout this errata sheet, the source need only be stated once.)					
Relief requested other than to change the translation as shown above.					

Office of the Presiding Officer
Military Commission

8 September 2005

This document has been approved by both the Presiding Officer as a Presiding Officer Memorandum, and by the Chief Clerk for Military Commissions in the form he deems appropriate.

Presiding Officers Memorandum (POM) # 14-1: Commissions Library

This POM supersedes POM # 14 dated 5 August 2005.

1. This POM, with the concurrence of the Chief Clerk for Military Commissions (CCMC), formally establishes the Military Commissions Library (Commissions Library). The Commissions Library is an electronic collection of cases, resources, and other writings of benefit to counsel, the Presiding Officers, the Review Panel (should that body become involved), and others.

2. Purpose of the Commissions Library. The Commissions Library has many purposes to include:

a. Provides a readily accessible source of the Commissions Library contents to users.

b. Permits users to electronically "cut and paste" selected contents of the Commissions Library into filings or other documents.

c. Permits users to electronically search documents.

d. Alleviates the need for counsel to attach copies of authority cited in their filings if that authority is contained in the Commissions Library. (See POM 4-2.)

e. Permits users to electronically capture and preserve, for possible future use in the Commissions, items that appear on the Internet, because Internet items present at one time can be changed or removed from the Internet without notice.

f. Saves time, space, and other resources by making voluminous materials easily transportable, searchable, and printable

3. Form, location, and access to the Commissions Library.

a. The Commissions Library is in electronic form and can be made available on CD/DVD or other media as well as being hosted on computer servers accessible to users.

b. As the Commissions Library will not contain any classified or protected information, the contents of the Commissions Library may be widely distributed.

c. All personnel assigned or attached to the Office of Military Commissions and all civilian counsel authorized to represent an accused will have access to the Commissions Library. Other personnel will be authorized access on an as-required basis as determined by the CCMC.

4. Commissions Library contents.

a. The Commissions Library will not contain, under any circumstances, any classified or protected information.

b. Filings (see POM # 4-2) included in the filings inventory (see POM # 12) will not be contained in the Commissions Library as those items may contain protected information.

c. Potentially, anything useful as a reference or resource to the practice before a Military Commission may be placed into the Commissions Library. Ordinarily the Commissions Library contains: cases other than those readily available as a published opinion on Lexis-Nexis or similar services; large references to alleviate users from having to have the book with them (MCM or the Military Judges Benchbook, for example) items that appear on the Internet so the correct document is preserved before the document is changed or removed from the Internet; "hard-to-find" items (such as decisions of international tribunals and similar writings); treaties and treatises; law review articles; and like items.

d. While there is no requirement that reported cases decided by a United States court (whether federal, state, or military) be included, the CCMC may decide to include them so that they are readily available, especially for users who are not expert with legal research techniques.

5. Responsibilities.

a. The CCMC is responsible for maintaining the Commissions Library, hosting it on servers accessible to OMC personnel, and making it available on servers at Guantanamo Naval Base when the Military Commission is in session. The Assistant to the Presiding Officers will assist whenever his assistance is required.

b. The CCMC may place any item into the Commissions Library he deems appropriate. As a general rule, once an item has been placed into the Commissions Library, it will not be removed because users may rely upon the item being in the Commissions Library once it has been placed therein. Prior to removing an item, the CCMC will provide notice to all users.

c. The CCMC will place into the Commissions Library anything the Presiding Officer directs be placed therein.

d. Counsel, the Assistant to the Presiding Officers, and others may request that the CCMC place an item into the Commissions Library. Ordinarily, requests will be approved unless the matter is already contained in the library or there is no possible benefit to having the item included.

e. In each instance where a request is made that an item be included, the CCMC will inform the requester whether the request has been approved.

f. The CCMC will provide all users, on an as-needed basis, updates to show what has been added to the Commissions Library.

6. Procedures to include an item into the Commissions Library.

a. A request to include an item into the Commissions Library will be submitted to the CCMC only by electronic mail. No electronic mail will request more than one item be included (i.e., only one item to be included per email.) The electronic mail will include:

(1). In the subject line, "Request to include item in the Commissions Library."

(2). In the body of the email, a description of the item to be included which is suitable for direct inclusion into the Commissions Library index. If the item is one for which there is a generally accepted Blue Book cite, the cite will also be included.

(3). As an attachment, the exact document to be included.

b. A request to include an item into the Commissions Library will not contain just a web address (URL.) Instead, the requester will convert the web page content into a file, and the file will be attached.

c. Acceptable file formats are Microsoft Word, HTML, JPG, BMP, RTF, TIFF, or Adobe Acrobat unless the CCMC permits, on a case by case basis, a different file format.

d. When the electronic form of an item to be included in the Commissions Library is available, the electronic version will be submitted as that form makes use and electronic searching easier.

(1). Requesters will <u>not</u> take an item that is in electronic form, scan it, and submit the scanned version. For example, if the document is available in Word, send the Word document (or electronically convert it (not scan it) to Adobe Acrobat (PDF.))

(2). A document available in electronic form will not be printed and then scanned as this reduces the usability of the document.

e. It is the responsibility of the requester to ascertain that an item requested to be included in the Commissions Library is not available in electronic form before submitting a scanned document to be included. The CCMC may reject a request that an item be included in the Commissions Library in a scanned, non-electronically-searchable form if the electronic version can be located by the requester.

7. Written copies of contents of the Commissions Library.

a. The Commissions Library is in electronic form.

b. Printed extracts of the Commissions Library used by counsel during a session of the Commission.

(1). Counsel appearing before the Commission may elect to print selected extracts of the Commissions Library to make them available to the Presiding Officer during argument or other sessions of the Commission where special emphasis may be required. This practice should be used judiciously.

(2). If counsel wish extracts of the Commissions Library be made available to the Commission during a session, counsel are responsible for making and providing sufficient copies for the Presiding Officer, each opposing counsel, and a copy for inclusion in the record of trial. If sufficient copies are not made available at the time counsel wishes the Commissions Library extract to be used, the Presiding Officer may deny counsel the opportunity to use the extract.

Approved by:

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

M. Harvey
Chief Clerk for Military Commissions

UNITED STATES OF AMERICA	Protective Order # 1
v.	Protection of Identities of All Witnesses
OMAR AHMED KHADR	11 January 2006

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

R.S. Chester
Colonel, U.S. Marine Corps
Presiding Officer

UNITED STATES OF AMERICA	Protective Order # 2 Protection of Identities of Investigators and Interrogators
v.	
OMAR AHMED KHADR	11 Jan 2006

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and

b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

4. The following actions do not violate this protective order:

a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

b. Using "nicknames" or any other name (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT include any name that the accused may have learned through some other means other than the individual themselves; and

c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identities of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

7. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

R.S. Chester
Colonel, U.S. Marine Corps
Presiding Officer

REVIEW EXHIBIT 47

Review Exhibit (RE) 47 is curriculum vitae of Translator No. 1.

RE 47 consists of 7 pages.

Translator No. 1 has requested, and the Presiding Officer has determined that RE 47 not be released on the Department of Defense Public Affairs web site. In this instance Translator No. 1's right to personal privacy outweighs the public interest in this information.

RE 47 was released to the parties in *United States v. al Khadr*, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 47.

//signed//

M. Harvey
Chief Clerk of Military Commissions

REVIEW EXHIBIT 48

Review Exhibit (RE) 48 is curriculum vitae of Translator No. 2.

RE 48 consists of 2 pages.

Translator No. 2 has requested, and the Presiding Officer has determined that RE 48 not be released on the Department of Defense Public Affairs web site. In this instance Translator No. 2's right to personal privacy outweighs the public interest in this information.

RE 48 was released to the parties in *United States v. al Khadr*, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 48.

//signed//

M. Harvey
Chief Clerk of Military Commissions

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:
1001
JAM1
JAN 03 ...

FIRST ENDORSEMENT on CDC CMC ltr 1001 CMC-D of 23 Dec 05

From: Staff Judge Advocate to the Commandant
To: Judge Advocate General of the Navy

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. Forwarded, recommending approval, subject to the expectations outlined below.

2. Lieutenant Colonel Vokey is currently assigned as the Regional Defense Counsel for the Western Region based out of Camp [redacted] a position in which he has served for the last 30 months. The Western Region is one of the busiest judicial circuits within the Department of Defense in terms of case volume. Lieutenant Colonel Vokey is responsible for supervising approximately 20 defense counsel dispersed throughout the region to include locations at Camp [redacted] San Diego, Miramar, Barstow, Twenty-nine Palms, and Yuma, Arizona. This dispersion requires him to spend a significant portion of his time traveling to the various installations. Each counsel in the region carries a full caseload of approximately 20-25 cases. Additionally, Lieutenant Colonel Vokey carries his own caseload, which currently consists of two officer cases.

3. Lieutenant Colonel Vokey's significant trial experience, top-secret security clearance, and personal desire to participate in the military commissions make him a solid candidate to serve as a selected detailed counsel in this case. However, Lieutenant Colonel Vokey has leadership and supervisory responsibilities that must not be impacted. I have discussed this matter with the Chief Defense Counsel of the Marine Corps, who supports approval of this request, and she has assured me that Lieutenant Colonel Vokey can do both. Accordingly, I recommend approval of the request with the following expectations:

- That the Khadr case is the only military commission to which Lieutenant Colonel Vokey will be detailed;

RE 49 (Khadr)
Page 1 of 2

- That Lieutenant Colonel Vokey will continue to perform his primary assigned duties as the Regional Defense Counsel, Western Region to include representing clients in courts-martial and administrative boards; and
- That the Office of Military Commissions will fund all costs associated with Lieutenant Colonel Vokey's participation in this case.

4. I am available to discuss this matter further if you should desire.

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

5800
Ser 00/0001
5 January 2006

SECOND ENDORSEMENT on CDC OMC ltr 1001 OMC-D of 23 Dec 05

From: Judge Advocate General
To: Chief Defense Counsel, Office of Military Commissions

Encl: (1) SJA to CMC ltr 1001 JAM1 of 3 Jan 06

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. Enclosure (1) recommends approval of subject request with specific expectations. Request you address these expectations.

[redacted]

Copy to:
SJA to CMC

3

RE 50 (Khadr)
Page 1 of 1

From: Sullivan, Dwight, COL, DoD O[redacted]
To: "Munsor Ahmed" ; Morrison, John T CPT (FXI)
Cc:
Subject: FW: Request for Selected Detailed Defense Counsel
Sent: 1/10/2006 2:55 PM Importance: Normal

-----Original Message-----
From: Sullivan, Dwight, COL, DoD OSC
Sent: Tuesday, January 10, 2006 3:49 PM
To: [redacted]
Cc: [redacted]

Subject: Request for Selected Detailed Defense Counsel

From: Chief Defense Counsel, Office of Military Commissions
To: Judge Advocate General of the Navy

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

Ref: (a) Second Endorsement on CDC OMC ltr 1001 OMC-D of 23 Dec 05
(b) First Endorsement on CDC OMC ltr 1001 OMC-D of 23 Dec 05

1. Initially, I apologize for communicating with you by the relatively informal medium of e-mail. Because I am currently at the U.S. Naval Station Guantanamo Bay, this seems to be the most effective means of communication.

2. I have received reference (a), which requests that I address the expectations that the Staff Judge Advocate to the Commandant expressed in reference (b). This e-mail addresses those expectations.

3. The Staff Judge Advocate to the Commandant noted three expectations in his recommendation on the underlying request that LtCol Colby Volsey serve as selected detailed defense counsel in the commission case of United States v. Khadr. The first expectation is that Khadr will be the only military commission case to which LtCol Volsey will be detailed. The second expectation is that LtCol Volsey will continue to perform his primary assigned duties as the Regional Defense Counsel, Western Region, to include representing clients in courts-martial and administrative boards. The third condition is that the Office of Military Commissions will fund all costs associated with LtCol Volsey's participation in the Khadr case.

4. The detail of defense counsel is within the control of the Chief Defense Counsel of the Office of Military Commissions. I therefore can, and do, agree to the first expectation. LtCol Volsey will be detailed to no military commission case other than United States v. Khadr.

5. I have discussed the second expectation with [redacted] the Chief Defense Counsel of the Marine Corps. Col [redacted] has authorized me to state that if LtCol Volsey is made available as selected detailed defense counsel in the Khadr case, she and I will ensure that his participation in the case will not interfere with his ability to perform his primary duty as Regional Defense Counsel, including the representation of clients in individual courts-martial and administrative boards.

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Page 1 of 2

6. I have discussed the third expectation with Mr. [redacted] the Chief of Staff of the Appointing Authority's office. Mr. [redacted] has authorized me to state that if LtCol Vokey is made available as selected detailed defense counsel in the Khadr case, the Office of Military Commissions will provide fund cites to cover any TAD costs arising from those duties.

7. Please let me know if I can provide any additional information. The most effective way to communicate with me is by e-mail at this account. Should you so desire, I will, of course, be happy to call you or anyone on your staff to discuss this request.

Very Respectfully,

S/
DWIGHT H. SULLIVAN

RE 51 (Khadr)
Page 2 of 2

US v Khadr - Goals of the Jan 2006 Term at GTMO

Goal	APO Comments	PO Comments
Conduct Initial session • ID, qualifications, and swearing of counsel. • Accused's desires with respect to counsel. • Arraignment.	• I have Pete's script, and looking at it, and will send on 8 Dec. • Think about what we might do if Khadr's counsel want to wait until the other detailed counsel come on board in Feb.	
Voir dire of Presiding Officer and your ruling of any challenge against you.	• [redacted] I need to send to counsel so they can prepare for voir dire. While I don't think they need much time, they will say they do. • When you assemble these materials, I will send to counsel. You will see a draft of the email.	
In an 8-5 Conference (like RCM 802), discuss upcoming schedule of motions and sessions. • Counsel discuss their calendars. • All will discuss a proposed schedule of dates. • If there is agreement on dates, I will type up a document and it will become a FI (filings Inventory) and RE.	• As soon as the initial session is completed - and without saying on the record you will have an 8-5, get counsel into chambers. • I will prepare an outline of the dates we need to set. • The matters we need to set a schedule for are: o Global motions - the big, overriding issues that Pete and I did "directed briefs" on. o Law motions. o Evidentiary motions (should wait until discovery underway or complete.) o Witness requests - separate for law motions, evidentiary motions, and the case (merits and sentencing.) • We need to give counsel a heads up to be prepared to discuss. I will draft email.	
Potentially, go back and announce the above decision on the record.	•	

RE 52 (Khadr)
Page 1 of 1

BIOGRAPHY

COLONEL MORRIS D. DAVIS

Colonel Morris D. Davis is the Department of Defense (DoD) Office of Military Commissions (OMC) Chief Prosecutor. He is responsible for directing the overall prosecution efforts of the United States in military commissions. His duties include supervising all Military Commission Prosecutors and Assistant Prosecutors, as well as advising the DoD General Counsel on matters relating to military commission prosecution activities.

Colonel Davis was born in Shelby, North Carolina, on 31 July 1958. He entered active duty in 1983 after graduating from the North Carolina Central University School of Law and admission to the North Carolina State Bar. He served as the staff judge advocate for the 7th Bomb Wing, Dyess Air Force Base, Texas; the 14th Flying Training Wing, Columbus Air Force Base, Mississippi; and the 4409th Operations Group (Provisional), Riyadh, Kingdom of Saudi Arabia. His previous assignments as a judge advocate include serving as director of Legal Information Services, instructor (government contracts and fiscal law) and later as deputy commandant at the Air Force Judge Advocate General School, appellate government counsel, circuit trial counsel, area defense counsel, and chief of military justice. Colonel Davis completed a Master of Laws in government procurement law at the George Washington University and a Master of Laws in military law with a concentration in government procurement law at the Army Judge Advocate General School. He was selected as the Outstanding Judge Advocate for Headquarters Air Force in 1990.

EDUCATION:

1980 - Bachelor of science in criminal justice, Appalachian State University, Boone, NC
1983 - Juris doctorate, North Carolina Central University School of Law, Durham, NC
1985 - Squadron Officer School, by seminar
1992 Master of laws in military law (concentration in government procurement law), Army Judge Advocate General School, Charlottesville, VA
1992 - Master of laws in government procurement law, The National Law Center, George Washington University, Washington, D.C.
1995 - Air Command and Staff College, by correspondence

1999 - Air War College, by seminar

ASSIGNMENTS:

1. December 1983 to May 1985 - chief of military justice, Eastern Space and Missile Center, Patrick Air Force Base, FL
2. May 1985 to January 1988 - area defense counsel, Patrick Air Force Base, FL
3. January 1988 to May 1989 - circuit trial counsel, eastern circuit, Bolling Air Force Base, D.C.
4. May 1989 to July 1991 - appellate government counsel, Bolling Air Force Base, D.C.
5. July 1991 to June 1992 - student, LL.M. program, Army Judge Advocate General School, Charlottesville, VA
6. June 1992 to July 1995 - instructor, civil law division, Air Force Judge Advocate General School, Maxwell Air Force Base, AL
7. July 1995 to July 1997 - staff judge advocate, 14th Flying Training Wing, Columbus Air Force Base, MS
8. July 1997 to July 2000 - staff judge advocate, 7th Bomb Wing, Dyess Air Force Base, TX
9. July 2000 to June 2003, deputy commandant, Air Force Judge Advocate General School, Maxwell Air Force Base, AL
10. June 2003 to January 2005, director, Air Force Legal Information Services, Air Force Legal Services Agency, Maxwell Air Force Base, AL
11. January 2005 to September 2005, staff judge advocate, 20th Air Force, F.E. Warren Air Force Base, WY
12. September 2005 to present, chief prosecutor, Office of Military Commissions, Washington D.C.

MAJOR AWARDS AND DECORATIONS:

Air Force Meritorious Service Medal with four oak leaf clusters
Air Force Commendation Medal with two oak leaf clusters
Air Force Achievement Medal with one oak leaf cluster
Southwest Asia Service Medal

BAR ADMISSIONS:

United States Supreme Court
Court of Appeals for the Armed Forces
Air Force Court of Criminal Appeals
District of Columbia
State of North Carolina

EFFECTIVE DATES OF PROMOTION:

First Lieutenant	7 October 1983
Captain	7 April 1984
Major	1 April 1991
Lieutenant Colonel	1 August 1996
Colonel	1 September 2001

DISCUSSION

Terminology was modified to be consistent with Air Force practice.

Rule 3.6. PUBLICITY. (See Standard 3-1.3, Standard 4-1.3, Standard 6-1.1 and Standard 6-2.2.)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto; or

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) and (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate or correct information that is the subject of recent publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DISCUSSION

Air Force members must comply with applicable laws and regulations in making public statements of any kind. See, for example, AFI 51-201, Chapters 7 and 12; *The Freedom of Information Act* (FOIA), 5 U.S.C. 552; DoD 5400.7-R/AF Supplement, *DoD Freedom of Information Act Program*; *The Privacy Act*, 5 U.S.C. 552a; AFI 33-332, *Air Force Privacy Act Program*; and *The Victim and Witness Protection Act*, 42 U.S.C. 10601-10605. Defense counsel, both military and civilian, must refer not only to Rule 3.6, but also to Standard 4-1.3 and Standard 6-1.1. Air Force prosecuting lawyers must refer not only to Rule 3.6, but also to Standard 3-1.3 and Standard 6-1.1. Other court personnel must refer to Rule 3.6 and Standard 6-2.2.

Rule 3.7. LAWYER AS WITNESS

(a) [Modified] A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except when:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

DISCUSSION

See *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988).

Rule 3.8. SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL [Modified]

The trial counsel in a criminal case shall:

(a) [Substituted] recommend that the convening authority withdraw any charge or specification not warranted by the evidence;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a pretrial investigation under Article 32, UCMJ;

(d) at sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel in a criminal case from making an extrajudicial statement that the trial counsel would be prohibited from making under Rule 3.6.

DISCUSSION

This rule was modified to conform to military practice. In addition, the term "trial counsel" was substituted for "prosecutor"; however, the rule should be read to include other persons involved in a prosecution such as, for example, the Staff Judge Advocate and Chief of Military Justice. See also Rules 5.1 to 5.3.

Rule 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 3.3(a) to (c), Rule 3.4(a) to (c), and Rule 3.5.

Rule 3.6 — Trial Publicity

A lawyer in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat to the impartiality of the judge or jury.

Comment

[1] It is difficult to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to influence the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives. No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression.

[2] The special obligations of prosecutors to limit comment on criminal matters involve considerations in addition to those implicated in this Rule, and are dealt with in Rule 3.8. Furthermore, this Rule is not intended to abrogate special court rules of confidentiality in juvenile or other cases. Lawyers are bound by Rule 3.4(c) to adhere to any such rules that have not been found invalid.

[3] Because administrative agencies should have the prerogative to determine the ethical rules for prehearing publicity, this Rule does not purport to apply to matters before administrative agencies.

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RE 53 (Khadr)

Rule 3.8 — Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused;

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause; or

(h) Peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function,

which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This Rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The Rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

[2] Apart from the special responsibilities of a prosecutor under this Rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

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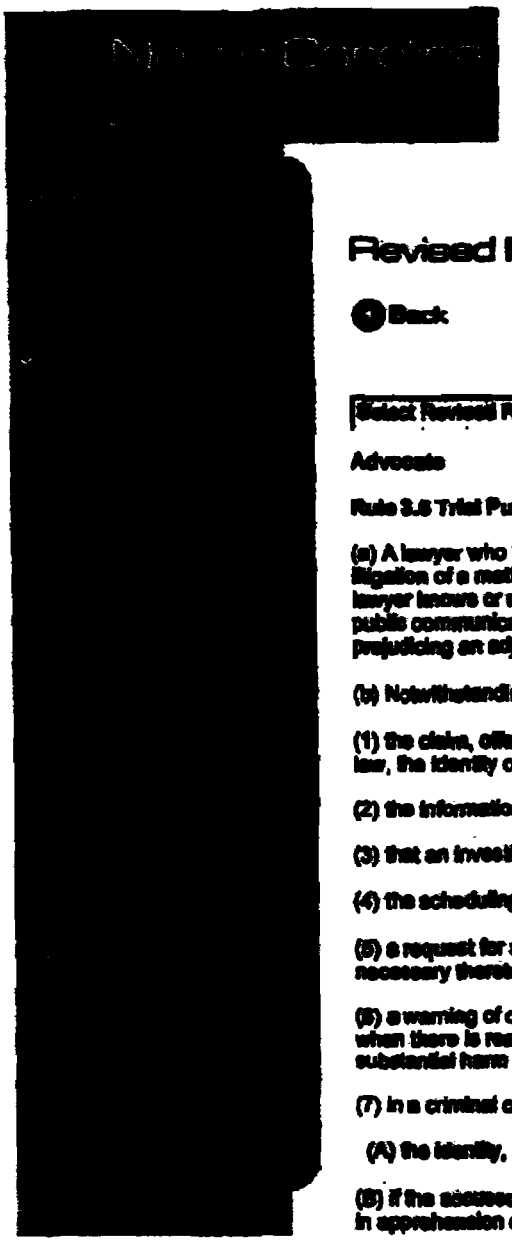

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Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the

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substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness,

or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 4. The rule restricting pretrial publicity does not apply when the case is on appeal.

98 FEO 4. Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

CASE NOTES

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Cited in *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 504 S.E.2d 802 (1998).

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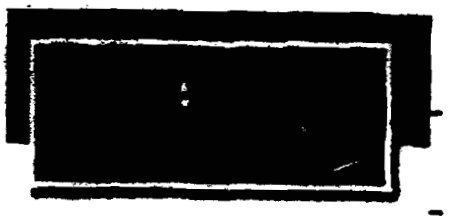

Revised Rules

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Advocate

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law

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enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

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[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

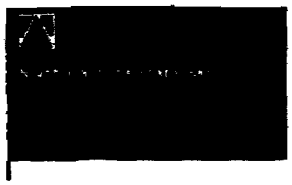
RPC 129. Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 152. Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.



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Lawyers Address Thorny Issues on Eve of Military Commissions Hearings

By Kathleen T. Rhem
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, Jan. 10, 2006 – Military commissions to try enemy combatants held here for alleged war crimes are intended "to prosecute unlawful conduct, not persecute religious beliefs," a top official with the commissions said here today.

Air Force Col. Morris Davis, chief prosecutor for the Defense Department's Office of Military Commissions, said he and his team intend to prosecute all military commissions cases in a fair and open manner. Hearings in two such cases are scheduled to get under way here tomorrow.

"A lot of folks have questioned whether these proceedings should go forward," Morris said. "We're facing an enemy like we've never faced before, and perhaps the law hasn't adapted to contemplate that enemy. Some say we're making up the rules as we go along, but the law has to adapt to today's environment."

The prosecutor's comments came in the face of tough criticism from human rights organizations and defense attorneys for the two men due in court this week.

In particular, critics decry the trial and continued detention of Omar Ahmed Khadr, a Canadian teen accused of killing a U.S. serviceman and wounding several others in Afghanistan in 2002. Khadr was 15 at the time. His civilian defense attorney, Munsur Ahmad, a law professor at American University, today called on the Canadian government to protest Khadr's detention and trial at Guantanamo Bay.

Davis was critical of press reports that create "a sympathetic picture of this poor kid who's all but blind in one eye."

"Well when we get past this defense facade of, 'It ain't fair,' and we get to the facts, you'll get to hear from (former Army Sgt.) Lane Morris, who is not almost blind in one eye, he lost an eye because of Mr. Khadr," Davis said.

He spoke of news articles that mentioned Khadr's attorney said his client almost died in 2002 and received inadequate medical care after that. "Well (at trial) you'll hear about (Army Sgt. 1st Class) Chris Speer, an American medic who was murdered by Mr. Khadr," Davis said. "You'll see pictures of Mr. Khadr (in which he) looks like he is almost dead, but thanks to the American medics who stepped over their dead friend and tended to Mr. Khadr, he's alive today."

Davis discounted reports that Khadr had been tortured in U.S. custody. "Part of (al Qaeda's) standard training procedure is if you're captured by Western forces, say you're tortured because the West just can't stomach that kind of thing," he said.

He also responded to public statements by human rights experts wondering what prosecuting a minor

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says about U.S. values. "Well, what it says about who we are is we're going to hold terrorists accountable when they kill American military forces," Davis said.

Davis noted Khadr's age was taken into account in that he is charged with murder and attempted murder, yet prosecutors are not seeking the death penalty. He also noted that 15-year-olds charged with murder in U.S. civilian courts routinely are tried as adults.

The other case scheduled for hearings this week is that of Ali Hamza Ahmad Suleyman al Bahlul, a Yemeni man accused of crafting terrorist propaganda. Attorneys on both sides are working to find a solution to an ethical dilemma the case has imposed on detailed military attorney Army Maj. Thomas Fleener.

In Bahlul's first appearance before a military commission, in August 2004, he asked to represent himself or to be represented by a Yemeni attorney. In July 2005, John D. Altenburg Jr., appointing authority for the Defense Department's Office of Military Commissions, ruled that Bahlul may not represent himself. Under military commissions rules, detailed military defense counsel must represent all defendants. Further, private defense attorneys are required to be U.S. citizens and possess a secret security clearance.

Legal wrangling and delays have kept the case out of court until now, and the Office of Military Commissions in November appointed Fleener as Bahlul's detailed defense counsel. Bahlul has since told Fleener's superiors he will not accept U.S. military representation and does not want to even meet with Fleener.

Fleener explained today that this places him in an ethical dilemma because he cannot mount a capable defense if Bahlul will not cooperate. He also has concerns about the ethical ramifications of forcing representation on a client who has asked to represent himself. He said the right to self-representation is recognized in all levels of U.S. and international law.

"To force a lawyer on a defendant can only lead him to believe that the law contrives against him," Fleener said. "Put another way, to force my representation on Mr. al Bahlul may give the appearance to the outside world that I am here not to serve as Mr. al Bahlul's attorney, rather simply to add some air of legitimacy to an otherwise wholly illegitimate process."

Fleener said he is seeking legal briefs from the state Bar Associations of Iowa and Wyoming, states in which he is licensed to practice law. He said he is particularly interested in Wyoming's opinion on the issue because he was living in Wyoming when he was activated by the Army Reserve to work on this case. "I have a great deal of interest in what the state of Wyoming says about my ability to practice law when I go home," he said.

Army regulations on the conduct of military attorneys are ambiguous on the issue. Army Regulation 27-26, Rules of Professional Conduct for Lawyers, states attorneys should ask to be removed from cases in which they cannot mount an effective case and from cases in which the client refuses representation. However, the regulation also states that "a tribunal or other competent authority" may require an attorney to stay on the case.

Commissions officials may address the issue during tomorrow's hearing.

Fleener stressed that he wants to represent Bahlul and that he feels the man needs an attorney. "It's

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rarely wise for someone to represent themselves," he said. "But I'm a public defender in the real world, and the 6th Amendment has some teeth to me, and one of those teeth is that a guy gets to represent himself if he wants to represent himself."

Speaking of military commissions cases in general, Davis said, his team is committed to keeping such cases as open as possible, despite rules that allow for closed hearings to present classified evidence. He said he's confident some future cases could be tried without any closed sessions.

"We've got nothing to be ashamed of in what we're doing here," Davis told reporters here to cover the hearings. "So we want you, we want the public, we want the world to see that we're extending a full fair and open trial to the terrorists that have attacked us. We're extending rights to them that they never contemplated."

He noted that both Bahlul and Khadr attended terrorist training camps in Afghanistan. "When these guys went to camp, they weren't making S'mores and learning how to tie knots," Davis said. "They were learning how to make bombs and kill Americans."

Related Site:
Military Commissions

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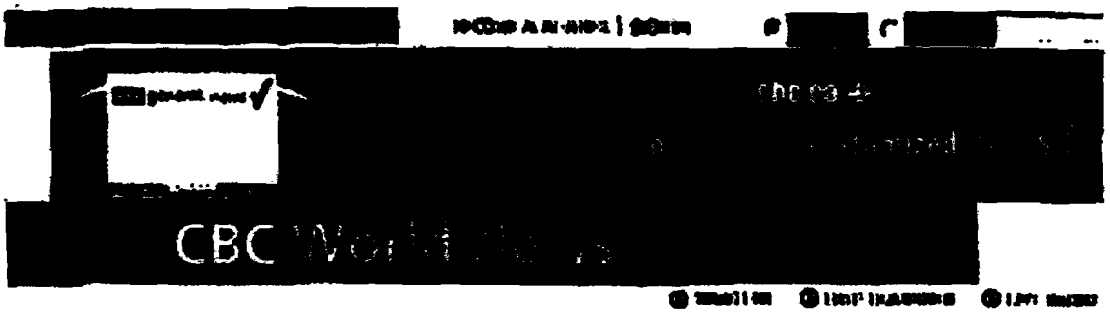
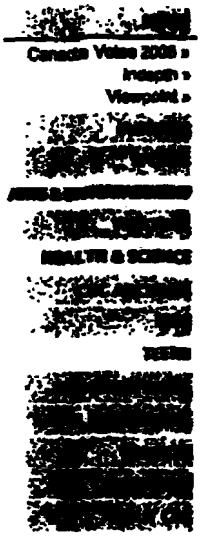




Guantanamo prison camp off limits during U.S. military hearing for K

20:52:59 EST Jan 9, 2006

BETH GORHAM

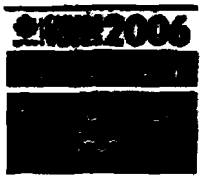
GUANTANAMO BAY (CP) - It's a barbed wire enclave totally at odds with the bea tropical island.

On this day, the notorious prison camp that's been holding Canadian teenager Omar more than three years is only faintly visible from the highest point of the historic U.S On one side of the peak, where towering windmills provide some of the energy for t there's Camp Delta's 500 suspected terrorists and the security forces that run the pris

Sprawling out on the other side, the base community of some 9,000 people that seem any regular town.

There are schools, an outdoor movie park, recreation centres, restaurants and suburb subdivisions of townhouses and large four-bedrooms with big garages. There is even and a McDonald's.

But this is clearly no regular place.



On another smaller point nearby, a yellow military commission building with extren security houses the plush courtroom where Khadr, 19, is expected to attend a pre-tri Wednesday.

Just outside town is the infamous line that divides the 116-square-kilometre base fro territory, where some 27 kilometres of fence are patrolled by more than 100 U.S. sol stadium-like lights are being installed on both sides.

"It's a relatively civil and cordial relationship," says Capt. Mark Leary, the base com "There are actually very few surprises" beyond migrants who brave landmines on th to cross over.

They come by sea too. Right now there are only 30 Cubans and one Haitian, althoug been many more at times.

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It's possible to tour the prison camp but that's not happening on this trip, one devotec military tribunal hearings in more than a year.

And there's been an extra push lately to improve access amid the continuing outcry a conditions and widespread allegations of torture.

"We're trying to open up more and more," says Maj. Jeffrey Weir, "(or) people will t trying to hide something."

Weir, who handles public relations, estimates about four different media organizatio week, many from the Middle East, some European. Africa too.

But no journalist has ever spoken to a prisoner and they rarely tour occupied blocks. their time is spent at the low-security communal camp designed for prisoners who ar being released.

"We don't want them to feel like they're being put on display," says Weir, and identif could put their families in danger.

He adamantly rejects torture allegations from released prisoners and the terrible tales Khadr and others to their lawyers; stories of beatings, threats and being shackled in s positions for many hours.

"We just don't do that, it doesn't happen. We do not deviate from our standard operat procedures," says Weir, who also vigorously defended security rules barring televisi from shooting from certain angles or capturing some buildings to prevent the base fr penetrated.

"The mission is in the worldwide view. A lot of the people who would be against thi operation would have no qualms about killing themselves to accomplish their missio make it any easier."

Everything is carefully controlled on this tour, similar to others provided by the Pent previous tribunal hearings.

Desert fatigue-clad soldiers with rifles frequently check identification and while ther efforts to reduce any excesses in security, the rules are stringent.

"Do not go beyond that stop sign," Weir says at one point. "If you do, I'm going to p boat and then put you on an airplane."

U.S. authorities stress that Camp X-Ray, a terrible temporary setup of small pens the worldwide condemnation, has been shut down.

They talk about respect for the Islamic faith, provision of culturally appropriate food observance Tuesday of Eid al Adha, the feast of the sacrifice, one of the most import the Muslim calendar.

Meanwhile, 43 detainees are still on a hunger strike. Thirty-two of them are being fo said Lt.-Col. Jeremy Martin, in a process that's been condemned by human rights ad

some physician groups.

"Our policy is to preserve life by all clinical means," said Martin, noting that no data at Guantanamo.

"There is a core group of hunger strikers who are very committed."

Khadr, who actually arrived at the camp just after he turned 16 years old, has been p group.

His hearing, and another this week for Ali Hamza al-Bahlul, have attracted a lot of c

Critics say the special military process set up by President George W. Bush for forei captured in the war on terror doesn't remotely afford due process.

None of the detainees are protected by the Geneva Convention since they are consid combatants and not prisoners of war.

The U.S. Supreme Court will hear arguments this spring that Bush has overstepped l boundaries.

Khadr's case is also contentious because he was only 15 when he was captured by U. Afghanistan after a firefight that killed an American medic.

His lawyers say he should have been treated as a juvenile and released from Guantar youths were.

Khadr, charged in November with murder and other counts stemming from the July : incident, faces life in prison if he's convicted.

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This photo of Omar Khadr was taken before he was imprisoned and distributed by his mother, Maha Khadr.

Prosecutor says Omar Khadr not a young innocent

Updated Wed. Jan. 11 2006 6:58 AM ET

CTV.ca News Staff

Omar Khadr may have been a fresh-faced 15-year-old kid when he was captured for the alleged murder of a U.S. army medic, but he is also a killer, according to the prosecutor working on his case.

Prosecutor Moe Davis, who described the Canadian teen as a terrorist murderer, is attempting to prove Khadr's guilt in Guantanamo Bay, where Khadr has been held since his capture in 2002. Khadr's pre-trial hearing begins Wednesday before a U.S. military tribunal.

That pre-trial will be the first time Canadians have seen Khadr since he was picked up and put in custody in Guantanamo Bay.

Davis is angry that Khadr -- accused of throwing a grenade at a U.S. medic, killing him and blinding another -- is being sympathetically portrayed.

"You will see evidence that the smiling face of Omar Khadr as he builds bombs to kill Americans," Davis said.

"You'll hear about Chris Spear who was murdered by Mr. Khadr. Thanks to American medics who stepped over their dead friend, Khadr is alive today."

Davis said the 19-year-old should be tried

A detainee is escorted to interrogation by U.S. military guards at Camp X-Ray at Guantanamo Bay U.S. Naval Base, Cuba, in this Feb. 27, 2002 photo.

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RE 53 (Khadr)

by a U.S. military tribunal despite claims that the process is flawed. He defended the controversial American system and said the law needs to grow to deal with new societal threats like terrorists.

(AP / Andrew Leighton)

Khadr's lawyers are trying to shut down the proceedings claiming that Guantanamo detainees are not getting their rights of due process granted under international law.

The military commissions are being challenged in the U.S. Supreme Court as unconstitutional, and some experts say the trial is a farce, especially since the military appointed its own rookie lawyer to defend Khadr.

"This is not a fair process, no matter how you dress it up this military commission is still a sham," Muneer Ahmad, a U.S. lawyer and professor said.

"A lawyer who's never defended a client even on charges of jaywalking, it would be laughable if the stakes weren't so high."

Critics claim Khadr was tortured into confessing,

Avi Cover, of Human Rights Watch, said Khadr has endured having pine solvent poured over him, threats of rape, and has been allowed to defecate on himself during his stint in Guantanamo Bay.

The U.S. has denied using such tactics, and points to the Khadr family tree. His father was a close associate of Osama bin Laden, and he and his brothers admit having spent time at terrorist training camps.

Khadr, who was captured at age 15, is facing a murder charge for the July 2002 death of a U.S. Army medic. Sgt. 1st Class Christopher Speer died 11 days after being injured by a hand grenade allegedly thrown by Khadr.

Charged in November with murder, attempted murder, conspiracy and aiding the enemy, Khadr faces life in prison after U.S. authorities said they wouldn't pursue the death penalty.

Wednesday's hearings will be similar to an arraignment. Ottawa has said officials will observe the proceedings, but they are unable to intervene.

The Khadr family has provoked intense debate in Canada. The family patriarch, Ahmed Said, believed to be a close associate of bin Laden's, was killed in a gun battle with U.S.-led coalition forces in Pakistan in October 2003.

One son, Karim, was paralyzed in the incident and returned to Canada with his mother in April 2004 to get medical treatment.

Another brother, Abdurahman, was once detained at Guantanamo but was released and went back to Canada.

Meanwhile, the extradition hearing for another brother, Abdullah Khadr has been put over until Feb. 2.

The Americans accuse the 24-year-old of conspiring to kill U.S.

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citizens abroad. He was arrested on Dec. 17 on a provisional arrest warrant issued by the United States.

With a report from CTV's Joy Malbon in Guantanamo Bay

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Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age

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Historically, the military ranks as one of the most trusted institution in America. In an annual poll conducted by the Gallup Organization, the public consistently rates the military as the institution in which it has the highest level of confidence placing it well ahead of the President, Congress and the church.[1] Public confidence remains high despite questions about operations in Iraq, prisoner abuse allegations at military confinement facilities, the on-going hunt for al Qaida in Afghanistan, concerns about the anthrax vaccination program, headlines over sexual assault allegations within the Department of Defense and questions over business dealings with Halliburton and Boeing.

To maintain the public's trust and confidence, particularly considering today's age of instantaneous access to news and information, requires greater effort and more attention than ever before. The public, rightfully, has a strong interest in its military and the military has a duty to the public to be as transparent as possible, and to the extent practicable, to serve as an honest, straightforward source of information. Communicating effectively and openly with the public enables the military to keep the public informed while highlighting the positive aspects of military service and the nature of on-going military operations. This communication through the media serves the military's interest in staying connected with society and the public's interest in monitoring its military.

Leaders must recognize the communications process is a continuum that starts at the decision-making stage and ends with an effect on public opinion after the communication is accomplished. A coherent communications process and strategy saves time and effort, more consistently promotes the military's long-term interests and provides the public the information it needs to assess its trust and confidence in the military.

The Demands of Command

From the newest airman in basic training to the Commander-in-Chief, everyone gets the same daily allotment of time. Demands dictate how each person allocates the time allotted, and "there just aren't enough hours in the day" is a universal complaint. Commanders face special challenges and demands on their time. Commanders start the day with at least a general notion of what they hope to accomplish, but one thing truly predictable is that the unpredictable will happen, forcing a reassessment of priorities and a reallocation of time and effort.

The essence of what a commander does, regardless of his or her level in the military hierarchy, can be distilled down to two words: make decisions. Every decision, whether a commander considers it trivial or monumental, affects someone, often in ways subordinates or other observers perceive as negative if not unfair or illegal. A person that believes a decision is wrong can elevate the perceived grievance to the most senior levels of the military, other governmental agencies, members of Congress and to the media in a matter of seconds thanks to modern technology . . . and these responses can all be done simultaneously. If that happens, commanders may find themselves devoting significant amounts of time

and effort justifying decisions made in the past rather than focusing on today's mission or tomorrow's potential requirements.

A complaint of the nature described above often takes on a life of its own and morphs in ways no one could imagine at the outset. The media want to attract interest, and nothing pulls in an audience like a scandalous headline. Politicians want publicity, and being perceived as someone who champions the cause of the little guy fighting a perceived flaw in the system has a natural appeal. All the while the public assimilates the information presented to them, often information presented in brief edited sound bites, and forms a collective opinion on the facts and the appropriateness of command action. Like Jason in the long series of Friday the 13th movies, a thorny issue seems to die off only to be resurrected when it is least expected, time and time again, resulting in a communications quagmire of indeterminate duration.

The military's reluctance to engage the media in the wake of a perceived scandal in many cases perpetuates the problem by allowing the complainant, the media and other interested parties to shape the battlefield in the struggle to influence public opinion. For better or worse, public opinion matters. Public opinion affects the political arena and can influence funding, oversight and direction to the Department of Defense. A number of headline examples, some to be examined in more detail later, demonstrate the military's historical approach to responding to controversy is inadequate in today's instantaneous information age. The military's rules of engagement in the competition for the public's opinion need to be reassessed. Senior leaders . . . commanders . . . must be more attuned to potential consequences of their decisions and more adept at identifying issues before they escalate, more skilled in shaping a response plan in the event of a controversy and more forthcoming in articulating why their decisions were proper and made sense.

First Lieutenant Kelly Flinn: A Lesson in Public Opinion

No case better illustrates the weaknesses in the old approach to responding to controversy or the influence public opinion possesses over government institutions than the case of Kelly Flinn. Lauded as one of the growing number of female graduates of the Air Force Academy, Lieutenant Flinn became the Air Force's first female B-52 pilot in 1995. She represented the Air Force at events such as the May 1996 air show at Andrews Air Force outside Washington, DC, the biggest event of its kind in the United States.[2]

Unfortunately for the Air Force, the poster girl developed her own desires completely unconstrained by the public role in which the Air Force cast her. Lieutenant Flinn began a course of conduct shortly after the May 1996 air show that soon led to even greater notoriety. She began a sexual relationship with a single enlisted man at Minot Air Force Base, North Dakota, in June 1996. Later that same month, a female airman and the airman's civilian husband arrived at Minot, and within days Lieutenant Flinn developed a sexual relationship with the airman's husband. The female airman discovered the affair in July and reported it to her noncommissioned officer first sergeant. The noncommissioned officer, in a gracious act that could have saved the young officer's career, warned Lieutenant Flinn to end the relationship. Lieutenant Flinn promised the noncommissioned officer the relationship would stop, but she continued the affair with the enlisted woman's husband.

In November 1996, a person under investigation by law enforcement authorities on an unrelated matter implicated Lieutenant Flinn and others for sexual misconduct. Lieutenant Flinn was questioned, chose to waive her right to remain silent and elected to provide a statement in her defense. She then made a false official statement to investigators (what is often characterized as obstruction of justice in civilian

investigations) denying a sexual relationship with the airman's husband. The civilian husband, on the other hand, admitted to the authorities he was having a sexual relationship with Lieutenant Flinn. The story did not end there. By December 1996, Lieutenant Flinn and the airman's husband were living together in Lieutenant Flinn's off-base apartment. After the female airman complained again about the continuing relationship, Lieutenant Flinn's commander gave Flinn an order to have no further contact with the airman's husband. Lieutenant Flinn violated the order, traveled with the airman's husband on vacation and even wrote a personal check to pay his college tuition. It was only after she learned in January 1997 that the airman's husband admitted to law enforcement authorities he had an on-going sexual relationship with Lieutenant Flinn that she asked him to move out of her apartment. On January 28, 1997, Lieutenant Flinn's commander preferred court-martial charges against her for disobeying the no-contact order, making false official statements, violating a regulation by fraternizing with an airman and for adultery with the female airman's husband.[3] And that is where the Air Force's public relations "trial" really began.

While many would debate the propriety of the course of action Lieutenant Flinn elected to pursue after she was charged, few could argue about its effectiveness. Lieutenant Flinn retained civilian legal counsel as well as a media relations firm.[4] Within weeks of the charges, Lieutenant Flinn's defense team crafted a plan to plead her case to the public through the media in hopes of avoiding ever having to argue the case before a judge or jury in a court-martial. In April and May 1997, lengthy articles in The New York Times and The Washington Post, as well as an appearance on 60 Minutes, conveyed the theme Lieutenant Flinn and her defenders wanted to sell the public: The Air Force was draconian and way out of step with modern society in persecuting a young woman for an affair of the heart.[5] Eventually more than one hundred media outlets were helping convey her message.[6] As an example of how effective her media campaign was, her story made the front page of The New York Times five times in less than two weeks.[7]

The Air Force's approach at the outset was the time honored "no comment" response that traditionally hamstrung both governmental agencies and prosecution teams, choosing instead to wait and present its case at trial.[8] The Air Force's reticence to speak out enabled Lieutenant Flinn and her team to frame the issue in terms favorable to her defense strategy with no opposition. By early May, just days before the case was set to go to trial, public opinion was clearly aligned with Lieutenant Flinn. Telephone calls to Air Force Public Affairs were seven to one that the Air Force was treating Lieutenant Flinn unfairly.[9] Equally as important, her ability to cast the issue in her own terms influenced political opinion on a bi-partisan basis. Senate Majority Leader Trent Lott, a Republican from Mississippi, said, "I think she is being badly abused. I'll tell you, the Pentagon is not in touch with reality on this so-called question of fraternization. I mean, get real: You're still dealing with human beings."[10] Senator Lott said he intended to raise the issue with the Secretary of Defense and opined, "at a minimum she ought to get an honorable discharge."[11] Senator Tom Harkin, a Democrat from Iowa, said, "I think the Air Force is looking ridiculous on this, and I think the military is too."[12] Representative James Traficant, a Democrat from Ohio, in a statement dripping with sarcasm, said: "For years, GI Joe was given a condom and a slap on the wrist. But now GI Jane gets a court-martial, a slap in the face and, to boot, labeled a Jezebel for life. I ask, if this was Lieutenant Errol Flynn instead of Lieutenant Kelly Flinn, would there be a court-martial, Congress? Beam me up."[13]

The Air Force eventually chose to enter the fray and tell its side of the story, that this was not simply a case of love gone awry, but a case of an officer who disobeyed orders, lied and undermined respect for the officer corps. On May 21, 1997, Air Force Chief of Staff General Ronald Fogleman told a congressional panel: "In the end, this is not an issue of adultery. This is an issue about an officer who is

entrusted to fly nuclear weapons, who disobeyed an order, who lied. That's what this is about."[14] But by then opinions were established and changing them would take time, something the Air Force wanted early on and by this point was running out of.

On May 22nd, Senator Slade Gorton, a Republican from Washington and a former Air Force judge advocate, highlighted the perils of fighting against such a public relations campaign if you are the institution. He sharply criticized General Fogelman's remarks saying, "we had the most outrageous statement on the part of the chief of staff of the Air Force, a four-star general, who, in effect, stated his belief in (Lieutenant Flinn's) guilt. He made a statement that is as outrageous an exercise of command influence as I can ever remember, and would have voided any possible court-martial conviction had this matter gone ahead."[15] Secretary of the Air Force Sheila Widnall brought the prosecution story to an end on May 22nd by accepting Lieutenant Flinn's request to resign in lieu of court-martial and the Secretary approved her separation with a general discharge.[16] Interestingly, by the time Secretary Widnall acted the Air Force's effort to tell its side of the story was already beginning to turn public opinion. Telephone calls to Air Force Public Affairs on May 21st were two to one in favor of prosecution, a dramatic shift from just a week earlier when callers opposed prosecution by a seven to one margin.[17]

Kelly Flinn: The Aftermath

The controversy did not end with the Secretary's approval of Lieutenant Flinn's discharge. General Joseph Ralston withdrew his name from consideration for appointment as Chairman of the Joint Chiefs of Staff in June 1997 after questions surfaced in the media about an affair he had with a civilian classmate when they were students at the National War College thirteen years earlier. The link to the Flinn controversy was obvious. As one reporter stated, "(h)ad it not been for Kelly Flinn, (General) Joe Ralston probably would have been chairman of the Joint Chiefs today."[18] On July 28, 1997, Air Force Chief of Staff General Ronald Fogelman asked Secretary Widnall to be relieved of his duties and allowed to retire a year before completing his normal four-year term, in part because of Flinn. General Fogelman said he and Secretary Widnall, in his view, "had a good relationship right up to the Kelly Flinn controversy."[19] Because of the Flinn case and several other issues, General Fogelman said he decided that, "perhaps I was riding the wrong horse here. After a while, you look around and experience some serious doubts about whether you can be right and everybody else wrong... In my heart, I concluded that my continued service was not in the best interest of the Air Force."[20] General Fogelman in essence concluded he was out of step with his civilian leadership, Congress and perhaps even the American public. Lieutenant Flinn, on the other hand, seemed to fare much better. She wrote a book, "Proud to Be," published by Random House in November 1997, and told People Magazine in December 1997, "(s)ome people have even suggested I run for Congress."[21]

The Air Force learned some important lessons from the Flinn case. The Under Secretary of the Air Force at the time, Rudy de Leon, said, "I think they (the Flinn defense team) had a very sophisticated plan. They were able to frame the story early on."[22] Clearly the Air Force was out maneuvered and caught unprepared to respond to the onslaught of public and political criticism Lieutenant Flinn's public relations campaign generated. Not only because of the Flinn debacle, but in an effort to prevent such shortcomings in the future, Air Force Chief of Staff General Michael Ryan and Secretary of the Air Force Whitten Peters formed a "Communication SWAT Team" in early 1998 called the Air Force Executive Issues Team, or by its acronym, AFPAZ.[23] The team reported directly to the Secretary of the Air Force and the Chief of Staff of the Air Force, and consisted of select members from five Air Staff and three Secretariat offices.[24]

The AFPAZ mission was to look out on the horizon for potential issues, proactively develop a response plan, and formulate fact-based themes and messages to enhance the Air Force's communications capabilities. The team was given unfettered access to meetings conducted by senior Air Force officials and the representatives from the functional areas received access to high-level meetings of and inputs from their counterparts in the field as issues appeared that might generate interest.[25]

Often the Privacy Act limited the Air Force's ability to respond to questions about individual administrative and criminal justice cases, so AFPAZ developed a Privacy Act release in conjunction with the Air Force General Counsel and the Air Force Judge Advocate General.[26] The release, if signed by the individual concerned, allowed the Air Force to discuss the specifics of the case and tell its side of the story. If the individual elected not to sign the release, it was a signal to the outside interested party, most often a reporter, that perhaps the individual had something to hide and did not want to give the Air Force the opportunity to set the record straight.[27]

This more aggressive, proactive approach put the Air Force on better footing to respond effectively to controversial stories. Former Air Force judge advocate, Brigadier General (retired) Jim Swanson, in a May 2003 article in USA Today, attributed the military's improved media posture in part to the lessons learned in the Kelly Flinn case.[28] General Swanson said senior leaders "now appear to clearly understand that it's a military imperative in the Information Age to fully accommodate the media's need for unfettered access to the truth. That being so, the military finally has something to thank Kelly Flinn for."[29]

Even the Little Issues Can Lead to Big Headaches

The Kelly Flinn case made headlines worldwide, affected the most senior levels of the Air Force, reverberated in the halls of Congress, and led to a rethinking of how the military engages with the media, but its origins can be traced back to North Dakota and a warning from a first sergeant to cease and desist and a no-contact order from a squadron commander. Their objective was to get an officer to stop carrying on a sexual relationship with the civilian husband of an enlisted woman. At the time, the first sergeant and the squadron commander certainly had little idea what a sensational case it would become. But these routine unit-level type decisions leaders make, day in and day out, have the potential to mushroom into time consuming, course altering events.

In July 1999, a female staff sergeant in the communications squadron at Dyess Air Force Base sent an email to her husband, a staff sergeant in the transportation squadron. Attached to the email were photographs of nude females with tattoos of animals and insects, with the females' genitals incorporated as part of each tattoo's design. The husband opened the attachment and showed the photographs to subordinates in his unit. One of the subordinates was offended and told his first sergeant. The matter was reported to security forces and investigators interviewed the husband. The husband elected to waive his right to remain silent and made a sworn written statement denying he received the email or saw the photographs.[30]

The commanders of the communications squadron and the transportation squadron elected to offer nonjudicial punishment to the husband and wife. The husband was punished for using a government computer to display pornographic pictures to his subordinates and for the false official statement he made to security forces investigators. The wife was punished for misusing the government email system to send pornographic pictures, something specifically prohibited by Air Force regulations.[31] While the facts of these cases are unique, these are the types of minor disciplinary infractions commanders confront on a daily basis. At the time, no one would have imagined that the eight-inch spread on the

front of the December 20, 1999, Air Force Times would read, "X-Rated Email, A Message Between Spouses: Whose Business is It?"[32]

The wife sent an email to the Air Force Times complaining that in the civilian sector what she and her husband did "wouldn't have even mattered" (a fact many labor law attorneys and corporate in-house counsel might strongly dispute) and claiming the Air Force overreacted.[33] The impression her description of the photographs created was far less explicit than what the pictures showed. When the Air Force Times reporter contacted officials at Dyess about the case, they provided him copies of the Privacy Act release developed by AFPAZ. The reporter presented the releases to both the husband and wife, and they signed giving consent for the Air Force to discuss their cases. This allowed base officials to set the record straight. They provided the reporter with a copy of the husband's second written statement to security forces, a statement he wrote after learning his wife confessed. In that statement the husband admitted showing the pictures to his subordinates and said his earlier sworn statement denying any knowledge was a "terrible mistake."[34] Base officials also offered to show the photographs to the reporter so he could see they were much more explicit than he had been led to believe. He declined the offer.

Dyess Air Force Base officials responded aggressively to the Air Force Times inquiry, secured Privacy Act releases, provided the written statements of the husband and wife to the reporter, offered to show him the pictures and provided him statistical information on disciplinary actions taken at the base for other misuses of government email. In the end, the story ran and was the lead article on the front page. Base officials would have preferred the story not run at all, but when it did appear on newsstands the overall tone was less critical and more balanced than it likely would have been had they failed to response. Also, the benign tone of the article did not generate broader media interest and the story died without much fanfare. There certainly was no outcry that spouses, and potentially friends or co-workers, should be allowed to use government computer systems to exchange pornographic images.

The Air Force Academy Sexual Assault Problem[35]

A former Air Force Academy cadet sent an email on January 2, 2003, to the Secretary of the Air Force, members of Congress, media outlets and others alleging there was a pervasive sexual assault problem at the Academy and complaining that sexual assault victims were ignored and even mistreated when they reported their assaults to Academy officials.[36] By year's end, the email led to over 1,900 news stories, four separate investigations, five congressional hearings and an hour-long feature on The Oprah Winfrey Show.[37] The Air Force was sharply criticized, not just because of the alleged assaults, but because of the way it was perceived to have responded to the controversy.[38]

Investigations are on-going, so it is premature to assess right and wrong in the Academy's sexual assault controversy, but there are some public opinion and public relations issues to consider.

First, information was available within the halls of the Air Force Academy suggesting there was a sexual assault problem requiring attention;[39] however, it appeared much of that information was not conveyed to the Academy's senior leadership. Well-intentioned processes to give victims access to support services, while allowing them to control whether their sexual assaults were reported to law enforcement investigators, kept some information from reaching commanders. It is entirely speculative at this point, but an obvious concern is whether, armed with this information, leadership would have engaged earlier and more aggressively, and possibly have prevented the issue from spinning out of control. It also begs the question of what was the point of collecting information if it was not going to be provided to the Academy's leadership? Confronting an issue early and aggressively certainly increases the chances it

can be resolved without becoming a national issue.

Second, the Secretary of the Air Force and the Chief of Staff released the Agenda for Change on March 26, 2003, nearly three months before the Working Group the Secretary established to investigate the problem submitted its report,[40] and announced that four of the Academy's senior leaders, including the Superintendent and the Commandant of Cadets, were being reassigned.[41] In the Air Force press release accompanying the Agenda for Change, the Secretary said the problems at the Academy predated the Superintendent and the Commandant, and "we do not hold (them) responsible."[42] This drew a quick and biting response from some members of Congress. Senator John McCain, a Republican from Arizona and a member of the Senate Armed Services Committee, said, "(i)t is abundantly clear the secretary of the Air Force has proven himself totally incapable of handling this issue" and he called the Air Force's response to the sexual assault allegations "some of the most incredible evasions I've seen in 40 years."[43] In a hearing before the Senate Armed Services Committee on March 31, 2003, senators criticized the Secretary and the Chief of Staff for reaching conclusions about responsibility before the investigations were finished and demanded a fourth investigation by an independent panel.[44] Regardless of who is or is not responsible for the problems at the Academy, releasing a statement implying that conclusions on accountability had been reached, even as investigations were on-going, created a perception that a fix was in and the Air Force was less than objective in confronting the issue. In hindsight, one could argue whether the statement on responsibility was necessary and, if it was, whether it could have been expressed in more preliminary, less conclusive terms. In the end, the positive impact the release of the Agenda for Change could have had on public opinion was overshadowed, to an extent, by the perceived negative implications drawn from the statement on responsibility.

Finally, the independent panel led by former Representative Tillie Fowler, a former Republican member of the House of Representatives from Florida, questioned whether the Air Force was capable of investigating itself. The Panel's report said:

> The Panel is also concerned about the seeming inability of the Air Force to adequately investigate itself. While the Air Force General Counsel's Working Group conducted a thorough investigation of the Academy, it completely failed to address one of the most significant contributors to the current controversy — ineffective oversight by Air Force leadership. Members of the Working Group knew about the prior involvement of Air Force leadership since they or their offices were engaged in the issues over the past ten years. Yet the General Counsel apparently made a determination not to include any of this information in the Working Group Report.[45]

The report goes on to say, "(t)he Panel believes that the Air Force General Counsel attempted to shield Air Force Headquarters from public criticism by focusing exclusively on events at the Academy."[46]

The Secretary, the Chief of Staff and the Air Force General Counsel testified before the Senate Armed Services Committee on September 30, 2003, following the release of the independent panel's report and the appearance of Representative Fowler and other panel members before the Committee on September 24th.[47] They faced tough bi-partisan questioning, particularly questions on why the Working Group's Report did not address Headquarters Air Force involvement. The General Counsel told Senator McCain she did not remember if she removed findings about prior Headquarters Air Force involvement from the report prompting Senator McCain to comment, "(w)e're in the dog-ate-my-homework, not-on-my-watch defense."[48] The Secretary, the Chief of Staff and the General Counsel also told the Committee the Working Group's earlier conclusion that there was no systemic effort to ignore sexual assault at the Academy might have been different in light of new information developed during the independent

panel's review. Following the hearing, the Committee wrote to the Department of Defense Inspector General requesting to expand an on-going Inspector General investigation to include potential responsibility at the Headquarters Air Force level.[49]

The lesson here is when the Air Force tells its side of the story it needs to be the complete story, or at a minimum a release with a caveat on the limits of what the story contains. In this case, the collateral issues associated with how the investigation was conducted and what was or was not included in the Working Group's report became a story almost equal in size and scope to the original sexual assault issue at the Academy. It took an untold amount of time and effort at the most senior levels of the Service to respond, all in the midst of on-going combat operations in Iraq when attention and effort could have most effectively been focused on the war.[50]

Effective Engagement

While the cases discussed above have a central theme . . . sex . . . sex is by no means the only topic that can lead to controversies and headlines. The aftermath of the April 2002 friendly fire incident in Afghanistan that claimed the lives of four Canadian soldiers and injured eight made headlines for months.[51] The on-again, off-again, on-again anthrax vaccination program, which resulted in courts-martial and other punitive actions for those who refused orders to take the vaccine, found its way into the federal court system and back into the headlines.[52] The Air Force's proposed multi-billion dollar tanker lease deal with Boeing generated a congressional firestorm and intense media attention.[53] Each controversy could serve as a case study in public and media relations, and the influence of public opinion on the military, but it is not the subject matter of cases that is central to the current discussion. The point is that the ability to communicate effectively with the public must be a core competency of every institution, to include the military services, in today's environment. That not only means honing the abilities of military leaders to engage effectively and forthrightly, but also transforming the military's underlying doctrine and practices on public opinion and media relations. Transparency and accuracy to the maximum extent possible should be primary objectives.[54]

A movement towards a more progressive stance began to take hold after the Flinn case, although it appears to have lost momentum over time. The military's approach to media relations and shaping public opinion were topics of a number of post-mortem analyses. A paper published by the University of Oklahoma Communications Department entitled "Proactive Media Communication: Changing Public Affairs Response Doctrine," used the Flinn case as the focal point for a review of the military's classical approach to engaging with the media.[55] The authors noted that military culture . . . its norms, rules and resources . . . at the time placed value on taking the high ground and not being drawn into Flinn's manipulative campaign.[56] Afterwards, the military, at least the Air Force, adopted new principles stressing being prepared to go on the offensive early and not allowing opposition groups or the media to shape the debate. The Public Affairs after action report in the Flinn case emphasized agenda setting and cultivation of themes consistent with the Air Force's interests as key components of an effective plan to better inform the media and the public.[57]

In today's environment, the public relies on the media for the bulk of the information it consumes.[58] Deputy Assistant General Counsel of the Department of Defense James Schwenk, a retired Marine Corps Brigadier General and former judge advocate, said, "(t)he people gain the information they need from an ever-increasing variety of sources, but there can be little doubt that they receive most of that information through the media."[59] General Schwenk argued that the military, as an agency of the federal government, serves the people and has a duty to provide the citizenry with information about its

activities. Citing the oath military members, both uniformed and civilian, take to support and defend the constitution, he said, "(o)ne might well conclude that the military has a Constitutionally-based obligation to provide information to the American public."[60] He argued that "no comment" responses increase the risk an issue will be portrayed in a misleading or unbalanced light, and refusing to comment could create an inference of "guilt by silence."[61] General Schwenk concluded, "(d)ealing with the media is not an additional burden unrelated to normal work in the Department of Defense. Dealing with the media is an inherent and important obligation of normal government service, military or civilian."[62]

The Flinn case highlighted a potential cultural divide separating the military and certain segments of the general public. Fewer members of the public, fewer elected representatives and fewer appointed officials than ever before have served in the military.[63] Fewer and fewer members of the public understand from personal experience the importance of good order and discipline in the heat of battle or a long, grueling campaign. This lack of military experience and comprehension of how the military operates leaves a void that can breed misunderstanding. It is incumbent upon the military, particularly with the public's interest in military matters, to work to bridge the gap. The military has an obligation to ensure the public is informed and has a basic understanding of the military so the citizenry is equipped to put information into context. Dr. John Hillen, a former Army officer and a public policy scholar who specializes in military issues, said, "(a) concerted effort by the military to get out front of these trends in public consciousness would go a long way to alleviating the pressure to close the values gap and help manage the understanding and appreciation gaps."[64]

The challenge is to meld all these considerations and craft a coherent, effective strategy that advances the military's and the nation's interests. Developing a strategy starts with recognizing the process as a continuum that begins with a risk management approach to decision making. Too often the focus is on how to respond after the controversy erupts. At the heart of every controversy is a decision or a number of related decisions, so the decision stage must be the starting point for considering a comprehensive strategy. The continuum ends with effective communication, when it is necessary, that influences public opinion consistent with the nation's interest in the military. What may constitute an effective, proactive strategy for today will require constant monitoring and transformation to adapt to an evolving environment. While by no means all-inclusive, the considerations discussed below offer a framework for decision making, engaging the press and the public, affecting public opinion and hopefully advancing the public's understanding of the military.

1. Assess the likely impact of a decision and weigh the potential consequences

Virtually every decision has an impact on someone. Think about it for a moment: selecting the squadron's airman of the quarter, preparing the duty schedule to cover a holiday period, evaluating bids for award of a contract, deciding who gets a definitely promote recommendation and who gets a promote, choosing targets and picking who will fly the missions against those targets, selecting units from the reserve component to activate for an extended deployment . . . the outcome in each case is likely to create a perception that some were "winners" and some were "losers," and the "losers" may not readily accept the decision.

That is not to say leaders should shy away from making decisions in hopes of avoiding controversies. Effective leaders are realists who recognize there are pros and cons to most every decision. The principles of Operational Risk Management (ORM)[65] provide a general framework for decision-making. Is a decision required? If so, what are the options? What are the potential risks and benefits of each option? Are there any reasonable ways to mitigate the risks and maximize the benefits? Given the decision that has to be made and considering all the circumstances, which is the best option? If the

decision is made and one of the risks comes true, what are the likely consequences and what is the appropriate response?

Leaders often ask their advisors, "can I do this?" In most cases the answer is yes. The more difficult question is not "may I do it," it is "should I do it?" President Richard Nixon coined the expression, "how will it play in Peoria?" and made it his touchstone for decision-making.[66] Regardless of how history judges Nixon's more infamous decisions, his "how will it play in Peoria?" analysis is simply another way of expressing the "should I do it?" assessment leaders ought to conduct. It recognizes there is more to weigh than just whether the decision is legal, moral and ethical, and takes into account both the impact the decision will have on the interested parties and the perception it will create. Even when the decision will not play well, it may still be the right decision. Leaders should weigh all the competing interests and make the best decisions they can, but they need to ensure they are not scoring Pyrrhic victories. Some decisions, no matter the potential risks or probable unpopularity, are unequivocally the right decisions and should be made. Others may allow for serious consideration of a second or third tier alternative. The end result is leaders need a realistic perspective that takes into account all factors, positive and negative, and leads to the best solution possible.

2. Memorialize the rationale for a decision

Anyone in a senior leadership position that has not been the subject of an investigation by an Inspector General, the object of adverse media attention or the recipient of a congressional inquiry need only wait . . . it is just a matter of time. In some cases it may be months, if not years, after the fact before a decision is called into question. When that happens, a record of how the decision was made, particularly if it involves what seemed to be an inconsequential decision for which the details have long since been forgotten, is invaluable. Obviously, the import of the decision has a significant impact on the level of documentation that would reasonably be expected. The deliberative process in a billion dollar procurement would likely have a more detailed history than picking the winner in the squadron's airman of the quarter competition, but even a few words jotted in a day planner could be helpful later. A leader whose decision is challenged should be able to articulate his or her rationale for the decision, and a record not only serves to refresh the leader's recollection, it also documents the various considerations at the time of the decision and negates the implication facts were recently recreated (or even fabricated) to justify a matter now under scrutiny.

Discussions are frequently conducted by email in today's environment. Email is a useful tool and the information recorded there can be helpful in reconstructing the deliberative process; however, it can become destructive within the institution if leaders become too informal in their email discussions. Microsoft founder Bill Gates discovered that the hard way during the 1997 antitrust suit filed against his company by the Justice Department. Email traffic in which he discussed how Microsoft could undermine its competition provided a smoking gun for the government's case and led to a settlement in 2002 on terms less favorable than Microsoft would have desired.[67] The author of a recent article provided sound email advice, "(n)ever say anything in an email you wouldn't say in a memo, a letter, or in front of a large audience."[68] It pays to think twice before hitting send to prevent embarrassment later if an issue develops and the email traffic becomes discoverable or public knowledge.

A potential problem with documenting the basis for a decision is that after the rationale is revealed the aggrieved party may dispute the underlying facts. An extreme example is the dispute over the failure to uncover weapons of mass destruction (WMD) in Iraq. President Bush cited Iraq's stockpile of WMD as a principal basis for the preemptive military action launched against Saddam Hussein and the brutal Baath Party in March 2003.[69] The subsequent failure to find WMD led to questions of whether the President misled the public about why the nation was going to war or whether he based his decision on

faulty intelligence. A special commission reviewed the pre-war collection and assessment of intelligence information, and the issue is a factor in the 2004 elections.[70]

Military leaders face similar scrutiny, although certainly of lesser magnitude, in any post-decision analysis of their decision-making processes. This potential for a later attack on the factual basis of a decision does not, however, outweigh the advantages of having a record of what went into the deliberative process. The factual basis should have been explored, considered and proven sound before the decision was made. What constitutes a reasonable level of certainty depends on the nature and significance of the decision. The earlier, "how will in play in Peoria?" analysis is a good rule of thumb. Would a reasonably prudent person make a decision of this magnitude given the character and weight of the evidence available? If the answer is no, then a leader should not expect it to play well if the decision is later challenged.

Obviously leaders cannot document every decision they make in the course of a day or little else would get accomplished. Likewise, determining how brief or how extensive a history is appropriate in cases where some amount of documentation is appropriate depends on the circumstances. In the end, it is an art and not a science. Deciding whether a decision should be documented and, if so, to what extent, is a decision in and of itself and like every other decision is subject to being criticized later. Leaders may find themselves in the proverbial, "damned if you do, damned if you don't" trap. It is a matter of discretion and judgment, and effective leaders must master the art of striking the right balance. As a final point on documenting a decision, if there are multiple bases for a decision, it often pays to list them all. If one of the bases is later shown to be erroneous the decision may still "play in Peoria" on the strength of the bases that remain.

3. Use the resources available to monitor the environment

A leader is generally insulated from the day-to-day environment of his or her organization making it difficult to accurately assess its overall health. Even those with a "management by walking around" approach to leadership are unlikely to get a true picture of how things are going at lower levels. There are, however, resources available to help leaders monitor their environments.

In a typical Air Force wing structure, the normal human tendency is to keep bad news from the wing commander whenever possible, instead presenting news in the best light. But a wing commander has the ability to stay informed by tapping members of his or her staff. For example, the wing legal office is engaged with all the units on the installation and should have a good sense of trends and issues. The staff judge advocate can and should be expected to keep his or her wing commander informed of matters likely to have an impact on wing operations. The command chief master sergeant is engaged with the unit first sergeants and other enlisted organizations, and should have his or finger on the pulse of the enlisted force. Both security forces and the Office of Special Investigations are actively involved in law enforcement, and they can provide information on developing trends and potential threats. While these are wing level examples, leaders at other levels have comparable points of reference available to them to assist in maintaining an accurate sight picture of their organizational environments. At the most senior levels of the Air Force, AFPAZ was created in part to provide senior leaders situational awareness of potential issues that could affect the Air Force.[71]

Utilizing these resources enables leaders to make informed, well-reasoned decisions rather than operating in a vacuum. Using the Air Force wing scenario as an example, a wing commander faced with a decision on a typical disciplinary matter, such as an airman driving under the influence of alcohol, can use his or her staff advisors to help him or her reach the right decision, one that will "play in Peoria." Law enforcement can provide advice on whether drunk driving is becoming a trend and brief the facts of

the particular case. The staff judge advocate can provide advice on the normal range of punishment for such offenses and help ensure consistency. The command chief master sergeant can provide input on how a proposed punishment will be perceived by the enlisted force. Taking all of these inputs into account helps the commander get from the "could I?" query to the "should I?" decision, and is most likely to result in a decision that will withstand scrutiny and serve institutional interests.

4. Consider a response plan

The time to think about how to respond to a controversy is before the controversy erupts, not afterwards. This principle was clearly recognized when AFPAZ was tasked to, "anticipate and monitor issues to ensure timely delivery of accurate and forthright Air Force messages."[72] The same principle is true at every level of leadership. It is better to anticipate a problem could develop, have a plan to respond, and not need it, than to try and cobble a plan together after the problem erupts and the issue has already begun to take shape. Proof of this point is intuitive, but difficult to establish with empirical evidence: Success is based on a potential issue never evolving into an actual controversy. The Lieutenant Flinn case is illustrative of the problem with trying to engage too late, after the fight has begun. For all practical purposes, public opinion was swayed and the debate was over before the Air Force ever stepped up to the podium.

There is no single model for an effective response plan. The appropriate amount of time and effort, and the proper level of sophistication, depends upon the circumstances. A reasonable plan to address a controversy that might arise from a squadron airman of the quarter selection would be markedly different from a response plan to deal with disciplinary actions related to a fatal aircraft accident during combat. The point is leaders at all levels should, at the time they make decisions, think through the "what ifs" that might follow and have, at a minimum, a notion of how they will respond and what resources are available to assist them. Public Affairs officers are available at all levels to help develop and articulate the message in terms that support the military's interests.

Leaders should consider what proactive steps they can take to mitigate the potential for a controversy to arise. For instance, after a decision is made on an airman of the quarter winner, the commander or the first sergeant might take a few minutes to meet with each of the non-selects individually to congratulate them on the accomplishments that led to their nominations for the award and to thank them for their contributions to the unit. The non-selects will still be disappointed they were not the winner, but some positive reinforcement could reduce the "why him or her and not me?" negative sentiment that can follow an award decision.

This principle was incorporated in the government procurement arena some years ago when the Federal Acquisition Regulation adopted procedures for the government to meet with and debrief unsuccessful offerors on why they were eliminated from competition for a contract or were not selected for the final award.[73] Explaining to an offeror where the weaknesses were in its proposal and discussing the rationale for the government's award decision can, in many cases, prevent a protracted and disruptive procurement protest later.[74] Before these debriefing procedures were adopted, it often took a formal protest and initiation of the contentious litigation process for a disappointed offeror to "discover" where it fell short. It simply made sense to provide the information early and in a more informal, less adversarial manner. Not only does it satisfy the disappointed offeror's desire for information, it also helps maintain the relationship between the government agency and a company that is either doing business with the government on other contracts or likely to compete again for future contracts.

5. Take the offensive

James Carville and Paul Begala, in their book, *Buck Up, Suck Up ... and Come Back When You Foul Up*, said it well:

> Hearing bad news about someone from a third party often elicits schadenfreude, that wonderful German word that means taking pleasure in someone else's pain. But when you hear it from the person directly, there's a lot less schadenfreude and a lot more sympathy.[75]

While they were referring to bad news on an individual level, the same principle holds true for an organization. Too often the military waits for the bad news to hit the media, and then starts a defensive campaign to mitigate the damage. In appropriate cases it would be in the military's interest to take the offensive and get in front of the news. Trial attorneys know that if there is dirt on a key witness it is best to bring that out early in direct examination and let the witness explain the circumstances. That takes the wind out of opposing counsel sails when he or she stands up and says, "Isn't it true that you ...". Otherwise, the bad news can be the focal point of cross-examination, making it appear the other side was trying to hide the truth from the jury and putting the witness' credibility in doubt. It has much less impact when the jury has already heard it during direct examination, so by the time it comes up again during cross-examination, the result is more of a "so what? I've already heard about that."

The Air Force Academy sexual assault scandal offers an example of this point. The public relations damage caused by the allegations of indifference to victims of sexual assault was almost equaled by damaging allegations the Air Force attempted to shield senior leadership from criticism for its role in the scandal. The Denver Post's September 24, 2003, front page headline read, "Charges Rebutted in AFA Abuses-Lawyer Didn't Shield Brass, Officials Say."[76] The article described testimony before the Senate Armed Services Committee on September 22, 2003, by Representative Tillie Fowler and other members of The Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy. The Panel told the Senate Armed Services Committee that information about the role of senior Air Force leaders in the sexual assault scandal was omitted from The Report of the Working Group Concerning the Deterrence of and Response to Sexual Assault at the U.S. Air Force Academy. Specifically, Representative Fowler alleged that the Air Force General Counsel "intentionally withheld information from her internal investigation to protect Air Force leaders."[77]

While the General Counsel vehemently denied the allegation and the Secretary and Chief of Staff defended their handling of the sexual assault issue, the damage was done.[78] The Chairman of the Senate Armed Services Committee announced that confirmation hearings on the Secretary's nomination to become Secretary of the Army would not be held until additional investigations were completed and the Inspector General for the Department of Defense was asked to investigate the role of Air Force senior leaders in the scandal.[79] On March 10, 2004, after his nomination for the Army post stalled in the Committee for over eight months, the Secretary asked the President to withdraw his name from consideration for the Army position in part because of lingering issues over the handling of the sexual assault scandal.[80]

The benefit of hindsight is undeniable and it suggests the Air Force's interests may have been better served had it acknowledged earlier that senior leaders knew of sexual assault issues at the Air Force Academy before the 2003 scandal hit.[81] Acknowledging the issue was known and addressing who knew about it and what actions they took or should have taken would not have stopped criticism, but the criticism would have been muted compared to the uproar that followed when it appeared there was a cover-up. Bad news does not get better with age and, as in this case, deferring telling the whole story can become a story in itself with significant consequences. The Air Force missed an opportunity to take the offensive and get out front of the issue and perhaps avoid the schadenfreude that followed.

The military cannot be the first one out of the chute every time for a variety of reasons. Many cases involve information on individuals that is protected by the Privacy Act.[82] In those cases, taking the offensive may not mean being first with the news, but being ready to respond when the news hits. Have the Privacy Act waiver ready and waiting. Have the relevant documents redacted, copied and ready to distribute. Have a spokesperson selected and prepared. If some information is classified, have it screened and any parts that are releasable ready for dissemination. In today's world, news organizations operate under tight deadlines and they will run with the story regardless of whether the military has had time to formulate a response. Being ready will not prevent bad news from happening, but it enables the military to be seen as forthcoming and allows it to help define the parameters of the issue.

6. Educate leaders on the art of public and media relations

Like it or not, it is simply a fact of life that the public is interested in the military and the media is its most prevalent conduit for information. The military recognizes that fact and has incorporated it into military doctrine. Joint Publication 3-61, Doctrine for Public Affairs in Joint Operations, acknowledges that the speed of current operations and advances in technology "significantly complicate the challenges to both commanders and public affairs personnel in supporting news media efforts to keep the public, both internal and external, informed."[83] The Joint Publication also acknowledges that an aggressive, coherent plan to facilitate the media's need for information is imperative, saying, "(t)o do otherwise simply places the military in a defensive, catch-up role and fails to achieve one of its own very important missions—keeping the public informed."[84]

Translating this doctrinal precept into an accepted practice is the challenge. A step in that direction is incorporating media awareness and public relations training into professional military education at all levels. Grooming leaders of today and tomorrow to appreciate the impact media attention and public opinion have on their ability to conduct operations with minimal unnecessary distractions logically belongs in the schoolhouse. The Air Force Public Affairs Center of Excellence (PACE), a part of the College of Aerospace Doctrine, Research and Education, directs and conducts formal training in various colleges and courses at Air University.

Students attending the Air War College complete "Engaging the Media," a mandatory three-hour course that includes an hour and a half of lecture and an hour and a half of seminar discussion. PACE conducts a thirty-hour elective entitled "The Commander and the News Media," leads two-hours of seminar discussion during "The Art of Command" and "Case Studies in Air Force Leadership" electives, and provides optional on-camera media training. PACE also participates in the Secretary of the Air Force's National Security Forum and the Solo Challenge and Joint Land, Aerospace and Sea Simulation exercises at the Air War College.[85]

Students attending the Air Command and Staff College are required to complete "The Role of the Media and Leadership," a one-hour lecture by a senior officer on the importance of understanding the role of the media; "The Military and the Media," a two and a half hour panel discussion by media representatives on military-media relations; and "Media and the Leader," a two and a half hour lecture on the power of the media and techniques for successful media interviews. PACE offers a thirteen-week long, thirty-nine academic hour elective entitled "The War for Public Opinion: Propaganda, Public Affairs and the Military-Media Relationship" and provides optional on-camera media training.[86]

PACE conducts public affairs and media training in many of the courses offered in the Ira C. Eaker College for Professional Development. This includes Wing Commander, Group Commander and On-Scene Commander courses offered by the Commanders' Professional Development School; the Air

Force First Sergeants' Academy; the Staff Judge Advocate Course and Operations Law Course conducted by the Air Force Judge Advocate General School; and classes offered in the International Officer School.[87]

Public affairs and media training are included in enlisted professional military education. PACE developed core blocks of training included in Senior Noncommissioned Officer Academy, Noncommissioned Officer Academy and Airman Leadership School courses.[88] PACE also participates in the Information Warfare Applications Course and the Contingency Wartime Planning Course conducted by the College of Aerospace Doctrine, Research and Education;[89] the Theater Campaign Warfare wargame conducted by the School for Advanced Air and Space Studies; the JAG FLAG exercise conducted by the Air Force Judge Advocate General School; and the Blue Thunder exercise conducted in the Air and Space Basic Course.[90]

Training should, and often does, focus on creating a mindset that transparency is desirable and the process starts with anticipating potential outcomes at the initial decision-making stage. In addition to traditional lectures focused on lessons learned in the past, training should include decision-making scenarios where students assess options and potential collateral consequences of each option, including issues likely to develop and a plan to respond to those issues. Additionally, training should include simulated interaction with the media; the type of preparatory training Public Affairs provides on an ad hoc basis now. The objective is not to develop leaders that make decision based upon their assessment of public opinion—doing the right thing should always be paramount—but to have them recognize and plan for potential fallout. Preparations through education and training, and forethought at early decision-making stages, can, in some instances, save considerable time, inconvenience and adverse publicity later.

Conclusion — Offensive Engagement in the Battle for Public Opinion

The military, the media, the public and Congress are inextricably linked in an information loop. The military acts, the media reports, the public forms opinions that can influence their elected representatives, and Congress provides oversight and direction to the military through appropriations and statutory guidance . . . and the process flows in an unending circular pattern. The military is locked in the current and has a choice to either fight it or facilitate its flow. The public understands that it is necessary to protect some things: plans for future military operations, classified information, data that would intrude on personal privacy and things of that nature.[91] The military cannot, however, use the "it's secret" card too often before it begins to appear as a subterfuge for hiding dirty laundry.

A commitment from senior leadership to promote the maximum transparency possible will facilitate change in attitudes at all levels. This attitude of openness and honesty promotes the military's interests in the long run. Proactive engagement enables the military to help shape the debate and maximize or mitigate, as the case may be, its influence on public opinion. It is time to take the offensive and influence the story rather than wait until forced to go on the defensive. The impetus must start at the top, but the practice must be engrained from the bottom up. More times than not the military has a good story to tell. Even when bad news happens preparation can lessen the impact. Time spent early on in training current and future leaders, and time spent thinking through how decisions will "play in Peoria" before they are made, can save time and much embarrassment later. For the military to preserve its standing as a trusted institution it must show the public it is forthright and it does not hide the truth. The public has the right to expect when its military speaks they can trust "that's the way it is."[92]

Notes

1. In the June 2003 survey, eighty-two percent of those polled expressed a great deal or quite a lot of confidence in the military, the military's second highest rating ever. Frank Newton, Military, Police Top Gallup's Annual Confidence in Institutions Poll, Gallup Poll News Service, Jun. 19, 2003. The percentage decreased to seventy-five percent in the June 2004 survey, but the military still placed first, well ahead of other institutions. Poll Shows U.S. Optimism on the Rise, United Press International, Jun. 3, 2004.

2. Charles Babington, Picnics, Parachutists and Flights of Fancy; At Andrews Base, Air Show is the Hot Topic of the Day, Washington Post, May 29, 1996, at B1.

3. Colonel Jack L. Rives, The Case Against Lieutenant Kelly Flinn, The Reporter, Dec. 1997, at 5-6.

4. Patricia A. Lang, Jon N. Nylander, Rhonda K. Paige, Jef Reilly, and William T. Wadsworth, Proactive Media Communication: Changing Public Affairs Response Doctrine, Defense Public Affairs Electronic Lyceum, Dec. 1997, available at www.ou.edu/deptcomm/dodjcc/groups/98A4/Flinndoc.htm.

5. Tony Capaccio, Pilot Errors, American Journalism Review, Oct. 1997, at 18-20.

6. Lang, supra, at 5.

7. Id.

8. Colonel Jack L. Rives, The Case Against Lieutenant Kelly Flinn, The Reporter, Dec. 1997, at 5-6.

9. Patricia A. Lang, Jon N. Nylander, Rhonda K. Paige, Jef Reilly, and William T. Wadsworth, Proactive Media Communication: Changing Public Affairs Response Doctrine, Defense Public Affairs Electronic Lyceum, Dec. 1997, available at www.ou.edu/deptcomm/dodjcc/groups/98A4/Flinndoc.htm.

10. Pilot's Trial Stalled While Pentagon Awaits Go-Ahead; Senate Majority Leader Lashes Out at Pentagon, Chicago Tribune, May 20, 1997, at 1.

11. Id. A poll released the week the case was set to go to trial showed the public supported an honorable discharge as well. According to a nationwide survey, sixty-five percent thought the Air Force should accept Lieutenant Flinn's resignation and give her an honorable discharge while twenty-four percent disagreed. Ron Martz, Strong Feelings Riding on Case, Atlanta Journal-Constitution, May 22, 1997, at 18A.

12. Incidental Adultery?, Jim Lehrer interview of Senator Tom Harkin and General Ronald Fogleman, Online News Hour, May 21, 1997, available at www.pbs.org/newshour/bb/military/may97/flinn_5-21.html.

13. Ron Martz, Strong Feelings Riding on Case, Atlanta Journal-Constitution, May 22, 1997, at 18A.

14. The NewsHour with Jim Lehrer, May 21, 1997, Transcript Number 5833.

15. The NewsHour with Jim Lehrer, May 22, 1997, Transcript Number 5834. Article 37 of the Uniform Code of Military Justice, 10 U.S. Code §837, prohibits unlawful command influence, which is an attempt to coerce or influence the findings, sentence or disposition in a military criminal proceeding.

16. Id.

17. Patricia A. Lang, Jon N. Nylander, Rhonda K. Paige, Jef Reilly, and William T. Wadsworth. Proactive Media Communication: Changing Public Affairs Response Doctrine, Defense Public Affairs Electronic Lyceum, Dec. 1997, available at www.ou.edu/deptcomm/dodjcc/groups/98A4/Flinndoc.htm. The Air Force's late May effort to correct the record included releasing a letter from the forgotten victim in the case, Airman Gayla Zigo, the wife of Lieutenant Flinn's paramour. The letter described the airman coming home to find Lieutenant Flinn, dressed in her flight suit, with the airman's husband. Newsweek described the letter as portraying Lieutenant Flinn as "an arrogant husband stealer." Gregory L. Vistica and Evan Thomas, Sex and Lies, Newsweek, Jun. 2, 1997, at 26.

18. Tony Capaccio, Pilot Errors, American Journalism Review, Oct. 1997, at 18.

19. Dr. Richard H. Kohn, The Early Retirement of Gen Ronald R. Fogelman, Chief of Staff, United States Air Force, Aerospace Power Journal, Spring 2001.

20. Id. General Fogelman said when he heard Secretary Widnall was considering giving Lieutenant Flinn an honorable discharge he told her, "Madame Secretary, if you give her an honorable discharge, you can also select a new chief of staff." General Fogelman said he had never spoken so directly to a superior before, but he felt that strongly about the issue. Id.

21. A Disgraced Pilot Airs Her Side of the Story; Kelly Flinn is Fighting to Win Back Her Reputation - and Her Wings, People Magazine, Dec. 29, 1997, at 152.

22. Tony Capaccio, The Kelly Flinn Spin Patrol, American Journalism Review, Sep. 1997, at 12.

23. Colonel Jack L. Rives, Who You Gonna Call? AFPAZ! An Overview of the Air Force Executive Issues Team, The Reporter, Dec. 1999, at 17. See Secretary of the Air Force Order 128.1, The Air Force Executive Issues Team, Nov. 12, 1999. On March 15, 2002, AFPAZ consolidated with several related functions in a new Communications Directorate under Special Assistant to the Secretary of the Air Force William C. Bodie. See Air Force News, Mar. 12, 2002, available at www.af.mil/news/Mar2002/n20020312_0388.shtml.

24. Id. Colonel Jack L. Rives, an Air Force judge advocate, headed the team from March 1998 to February 2000. He is now a Major General and currently serves as the Deputy Judge Advocate General of the Air Force. See www.af.mil/bios/bio_6920.shtml. Other team members were drawn from Personnel (AF/DP), Installations and Logistics (AF/IL), Air and Space Operations (AF/XO), Plans and Programs (AF/XP), Acquisitions (SAF/AQ), Legislative Liaison (SAF/LL) and Public Affairs (SAF/PA). Colonel Jack L. Rives, Who You Gonna Call? AFPAZ! An Overview of the Air Force Executive Issues Team, The Reporter, Dec. 1999, at 17.

25. Id.

26. For a brief overview of potential legal obstacles to the military releasing information, including the Uniform Code of Military Justice, the Privacy Act and the Freedom of Information Act, see, Patricia A. Lang, Jon N. Nylander, Rhonda K. Paige, Jef Reilly and Williams T. Wadsworth, Proactive Media Communication: Changing Public Affairs Response Doctrine, Defense Public Affairs electronic Lyceum, Dec. 11, 1997, available at www.ou.edu/deptcomm/dodjcc/groups/98A4/Flinndoc.htm.

27. Id.

28. Jim Swanson, Media Access Helps Military, USA Today, May 15, 2003, at 13A.

29. Id.

30. Mike Glenn, X-Rated Email, A Message Between Spouses: Whose Business is It?, Air Force Times, Dec. 20, 1999, at 1, 8. The author was the staff judge advocate at Dyess Air Force Base at the time and was involved in the case, including the response to the Air Force Times inquiry.

31. Id.

32. Id.

33. Id.

34. Id.

35. The authored served as the senior military member on the 2003 staff team that supported the Working Group Concerning the Deterrence of and Response to Sexual Assaults at the U.S. Air Force Academy.

36. Pam Zubeck, Colorado Springs Gazette, Despite Criticism, Leaders Say Culture is Changing, Dec. 28, 2003, at 1.

37. Id. Dusty Sanders, 7News Earning Recognition, Rocky Mountain News, Dec. 8, 2003, at 2D. The Oprah Winfrey Show, Harpo Productions, Inc., Dec. 8, 2003. A search of news sources on LexisNexis using the search terms "Air Force Academy" within 100 words of "sexual assault" during the period Jan. 1, 2003, and Dec. 31, 2003, returned 1,926 hits.

38. Vernon Loeb, Senators Fault Air Force on Abuse Scandal; Service's Leaders Defend Their Record at Contentious Hearing, Washington Post, Oct. 1, 2003, at A21.

39. For instance, in Academic Year 2001-2002, twenty-three sexual assaults were reported to the Cadet Counseling Center, the highest number in seventeen years. Likewise, a survey of cadets conducted in 2002 returned eighty positive responses (out of 1,948 total respondents) to the question whether the cadet had been sexual assaulted. See The Report of the Working Group Concerning the Deterrence of and Response to Sexual Assault at the U.S. Air Force Academy, Jun. 2003, at 150. (Available at www.af.mil/usafa_report/usafa_report.pdf).

40. The Agenda for Change, Mar. 26, 2003 (Available at www.af.mil/news/change_agenda.pdf).

41. Associated Press, Senators Fault Air Force, Seek Probe at Academy, Apr. 1, 2003, at A3.

42. Air Force Leaders Direct Agenda for Change at Academy, Air Force Press News, Mar. 26, 2003, (Available at www.af.mil/media_center/Jan-Mar2003/0326034.shtml).

43. Associated Press, Senators Fault Air Force, Seek Probe at Academy, Apr. 1, 2003, at A3.

44. Id.

45. Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy, Sep. 22, 2003 (Available at www.defenselink.mil/news/Sep2003/d20030922usafasport.pdf).

46. Id., at 4.

47. Vernon Loeb, Senators Fault Air Force on Abuse Scandal; Service's Leaders Defend Their Record at Contentious Hearing, Washington Post, Oct. 1, 2003, at A21.<![endif]>

48. Id.

49. Anne C. Mulkern, Allard: Probe Prior Leaders of AF, Academy, Denver Post, Oct. 23, 2003, at A6; M.E. Sprengelmeyer, Retreating from AFA Report; Findings on Assault No Longer Supported by Pentagon Brass, Rocky Mountain News, Oct. 1, 2003, at 5A.

50. Diana Jean Schemo, Air Force Secretary Says Academy's Leaders Could Be Punished in Rape Scandal, New York Times, Apr. 2, 2003, at A18.

51. Editorial, Illinois Airman Not Getting a Fair Shake, Chicago Sun-Times, Feb. 5, 2004, at 36. Harry Levin, Attorney for Friendly-Fire Pilots Tries Again for Classified Data, St. Louis Post-Dispatch, Jan. 9, 2004, at A5. The case was eventually resolved through nonjudicial punishment. Ariel Hart, Pilot Loses Appeal in Death of Canadians, The New York Times, Aug. 5, 2004, at A16.

52. Ron Martz, Legal Fight Puts Marine in Limbo; Cobb Man Drummed Out of Corps for Refusing Anthrax Vaccine Finds His Life on Hold While Appealing Bad Conduct Conviction, Atlanta Journal-Constitution, Jan. 25, 2004, at 4A.

53. Susan Chandler, Rumsfeld Reviewing Tanker Deal; Air Force-Boeing Contract on Hold, Chicago Tribune, Feb. 5, 2004, at C1. A former senior Air Force procurement official was convicted in federal court and sentenced to nine months in prison for improper dealings with Boeing while she served in the Pentagon and the nominee for the position of Commander of Pacific Command asked to withdraw his name from consideration after enduring sharp criticism during a hearing before the Senate Armed Services Committee over his role as Commander of Air Force Materiel Command and close ties with the convicted former official. Leslie Wayne, A Growing Military Contract Scandal, The New York Times, Oct. 8, 2004, at C1.

54. The desirability of these objectives is recognized in Air Force Public Affairs policy. Air Force Instruction 35-101, Public Affairs Policies and Procedures, Jul. 26, 2001, states: "Public Affairs strengthens the bonds between the Air Force and the public through open, timely and honest dialogue and programs targeted to communities, opinion leaders and the media."

55. Patricia A. Lang, Jon N. Nylander, Rhonda K. Paige, Jef Reilly and William T. Wadsworth, Proactive Media Communication: Changing Public Affairs Response Doctrine, Defense Public Affairs electronic Lyceum, Dec. 11, 1997, available at www.ou.edu/deptcomm/dodjcc/groups/98A4/Flinndoc.htm.

56. Id.

57. Id.

58. The internet is an ever-increasing source of news and information. A survey conducted in May 2004 found that eighty percent of those surveyed said they had gone online to read the news within seven days of the survey. The Harris Poll, May 19, 2004, available at www.harrisinteractive.com/harris_poll/index.asp?PID=464.

59. James Schwenk, Military Justice and the Media: The Media Interview, Journal of Legal Studies, United States Air Force Academy, Vol. 12, 2002/2003, at 19.

60. Id., at 20.

61. Id., at 25.

62. Id., at 32.

63. Dr. John Hillan, The Gap Between American Society and its Military: Keep It, Defend It, Mange It, 4 Journal of National Security Law 151, Dec. 2008, at note 18.

64. Id., at 165.

65. Air Force Policy Directive 90-9, Operational Risk Management, Apr. 1, 2000.

66. George J. Church, How Reagan Decides; Intense Beliefs, Eternal Optimism and Precious Little Adaptability, Time Magazine, Dec. 13, 1982, at 12.

67. L. Stuart Ditzen, You've Got Evidence; E-Mails Sent as Casually as Water-Cooler Chatter Never Truly Die, Philadelphia Inquirer, Jan. 11, 2004, at D1.

68. Id.

69. Rajiv Chandrasekaran and Susan B. Glasser, Ground War Starts, Air Strikes Continue as U.S. Keeps Focus on Iraq's Leaders, Mar. 21, 2003, Washington Post, at A1.

70. Walter Pincus, Study of Rhetoric on Iraq is Urged; Kay: Panel Should Check for Distortion, Washington Post, Feb. 11, 2004, at A25. Report on Iraqi Weapons, The Kansas City Star, Oct. 13, 2004, at B6.

71. Secretary of the Air Force Order 128.1, The Air Force Executive Issues Team, Nov. 12, 1999, at para. 1.a.

72. Id., at para. 1.b.

73. Federal Acquisition Regulation, Subpart 15.505 (authorizing a debriefing for offerors eliminated from the competitive range during competition for a contract) and Subpart 15.506 (authorizing a debriefing for unsuccessful offerors after an award decision is reached).

74. Before debriefings were authorized, the only way a disappointed offeror could discover why it was not selected for award was to file a formal protest.

75. James Carville and Paul Begala, Buck Up, Suck Up . . . and Come Back When You Foul Up, Simon & Schuster, 2002, at pg. 101.

76. Mike Scanlan and Anne C. Mulkern, Charges Rebutted in AFA Abuses-Lawyer Didn't Shield Brass, Officials Say, Denver Post, Sep. 24, 2003, at A1.

77. Id.

78. Vernon Loeb, Senators Fault Air Force on Abuse Scandal; Service's Leaders Defend Their Record at Contentious Hearing, Washington Post, Oct. 1, 2003, at A-21.

79. Id. See also, Mike Soraghan, U.S. Cadets Could Face 5 Years of Sex Surveys, Denver Post, Nov. 9, 2003, at B-4.

80. Bradley Graham, Nominee to Head Army Withdraws; Roche's Air Force Leadership Criticized, Washington Post, Mar. 11, 2004, at A4.

81. The Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy said the earlier report prepared after the Air Force initiated investigation did not address responsibility at senior leadership levels despite such information being available during the Air Force investigation. Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy, Sep. 2003, at 4.

82. Title 5, U.S. Code, Section 552a.

83. United States Joint Chiefs of Staff, Joint Pub 3-61, Doctrine for Public Affairs in Joint Operations, May 14, 1997, at I-2.

84. Id.

85. For a more complete description of the public affairs training conducted during Air War College, see, http://www.cadre.maxwell.af.mil/pace/awc.htm.

86. For a more complete description of the public affairs training conducted during Air Command and Staff College, see, http://www.cadre.maxwell.af.mil/pace/acsc.htm.

87. For a more complete description of the public affairs training conducted in courses offered by the Ira C. Eaker College for Professional Development, see, http://www.cadre.maxwell.af.mil/pace/cpd.htm.

88. For a more complete description of the public affairs training conducted in enlisted professional military education courses, see, http://www.cadre.maxwell.af.mil/pace/cepme.htm.

89. See, http://www.cadre.maxwell.af.mil/pace/cadre.htm.

90. See, http://www.cadre.maxwell.af.mil/pace/wargaming.htm.

91. James Schwenk, Military Justice and the Media: The Media Interview, Journal of Legal Studies, United States Air Force Academy, Vol. 12, 2002/2003, at 32-33.

92. Walter Cronkite hosted the CBS Evening News for nineteen years and ended each evening's broadcasts, "and that's the way it is." Walter Cronkite has often been acknowledged as the most trusted man in America. See, http://smithsonianassociates.org/programs/cronkite/cronkite.asp and http://www.museum.tv/archives/etv/ index.html.

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*62 M.J. 175, *; 2005 CAAF LEXIS 1107, **

UNITED STATES, Appellee v. Terry A. FLETCHER, Technical Sergeant U.S. Air Force, Appellant

No. 04-0465

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

62 M.J. 175; 2005 CAAF LEXIS 1107

January 25, 2005, Argued
September 30, 2005, Decided

PRIOR HISTORY: [**1] Crim. App. No. 34945. Military Judge: Harvey A. Kornstein. United States v. Fletcher, 2004 CCA LEXIS 46 (A.F.C.C.A., Feb. 27, 2004)

CASE SUMMARY

PROCEDURAL POSTURE: Appellant servicemember entered a plea of not guilty to wrongful use of cocaine in violation of Unif. Code Mil. Justice art. 112a, 10 U.S.C.S. § 912a. He was tried and sentenced by members to a bad-conduct discharge, one month of confinement, and a reduction in grade to E-1. The convening authority approved the sentence, and the findings and sentence were affirmed by the Air Force Court of Criminal Appeals in an unpublished opinion. He appealed.

OVERVIEW: The Government's case was based on the positive results of two urinalysis tests. During findings argument, the trial counsel offered her personal views, made disparaging comments about the servicemember and his counsel, and drew parallels between the case and the legal problems of various entertainers and public religious figures. The court found error in trial counsel's open criticism and personal attack upon defense counsel. Because this error was properly preserved by objection, the court tested for prejudice under Unif. Code Mil. Justice art. 59(a), 10 U.S.C.S. § 859(a). It also found error that was "plain and obvious" in trial counsel's arguments that vouched for evidence, injected unsolicited personal views of the evidence and guilt, suggested that the defense was a fabrication, and introduced facts not in evidence. Because there was no objection to these "plain and obvious" errors, the court tested them under the plain error doctrine to determine whether they resulted in material prejudice to a substantial right of the accused. It determined that the errors were materially prejudicial to the servicemember's substantial rights under both § 859(a) and the plain error doctrine.

OUTCOME: The decision of the Air Force Court of Criminal Appeals was reversed. The findings and sentence were set aside, and the record of trial was returned to the Judge Advocate General of the Air Force. A rehearing was authorized.

CORE TERMS: cocaine, defense counsel, lab, military, misconduct, urine, plain error, prosecutor, prosecutorial misconduct, machine, okay, disparaging, urinalysis, fiction, religious, isn't, discrepancy, guy, guilt, credibility, perfect, church, wasn't, water, email, objected, duty, laboratory, paperwork, indicator

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Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

Military & Veterans Law > Military Justice > Trials

HN1 Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct actually impacted on a substantial right of an accused (i.e., resulted in prejudice). More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN2 The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN3 Prosecutorial misconduct occurs when a 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. More Like This Headnote

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

HN4 When proper objection was made at the trial level, an appellate court reviews for prejudicial error. Unif. Code Mil. Justice art. 59, 10 U.S.C.S. § 859. More Like This Headnote

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

HN5 Failure to object to improper argument before the military judge begins to instruct the members on findings constitutes waiver. R.C.M. 919(c), Manual Courts-Martial.

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In the absence of an objection, an appellate court reviews for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN16 It is improper for a trial counsel to interject herself into the proceedings by expressing a personal belief or opinion as to the truth or falsity of any testimony or evidence. When a trial counsel offers her personal opinions, they become a form of unsworn, unchecked testimony and tend to exploit the influence of the office and undermine the objective detachment which should separate a lawyer from the cause for which she argues. There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion. One is by giving personal assurances that the Government's witnesses are telling the truth. Another is by offering substantive commentary on the truth or falsity of the testimony and evidence. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

HN17 Improper vouching occurs when the trial counsel places the prestige of the government behind a witness through personal assurances of the witness's veracity. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN18 Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed. Prohibited language includes "I think it is clear," "I'm telling you," and "I have no doubt." Acceptable language includes "you are free to conclude," "you may perceive that," "it is submitted that," or "a conclusion on your part may be drawn." More Like This Headnote

Legal Ethics > Prosecutorial Ethics

HN19 Improper interjection of a prosecutor's views can also include substantive commentary on the truth or falsity of testimony or evidence. As the U.S. Supreme Court has recognized, prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN20 When the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be. In addition, when a trial counsel offers her personal views of a defendant's guilt or innocence, it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed. Such tactics are not to be condoned. They

tilt the scales of justice, risk prejudicing the defendant, and carry the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN21 Not only is it improper for a trial counsel to interject her personal views into a case, it is also improper for a trial counsel to attempt to win favor with the members by maligning defense counsel. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN22 When one attorney makes personal attacks on another, there is the potential for a trial to turn into a popularity contest. Rather than deciding the case solely on the basis of the evidence presented, as is required, the members may be convinced to decide the case based on which lawyer they like better. Disparaging remarks about defense counsel may cause the jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the true facts of the case. In addition, derogatory comments about opposing counsel can detract from the dignity of judicial proceedings. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN23 A prosecutor's obligation to desist from the use of pejorative language is every bit as solemn as his obligation to attempt to bring the guilty to account. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN24 A prosecutor must be careful not to characterize a defense as fabricated. It is error for a trial counsel to disparage defense counsel by accusing him of intentionally omitting unfavorable evidence in aid of spinning a yarn more favorable to the defendant. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN25 Disparaging comments are improper when they are directed to the defendant himself. For example, calling the accused a liar is a dangerous practice that should be avoided. As the U.S. Court of Appeals for the Second Circuit has explained, although it might expect a character in a Perry Mason melodrama to point to a defendant and brand him a liar, such conduct is inconsistent with the duty of the prosecutor to seek justice, not merely to convict. Model Code of Professional

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Responsibility EC 7-13 (1969) (final draft). More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN16 An exceedingly fine line distinguishes permissible advocacy from improper excess. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN17 It has long been held that a court-martial must reach a decision based only on the facts in evidence. It is also well established that arguments made by counsel are not evidence. When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles. There is, however, an exception to this general rule. It is proper for a trial counsel to comment during argument on contemporary history or matters of common knowledge within the community. In the past, "common knowledge" has included knowledge about routine personnel actions, knowledge of ongoing military actions overseas, knowledge of the Navy's "zero tolerance" policy for drug offenses, the existence in the United States of a "war on drugs," and any other matter upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all. At the same time, counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN18 It is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct. In assessing prejudice, the U.S. Court of Appeals for the Armed Forces (CAAF) looks at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. Federal circuit courts use a variety of different tests to determine impact of prosecutorial misconduct on a trial. CAAF believes the best approach involves balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. In other words, prosecutorial misconduct by a trial counsel will require reversal when trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident that the members convicted the appellant on the basis of the evidence alone. Indicators of severity include (1) the raw numbers--the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether trial counsel abided by any rulings from the military judge. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Ethics

HN19 A judge should interrupt trial counsel before she runs the full course of her impermissible argument. Corrective instructions at an early point might dispel the taint of the initial remarks. More Like This Headnote

COUNSEL: For Appellant: Captain John N. Page III (argued); Colonel Beverly B. Knott, Lieutenant Colonel Carlos McDade, Major Terry L. McElyea, and Captain Jennifer K. Martwick (on brief).

For Appellee: Captain Kevin P. Stiens (argued); Colonel Gary F. Spencer and Lieutenant Colonel Robert V. Combs (on brief).

JUDGES: ERDMANN, J., delivered the opinion of the court, in which GIERKE, C.J., and EFFRON and BAKER, JJ. joined. CRAWFORD, J., filed a dissenting opinion.

OPINIONBY: ERDMANN

OPINION: [*178] Judge ERDMANN delivered the opinion of the court.

Technical Sergeant Terry Fletcher entered a plea of not guilty to wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2000). He was tried and sentenced by members to a bad-conduct discharge, one month of confinement and a reduction in grade to E-1. The convening authority approved the sentence, and the findings and sentence were affirmed by the United States Air Force Court of Criminal Appeals in an unpublished opinion. United States v. Fletcher [**2] , 2004 CCA LEXIS 46, No. ACM 34945 (A.F. Ct. Crim. App. Feb. 27, 2004).

HN2 Trial prosecutorial misconduct is behavior by the prosecuting attorney that "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996). During the findings argument the trial counsel offered her personal views, made disparaging comments about Fletcher and his counsel and drew parallels between Fletcher's case and the legal problems of various entertainers and public religious figures. We granted review to determine whether the trial counsel's acts constituted prejudicial misconduct. n1 We find that the trial counsel's comments during her findings argument rose to the level of prosecutorial misconduct and that the misconduct was prejudicial. [**3]

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n1 We granted review of the following issue:

WHETHER THE CIRCUIT TRIAL COUNSEL'S FINDINGS ARGUMENT WAS IMPROPER AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

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BACKGROUND

Fletcher was accused of wrongfully using cocaine. The Government's case was based on the positive results of two urinalysis tests. The first urinalysis was performed as part of a random inspection of Fletcher's unit and he voluntarily submitted to the second test.

At trial Fletcher produced several character witnesses who described him as a "truthful person" and a "law abiding citizen" with a "positive moral character." Fletcher called witnesses from his church who testified about his substantial participation in church activities. Fletcher also took the stand himself, testifying about his strict religious upbringing, his nearly twenty years in the Air Force, his family life and his involvement in the community.

After the presentation of the evidence, the trial counsel made a findings argument. (Attached as Appendix [**4] I to this opinion.) The argument contained a number of references to the trial counsel's personal opinions about the believability of the evidence and personal comments about the trial defense counsel and Fletcher. In addition, near the end of her argument the trial counsel spoke to the members about a number of entertainers and religious leaders, saying:

> Is religion an indicator of law abidingness? Is it okay to play faith for a get out of jail free card — nah uh. Do people even with true faith make criminal mistakes? . . . Do they use drugs? Yeah. Do they commit adultery on their wives? Ask Jessie [sic] Jackson about his two year old daughter. Ask Jerry Falwell about the hooker that he got caught with having intercourse in a car in Palm Springs. Jim Bakker cheating on his taxes. I challenge [*179] you in findings to come up with the rest. I made a huge list but I don't have time to go over them. [Does] the fact that he's done good work mean that he can't use cocaine, nah uh. Dennis Quaid, prolific actor, needed inpatient treatment. Friends, Matthew Perry, fabulous performer, shows up every week. Had to go to inpatient treatment for drugs. How about this one, Robert Downey, [**5] Jr., wins an Emmy for the performances that he had during the time . . . he was actually being arrested, charged and showing up positive for having used cocaine. n2

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n2 We have included this text and the attached Appendix I because the words used by the trial counsel are a necessary factual predicate to our decision. In so doing the court is not validating the accuracy of the trial counsel's statements with respect to the conduct mentioned or whether the persons named were in fact appropriately linked to such conduct.

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DISCUSSION

I. Prosecutorial Misconduct

The cornerstone for any discussion of prosecutorial misconduct is Justice Sutherland's opinion in Berger v. United States:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall [**6] be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. at 88. The Supreme Court explained that prosecutorial misconduct occurs when a "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." Id. at 84; see also Meek, 44 M.J. at 5 ("Prosecutorial misconduct can be generally defined as action or inaction by a trial counsel in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon."). Fletcher identifies four categories of alleged misconduct by the trial counsel: (1) interjection of her personal beliefs [**7] and opinions, (2) disparaging comments about defense counsel, (3) disparaging comments about the defendant, and (4) introduction of facts not in evidence.

During the prosecution's findings argument, defense counsel objected to a series of comments that attacked him personally. As proper objection was made at the trial level, we will review those comments for prejudicial error. Article 59, UCMJ, 10 U.S.C. § 859 (2000). There was no objection made to the remainder of the trial counsel's comments. Failure to object to improper argument before the military judge begins to instruct the members on findings constitutes waiver. Rule for Courts-Martial (R.C.M.) 919(c). In the absence of an objection, we review for plain error. United States v. Rodriguez, 60 M.J. 87, 88 (C.A.A.F. 2004). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. Id. at 88-89.

1. Interjection of the Trial Counsel's Personal Beliefs and Opinions

It is improper for a trial counsel to interject herself into the proceedings by expressing a "personal [**8] belief or opinion as to the truth or falsity of any testimony or evidence." United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980) (quoting ABA Standards, The Prosecution Function, § 5.8(b) (1971)); see also United States v. Kinderhacker, 25 C.M.A. 346, 2 M.J. 128, 129-30, 54 C.M.R. 1072 (C.M.A. 1977). When a trial counsel offers her personal opinions, they become "a form of unsworn, unchecked testimony and tend to exploit the influence of [the] office and undermine the objective detachment [*180] which should separate a lawyer from the cause for which she argues." Horn, 9 M.J. at 430 (quoting ABA Standards, § 5.8(b), Commentary at 128). There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion. One is by giving personal assurances that the Government's witnesses are telling the truth. United States v. Young, 470 U.S. 1, 18-19, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985). Another is by offering substantive commentary on the truth or falsity of the testimony and evidence. Id. at 8.

a. Improper vouching

The federal circuit courts are in agreement that ****Improper vouching occurs when the trial counsel "places the prestige [**9] of the government behind a witness through personal assurances of the witness's veracity." United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993) (citations omitted). n3

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n3 See also United States v. Perez-Ruiz, 353 F.3d 1, 9 (1st Cir. 2003); United States v. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981); United States v. Walker, 155 F.3d 180, 187 (3d Cir. 1998); United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997); United States v. Ramirez-Velasquez, 322 F.3d 868, 874 (5th Cir. 2003); United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999); United States v. Anderson, 185 F.3d 676, 686 (7th Cir. 1999); United States v. Bearman, 361 F.3d 1061, 1065 (8th Cir. 2004); Carpio v. Mullin, 317 F.3d 1196, 1219 (10th Cir. 2003); United States v. Cano, 289 F.3d 1354, 1365 (11th Cir. 2002).

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****Improper vouching can include the [**10] use of personal pronouns in connection with assertions that a witness was correct or to be believed. United States v. Washington, 263 F. Supp. 2d 413, 431 (D. Conn. 2003). Prohibited language includes "I think it is clear," "I'm telling you," and "I have no doubt." Id. "Acceptable language includes 'you are free to conclude,' 'you may perceive that,' 'it is submitted that,' or 'a conclusion on your part may be drawn.'" Id.

In this case, the trial counsel repeatedly vouched for the credibility of the Government's witnesses and evidence. For example, after discussing the testing methods and cut-off levels, she concluded "we know that that was from an amount that's consistent with recreational use, having fun and partying with drugs." Emphasis added. She referred to another exhibit, the drug test results, personally characterizing the exhibit as "a perfect litigation package." In talking about one of the prosecution's main witnesses, she opined, "It's very apparent from talking to Doctor Jain that he is the best possible person in the whole country to come speak to us about this."

b. Unsolicited personal views of the evidence and comments on the defendant's [**11] guilt

****Improper interjection of the prosecutor's views can also include "substantive commentary on the truth or falsity of testimony or evidence." Washington, 263 F. Supp. 2d at 431. As the Supreme Court has recognized, "Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." Young, 470 U.S. at 7.

During her findings argument, the trial counsel described the Government's evidence as "unassailable," "fabulous," and "clear". With respect to Fletcher's guilt, the trial counsel said, "It's so clear from the urinalyses that he was doing it over and over," "He clearly is a weekend cocaine user," and "He is in fact guilty of divers uses of cocaine." When describing Fletcher's defense she used words like "nonsense," "fiction," "unbelievable," "ridiculous" and "phony".

The trial counsel's interjection of her personal beliefs and opinions was error. Comments such as the ones that the trial counsel made about Dr. Jain and the prosecution's exhibits could be perceived as putting the weight of the Government behind the statements with the

result [**12] that the testimony or evidence in question appears stronger than it really is. Berger, 295 U.S. at 88. This is a dangerous practice because "[HN10]"when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore [*181] his views, however biased and baseless they may in fact be." Modica, 663 F.2d at 1178-79.

In addition, when a trial counsel offers her personal views of a defendant's guilt or innocence, as trial counsel did in this case, it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed. Id. at 1181. As the First Circuit has explained, "Such tactics are not to be condoned. They tilt the scales of justice, risk prejudicing the defendant, and carry the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses." Perez-Ruiz, 353 F.3d at 9-10. These are results we seek to avoid.

Because defense counsel did not raise any objection at trial, the injection [**13] of trial counsel's personal beliefs and opinions must rise to the level of plain error before relief is warranted. We find that the errors here are plain and obvious. Over the course of her findings argument, there are more than two dozen instances in which the trial counsel offered her personal commentary on the truth or falsity of the testimony and evidence. She repeatedly inserted herself into the proceedings by using the pronouns "I" and "we." She put the authority of the Government and her office behind the prosecution's witnesses and she bluntly concluded that Fletcher was in fact guilty. These errors were blatant and obvious.

2. Disparaging Comments About Defense Counsel

[HN11]"Not only is it improper for a trial counsel to interject her personal views into a case, it is also improper for a trial counsel to attempt to win favor with the members by maligning defense counsel. United States v. Xiong, 262 F.3d 672, 675 (7th Cir. 2001) (holding that "disparaging remarks directed at defense counsel are reprehensible"); see also United States v. Olivieria, 378 F.3d 412, 418 (4th Cir. 2004) (recognizing that it is "improper for a prosecutor to launch [**14] a personal attack upon the defense attorney or upon defense lawyers generally"), vacated and remanded by, 160 L. Ed. 2d 1050, 125 S. Ct. 1064 (2005); TJAG Policy Memorandum, TJAGD Standards - 2, Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct, attachment 2, para. 28 (Oct. 15, 2002) (explaining 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").

[HN12]"When one attorney makes personal attacks on another, there is the potential for a trial to turn into a popularity contest. Rather than deciding the case "solely on the basis of the evidence presented," as is required, the members may be convinced to decide the case based on which lawyer they like better. Young, 470 U.S. at 18. Disparaging remarks about defense counsel may "cause the jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the true facts of the case." Xiong, 262 F.3d at 675. In addition, derogatory comments about opposing counsel [**15] can "detract from the dignity of judicial proceedings." Id.

In this case, trial counsel made disparaging comments about defense counsel's style and also made comments suggesting that Fletcher's defense was invented by his counsel. Defense counsel objected to the first group of comments, but not to the second group. Thus, we will analyze the comments suggesting the invented defense under the plain error standard. In assessing prejudice, we will consider the other erroneous comments that were objected to by defense counsel.

Here, the trial counsel openly criticized defense counsel by accusing him of scaring witnesses, cutting off witnesses and suborning perjury from his own client. At the start of her rebuttal argument the trial counsel said, "Well, we sure do have different styles. And I think it actually is going to play for once in the case. I will not shout at you. I will reason with you. I will present evidence and what's fair." A few pages later, she characterized the defense counsel as "the [*182] one with the overpowering and yelling and cutting people off cross examinations and the wild argument." She then said, "He's the one that could have scared a witness and freaked them [**16] out. Me, I won't cut them off. I'll apologize if I do." She later stated, "Well, ask yourselves, do I scare you?"

Defense counsel properly objected to these comments because it was error for the trial counsel to make this type of personal attack. See United States v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st Cir. 1989) (recognizing that [HN13]"the prosecutor's obligation to desist from the use of pejorative language . . . is every bit as solemn as his obligation to attempt to bring the guilty to account."). Defense counsel's objections were sustained by the military judge.

The defense counsel did not object when the trial counsel suggested that Fletcher's defense was invented by his counsel. The trial counsel referred to Fletcher's arguments as "fiction" at least four times and called one of Fletcher's arguments a "phony distraction." She also called the defense case "that thing they tried to perpetrate on you." As the district court explained in Washington, [HN14]"[a] prosecutor must be careful not to characterize a defense as fabricated." 263 F. Supp. 2d at 434 (internal quotation marks and citation omitted). It is error for a trial counsel to disparage [**17] defense counsel by accusing him of "intentionally omitting unfavorable evidence in aid of spinning a 'yarn' more favorable to [the defendant]." Id. at 436- 37; see also United States v. White, 486 F.2d 204, 206 (2d Cir. 1973) (criticizing the prosecutor's repeated suggestions that the defense was "fabricated" as "unwise and unnecessary").

The trial counsel's disparaging remarks about defense counsel were less incendiary than her other comments and carried with them a greater likelihood of having been provoked. Yet when combined with the erroneous comments made about defense counsel's style, the trial counsel's other comments disparaging defense counsel constitute error that was plain and obvious. Trial counsel's attacks on defense counsel's courtroom manner and integrity were gratuitous and obviously intended to curry favor with the members. She drew direct comparisons between her style and that of defense counsel, painting herself as less "scary," more polite and more honest. The trial counsel's obvious attempts to win over the jury by putting herself in a favorable light while simultaneously making defense counsel look like a mean and nasty person [**18] who would say anything to get his client off the hook were plainly improper. The trial counsel erroneously encouraged the members to decide the case based on the personal qualities of counsel rather than the facts. Not only did her comments have the potential to mislead the members, but they also detracted from the dignity and solemn purpose of the court-martial proceedings.

3. Disparaging Comments About Fletcher's Credibility

[HN15]"Disparaging comments are also improper when they are directed to the defendant himself. For example, this court has said that calling the accused a liar is a "dangerous practice that should be avoided." United States v. Clifton, 15 M.J. 26, 30 n.5 (C.M.A. 1983). As the Second Circuit has explained, "Although we might expect a character in a Perry Mason melodrama to point to a defendant and brand him a liar, such conduct is inconsistent with the duty of the prosecutor to 'seek justice, not merely to convict.'" White, 486 F.2d at 206 (quoting ABA Code of Professional Responsibility, Final Draft, 1969, Ethical Consideration 7-13, at 79).

Here, the trial counsel told the members that Fletcher had "zero credibility" and [**19] that his testimony was "utterly unbelievable." In rebuttal the trial counsel also said, "When the Accused gets up on the stand and he lies who in fact was asking him the question? His own lawyer. Not me. And that was the first lie." Fletcher argues that these comments were plain error because they branded him a liar, unfairly disparaging and demeaning him in the eyes of the members. Fletcher argues that the trial counsel's comments were similar to those made in Knickerbocker, where this court held that the [*183] trial counsel acted inappropriately by offering his personal opinion that the accused's testimony was a "fairy tale" that he found "insulting." 2 M.J. at 129.

The lower court found that "these comments were proper and relevant when viewed in the context of the trial as a whole." We disagree. We find that the trial counsel's comments crossed the HN16 "exceedingly fine line which distinguishes permissible advocacy from improper excess." White, 486 F.2d at 207. Fletcher's defense rested heavily on the claim that he was a good airman with an excellent reputation for truthfulness, and Fletcher provided testimony that could readily be viewed as incorrect or [**20] even as a lie. He first testified that he had never used drugs, but later admitted that he had experimented with marijuana. The trial counsel then properly impeached Fletcher on the stand. Thus, the defense opened the door and it was appropriate for the trial counsel to comment on Fletcher's conflicting testimony during her findings argument. It was improper, however, for the trial counsel to use the language that she did, language that was more of a personal attack on the defendant than a commentary on the evidence.

The question is whether this error rises to the level of plain error. Although the trial counsel should have avoided characterizing Fletcher as a liar and confined her comments instead to the plausibility of his story, her comments were not so obviously improper as to merit relief in the absence of an objection from counsel. Accordingly, we find that the trial counsel's comments about Fletcher's credibility did not rise to the level of plain error.

4. Introduction of Facts Not In Evidence

HN17 It has long been held that a court-martial must reach a decision based only on the facts in evidence. United States v. Boule, 9 C.M.A. 228, 233, 26 C.M.R. 8, 13 (1958). [**21] It is also well established that arguments made by counsel are not evidence. Clifton, 15 M.J. at 29. "When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles." Id. at 29-30.

There is, however, an exception to this general rule. This court has held that it is proper for a trial counsel to comment during argument on "contemporary history or matters of common knowledge within the community." United States v. Kropf, 39 M.J. 187, 188 (C.M.A. 1994). In the past, "common knowledge" has included "knowledge about routine personnel actions," United States v. Stargell, 49 M.J. 92, 94 (C.A.A.F. 1998); knowledge of ongoing military actions overseas, United States v. Meeks, 41 M.J. 150, 158-59 (C.M.A. 1994); knowledge of the Navy's "zero tolerance" policy for drug offenses, Kropf, 39 M.J. at 188-89; the existence in the United States of a "war on drugs," United States v. Barrazamartinez, 58 M.J. 173, 175-76 (C.A.A.F. 2003); and any other matter "upon which men in general have a common fund of experience and [**22] knowledge, through data notoriously accepted by all." United States v. Jones, 2 C.M.A. 80, 87, 6 C.M.R. 80, (1952) (quoting Wigmore, Evidence § 2570 3d ed.).

At the same time, counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury. Barrazamartinez, 58 M.J. at 176. For example, in Clifton, the accused was charged with adultery. 15 M.J. at 27. During the findings argument, the trial counsel used an analogy to try to persuade the members that they could infer prejudice to good order and discipline. Id. at 28. The trial counsel argued that adultery is like heroin use,

that both are charged as violations of Article 134, UCMJ, 10 U.S.C. § 934 (2000), and that in both cases prejudice to good order and discipline can be inferred. Id. On appeal, this court found that trial counsel's argument improperly drew a connection between the accused's actions and drug use in order to inflame the passions and prejudices of the court members. Id.

In this case Fletcher argues that it was plain error for the trial counsel to refer to Jesse Jackson, Jerry [**23] Falwell, Jim Bakker, Dennis Quaid, Matthew Perry and Robert Downey Jr. because there were no facts in evidence regarding any of these individuals [*184] and their names were used only for their sensational value. The Government maintains that such matters are within the common knowledge of the community and that Fletcher opened the door by arguing that he could not be a drug user because he had a reputation for doing good work and regularly attending church.

We find that the trial counsel's references to religious figures and entertainers improperly invited comparison to other cases, the facts of which were not admitted into evidence and which bore no similarity to Fletcher's case. Although references to public figures and news stories may be allowed, the specificity and detail of her comments went well beyond the generic comments we have allowed in the past. See Barrazamartinez, 58 M.J. at 175-76; Kropf, 39 M.J. at 108-09. The trial counsel did not make generalized references to current events to give her argument some context. She made specific references to sensational events not in evidence in order to support her contention that Fletcher was guilty. [**24] Fletcher's good citizen defense may have opened the door to an appropriate response, but the comments of the trial counsel were "outside the bounds of fair comment." Barrazamartinez, 58 M.J. at 178 (Baker, J., dissenting).

Moreover, this error was plain and obvious. When the trial counsel asked the members to "ask Jesse Jackson about his two year old daughter," and to "ask Jerry Falwell about the hooker that he got caught having intercourse with in a car in Palm Springs," she was not drawing legitimate inferences based on the evidence nor was she referring to matters within the common knowledge of the members. She was instead inviting the members to accept new and inflammatory information as factual based solely on her authority as the trial counsel. These arguments were clearly improper and should have been prohibited or stricken by the military judge.

To summarize, we find error in trial counsel's open criticism and personal attack upon defense counsel. Because this error was properly preserved by objection, we will test for prejudice under Article 59(a). We also find error that is "plain and obvious" in trial counsel's arguments that vouched for evidence, injected [**25] unsolicited personal views of the evidence and Fletcher's guilt, suggested that the defense was a fabrication, and introduced facts not in evidence. Because there was no objection to these "plain and obvious" errors, we will test them under the plain error doctrine to determine whether they resulted in material prejudice to a substantial right of the accused.

II. Prejudice

We have previously held that [**26] "it is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." Meek, 44 M.J. at 6. In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. Id. at 5. The federal circuit courts use a variety of different tests to determine the impact of prosecutorial misconduct on a trial. We believe the best approach involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. In other words, prosecutorial misconduct by a [**26] trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that

we cannot be confident that the members convicted the appellant on the basis of the evidence alone.

1. Severity of the Misconduct

Indicators of severity include (1) the raw numbers -- the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge. See Modica, 663 F.2d at 1181.

Here, the trial counsel's improper comments permeated her entire findings argument. [*185] In twenty-one pages there are several dozen examples of improper argument. The improper comments do not stand as isolated incidents of poor judgment in an otherwise long and uneventful trial. Fletcher's court-martial lasted less than three days and the members deliberated for less than four hours. Accordingly, the trial counsel's misconduct was both pervasive and severe.

2. Curative Measures [**27]

The military judge's curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct. Before the findings argument began the military judge gave a generic limiting instruction reminding the members that "what the attorneys say is not evidence." This instruction was not a targeted, curative response as it was given before the findings arguments rather than in response to a given statement or at the end of the argument. On a single occasion during the findings argument, the military judge chastised the trial counsel for her personal attacks on defense counsel. This single rebuke was not curative and was not enough to remedy the trial counsel's severe and pervasive misconduct. See Horn, 9 M.J. at 430.

The military judge did not make any effort to remedy any misconduct other than the few statements to which defense counsel objected. As this court has recognized, [*186] "the judge should have interrupted trial counsel before she ran the full course of [her] impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks." Knickerbocker, 2 M.J. at 129. On the [**28] facts of this case, "it is impossible to say that the evil influence upon the [members] of these acts of misconduct was removed by such mild judicial action as was taken." Berger, 295 U.S. at 85.

3. Weight of the Evidence

Fletcher argues that the court should view the strength of the Government's case absent any misconduct by the trial counsel with some skepticism. Fletcher argues that there were no testifying eyewitnesses who saw him use cocaine, he never admitting to using cocaine, he readily consented to the second drug test after the first positive result, he had a long and distinguished military career, and there were numerous character witnesses who testified to both his reputation for truthfulness and his law-abiding character. Although this court has upheld convictions in which a urinalysis test was the primary evidence, we have never said that a positive drug test automatically leads to a conviction. In addition, Fletcher not only testified directly that he had not used cocaine, he presented circumstantial evidence concerning his religious and family life that could reasonably have raised questions in the members' minds about the strength of the prosecution's [**29] evidence.

When the three factors set out above are weighed against one another, the balance is firmly in Fletcher's favor. The trial counsel made multiple improper arguments. She violated the rules against vouching for witnesses, offering of personal views, attacking opposing counsel,

and arguing based on scandalous facts not in evidence. In addition, her argument based on facts not in evidence was not extraneous commentary, but it was aimed directly at Fletcher's good citizen/good character defense. The trial counsel's "excess zeal [was] so egregious that it tainted the conviction." White, 486 F.2d at 204. Her misconduct was not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." Berger, 295 U.S. at 89. In this case, trial counsel's statements were so inflammatory and damaging that we cannot be confident that the members convicted Fletcher on the basis of the evidence alone.

Accordingly, we find that the errors here were materially prejudicial to Fletcher's substantial rights under both Article 59(a) and the plain error doctrine. [**30] In light of this prejudice, the findings and sentence must be reversed.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is reversed. [*186] The findings and sentence are set aside, and the record of trial is returned to the Judge Advocate General of the Air Force. A rehearing is authorized.

APPENDIX I

United States v. Fletcher

04-0465/AF

FINDINGS ARGUMENT BY THE GOVERNMENT

CTC: Good morning. As we told you in our opening statement of this case, the Accused had a secret and his urine told that the Accused used cocaine on diverse occasions in April of 2001. As we turn and look at the evidence in this case, it's going to be apparent that Prosecution Exhibits 1, 2, 3, 4, the bottles, they're all reliable. They're all trustworthy. They are all well done. He in fact went in, gave his urine and it was his urine that was sent to the lab and it was his urine that was tested at the lab. So, we don't really have to worry about what happened, because of the triple locks, the ciphers. The fact that the Accused's sample was collected according to the military standards, the exacting standards that we set for this.

Now, that brings us then to what happens [**31] at the lab, which is where we hear from Doctor Nariah Jain, and that's Prosecution Exhibit number 6. It's very apparent from talking to Doctor Jain that he is the best possible person in the whole country to come speak to us about this. He's the father of GCMS for urine testing for drugs. He was there at the beginning and he's there now. And the defense would want to say that he's an old man. Well, you saw him. He's on the top of his game. He's never been better. The defense would like to say, well, the machines are old. Don't trust the man, don't trust the machines. Neither the man nor the machines are old. They are both on the top of their game and the Air Force is using the best ones possible. The defense would like to say "Hey, Doctor Jain, he's not even from the lab." Isn't that great though? He's independent. He's not there from Brooks Laboratory representing a lab that he doesn't want to turn in for not being good. He's an independent person who is a civilian, who doesn't work for Brooks Laboratory, but is deeply and intimately involved in the setting up and the oversight. He is utterly reliable. So, Doctor Jain is the perfect person, who we are very fortunate to have heard [**32] from him in this matter.

Let me turn to Prosecution Exhibit number 7, which is the first test of the Accused's urine. And this is a perfect litigation package. Prosecution Exhibit number 7, shows that 22, excuse me, 200 samples were tested. Only the Accused showed up with cocaine in it. Another sample was taken from the original bottle. A whole different aliquot was poured and it was actually put into a whole different machine. The testing was performed, and it again showed

up BZE, just the same amount of benzoylecgonine. Why is it that we're testing for benzoylecgonine? Well, it's the smart and scientifically sound thing to do. You'll recall that during the defense's opening, he said that they don't even test for cocaine. Aren't you glad? If for example, cocaine were to be flying through the atmosphere, which we know it doesn't anymore than cyanide does and we're all still breathing, then fine, you know, we're not testing for cocaine. Why? Because the human body doesn't excrete cocaine. It puts out the metabolite for it. So we want to know if the man's body processed the cocaine, and yes, it did..

And you compared the immunoassay, which are the first two tests and their quantities [**33] versus the gas chromatography mass spectrometry, which will test only for BZE, and you can see that he had the processed metabolite of cocaine in his urine, not cocaine. Very, very reliable, and of course I've come to the last part of the first test which is the gas chromatography and mass spectrometry portion which quantifies his urine at 208 nanograms per milliliter, twice the cut off limit. The cut off limit, what does it mean? You can't pick it up from the atmosphere. You can't walk by a guy cracking smoke [sic]. You can't even dip your hands in cocoa paste even if you are a nail biter, even if you do have cuts in your hands, it won't go to a hundred, let alone 208. So, we know that [*187] that was from an amount that's consistent with recreational use, having fun and partying on drugs. And Doctor Jain has testified for us, that if the sample was given on a Monday, it is consistent with him having used it over the weekend, Friday night, Saturday night. It is in fact, what we told you from the beginning, the urine tells on the Accused's use of cocaine.

Now, the defense would like you to think about log discrepancies. Okay, let's talk about lab discrepancies. And the lab discrepancies [**34] aren't scary. They're actually very comforting. They do in fact show us how incredibly good the lab is. They have a whole bunch of checks and balances and they work. And they showed us that they work. There are internal standards. There are quality controls. There is quality assurance. There is blind quality controls. And there are external quality controls, i.e., the samples sent in disguised as members' samples. And they all test out exactly right.

Now the defense has pointed to the lab discrepancy reports. Let's talk about those. And I would point you towards when we were talking about and going over actually and in my redirect, what lab discrepancy reports truly are. And if you look at Prosecution Exhibit number 8, on page 25, when the internal standard didn't have an exact high peak on a water blank, that's an internal standard discrepancy. It's great. It shows us that the machine is working. And even if it isn't exactly perfect, which Doctor Jain said it's forensically important, he wouldn't have done it over again. But the lab, hey, they're going to do it over again. How many times do things like that happen a month at the laboratory? Well, we talked about it and we revealed [**35] the numbers. About 12 in April and 18 or so in May of 2001. And we know that they test 30,000 samples per month. You do the math. It's about .05 percent of discrepancies like that, internal standards, calibration off. And we don't even go forward and test it if the calibration isn't perfect. How would you know the calibration was perfect? It's in the reports for that machine, for that test for that day for his sample. It's comforting.

Now, how do you know you've got everything to do with the Accused's sample? Well, again, Prosecution Exhibit number 8, even when the printer didn't print out the first page cause there was some sort of a problem with the printer, you're going to have to suffer through looking at starting the printer over again. And they include that. Paperwork thrown away. Does it make any difference if we would have thrown away that paperwork? Well, now it's included for you. Even a reprint, just because the first page didn't come out. It's unassailable.

Now, Greystone's report, and that's amusing, because when you actually heard it for the first time from the defense it sounded rather spook-tacular, but it's not. What were the problems? Okay, have you ever had an [**36] opportunity to have an inspection in your unit? Even if

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It's tip, tip top, the people who come through and inspect have got to find something, they've got to. Why are they doing an inspection if they don't really look for something? What do we have in the Greystone report? Inconspicuously posted, set of people who are allowed in the room. Well, we know that there 80 people who work at the lab. Each people [sic] have to do a card swipe to get into each particular section. And it only works by the hours. So if they were to come back after close of business, they don't get to get in. Conspicuously posted, and of course let's shine the true light of what that really means. The elevator permit wasn't posted right by the door. It was posted some other place. Okay, the equivalent of sign in logs not completely filled out. You ever had two people come to your unit, you put the names down, but they're both from the same location and they have the same phone number, so you draw a line and do ditos. They don't accept that there. So, you get written up. A secondary alarm system, after the ones that we talked about, not responded to when it went off in the middle of the day. Okay, and that's [**37] what they got for the whole report. Excellent.

Picking on the lab employees for stuff like 1998 problems with chain of custody annotations [*188] with Mr. Colunga was cheap, it was cheap. There's nothing wrong with the chain of custody on the Accused's sample. And really there was nothing wrong back in '98, but he wasn't too swift with the paperwork. That was a long time ago.

Tube swapping, it's a rather sexy term isn't it? It could get your attention at the beginning? Nonsense. We know that the Accused's tube can't be swapped because a scanner from the machine will pick it up. It's bar coded like the supermarket. And you can check everywhere yourselves. Tube swapping doesn't happen. But you know it isn't going to happen because it would say so when a water blank shows up glowing with cocaine and the Accused's shows up looking like water. Of course, it didn't happen. Sometimes when it's fed into a machine. But the internal standards and quality controls are in place. At the hospital here at the base, has anybody ever been late to work there? Has anybody ever gotten a letter of reprimand for financials or whatever or anybody ever dropped a tube there? Does that mean that you wouldn't go [**38] and get your teeth clean and trust that they're clean. This is a lot simpler. There is no human error once you feed it into the machine. These machines are properly calibrated every time. There's every possible control on them. Their error rates are miniscule. They've got water blanks, and the gas chromatography mass spectrometry are new machines, state of the art, and gas chromatography is the gold standard. We've got the best and the newest.

And the lab is starving for work. They're not overworked and rushing to get this done. They've done a magnificent job. Prosecution Exhibit number 8, same, same, except for we've got that water blank, a little bit of a flat peak, but starts over again on that run and that's of course what they do when an internal standard is off, they start over and do a new one. And of course, the printer page went out. That's not very impressive. The results are fabulous. And they're what we'd expect from that lab and their exacting forensic standards. Now, the Accused tested positive for cocaine metabolite in his sample.

And we don't know, we've never presented who it was that he was using with; how much he bought it for or how much he was using, or whether [**39] he was having a good time when he was getting high. We don't know. But the law does in fact allow you to infer that he was using it knowingly. That's the law, you can do that. And it makes sense if you think about it, because folks use drugs in private. They're not going to do it at the unit. He's not going to show up at the office and stick something up his nose or light up a crack pipe. He's not going to do it at the office or do it in public. Any potential witnesses for this are probably other drug users themselves and are arguably in hiding distancing themselves from him as he goes through this, whoever his dealer is. Why should you make this inference in this case though, and that's where we're going to ask you to apply good old fashion common sense.

Taking a look, what alternates would the defense have you believe, well for goodness sake,

that he ate hundreds and thousands of dollar bills and metabolized them all about an hour before he took his urine sample; right. At 8:30 -- at 9:30 a.m., in the morning, he spend the wee hours munching dollar bills, no. Cocaine in the air at Cape Canaveral, in his home, in his car. Well, we know that doesn't even work anyway. The pizza guy [**40] took his hard earned pizza delivery money and sprinkled it on his pizza? Fiction, fiction. How about that hand washing thing that they tried to perpetrate on you? Hand washing, it's not going to skew it to a positive result if somebody has spiked their hands. It's going to skew it for a negative result.

Now, we know that Mr. Varoz tells everyone, including the Accused, wash your hands with just water. The fact that the Accused may or may not have done that, does or doesn't remember, doesn't go in his favor if he chooses not to wash his hands and follow the rules before he gives his urine sample. Now, not to be crude, but you gentlemen have the advantage over us. You've got the opportunity and equipment to aim right in the bottle and not even go on your hands. [*189] Women, not such a good luxury. We don't stand as good a chance. Gender bias in favor of the Accused's sample. Don't give him the benefit of that doubt.

Now, the argument of cocaine falling from the ceiling and going into the -- or from his clothes even, if he has cocaine on this clothes, going into the sample and then somehow 100 percent metabolizing for BZE is preposterous considering the fact that he isn't old enough to make [**41] the alkaline urine -- that the conditions were not such that a hot temperature to cook it, and it happened twice. Did cocaine actually fall from the ceiling, from the Patrick bathroom as well as from our laboratory here, or excuse me, as well as from the bathroom up at the Cape, another fiction. That thing about well, you could have been exposed to a tiny amount and it just metabolized, or entered the urine and suddenly, you know, at the exact right time you give the urine in the cup to reach 202 and 136 [sic] two weeks in a row. Hmm, no, not at all, it's ridiculous. You know what it is, it's as stupid as a teenager coming to you and saying dad, I got pregnant from a toilet seat at a gas station. And then coming around to you later and then saying the same thing again. If you're not convinced from the first urinalysis, how about by the second? Do you need a third? Do you need a fourth? A dozen, do we pee him every two weeks and keep testing? No.

Now, we've seen some nice people come in and testify on his behalf, and he's a good worker. And I'm not taking anything away from his family or his church or his duty performance. And the Accused is probably a nice person. But nice persons [**42] [sic] can use drugs. Church goers can use drugs. And people can be other than what they present themselves to be at work and on Sunday mornings. All the times that he was possible to do these things, unaccounted for.

You know, the guy knew since the 24th of April that he was hot for urinalysis. He's had the opportunity to reconstruct and when he testifies to you "I don't know." Where was he? Why'd you take leave? "I don't know." How reliable, how believable and credible is that. Are we to believe that he didn't check it out? We get 30 days of leave a year. We use them very judiciously, especially when we're coming around to retirement. We want to have a big blowout of time at the end where you get terminal leave. And you get paid. I don't know what I did with my leave. I don't think so.

Should we trust him? Well, let's look back on one of the most telling factors about who he really is. He sure did give a nice speech. It's almost seemed genuine, but he didn't know that I had on my desk under the paperwork, researched back to 1983, and discovered that he had used marijuana. He didn't know I had that. So when he stood up there and he sat down and he just looked you all right straight [**43] in the face with the most integrity appearance he could muster and said, "I have never used drugs and I never will." You really want to go for it. Fiction, and I knew it. Why? Because it's in his paperwork, but he didn't know that I knew. And he didn't know that I would tell him.

Now, I went a long time cross examining him, gave him the opportunity to have integrity or to make another fiction for you, all the way through at the very end of my cross examination, I asked him about why? And his excuse showed that he had no integrity. He could have come forward and said, look it was a long time ago. And I just didn't think you'd find out about it, and it really shouldn't matter because I was a teenager. Ha -- he said I thought the defense counsel was asking me about the military only. And if that were true, then his answer should have been, while in the military I have never used drugs. And while in the military I never will. Nuh uh, that's not what he said. His impression wasn't impressive and a complete fiction. And it shows how he tricks all of these other nice people who came in to say he's a good guy.

Now, let's go back and reconstruct, what was the defense counsel's question. [**44] The third time he asked it, I didn't even object asked and answered, let's see what happened. Sergeant Fletcher between the 1st of April and the 24th of April did you knowingly use cocaine? That was the question. His [*190] answer, I did not. It was designed to build credibility with you all. Okay, but there are other indicators into his lack of credibility and it's not too bad to deal with just on it's own. How about the joke, I've never opened my personal emails, because right then I was working in the orderly room. Oh yeah, when have you been in the orderly room since? January, he's trying to pass it off that he doesn't check his emails since January. Nuh uh, is that actually possible? Well the witnesses, his friends say not. We all know that we're networked. You can check your email even if you're not on your own computer.

How about with all those extra taskings he was trying to impress you with, he doesn't check his email? Or how about, yeah, get this one, I don't know where I took leave to. There's another indicator. Do you know where you took leave to this year? Sure you do. Last year, probably. The year before, likely. Would you be darn good and certain where you took leave to if [**45] your urinalysis had come up positive? Absolutely. He's got zero integrity and he's telling us that he didn't knowingly use cocaine is utterly unbelievable.

Well, how about the idea of well, I got, he might have used the wife's prescriptions -- for arthritis meds? For back pain -- nah uh. We know what the process is if you do something like that. A guy has a medical issue, uses his wife's scrip, tests positive for something. Well, they don't give out prescriptions for cocaine. They got this laboratory -- or at this base here, but let's say that even if something like that had happened in the past, what's the process? They guy says okay, this is probably where I got it from, and we investigate and drop the charges, and admonish him for using somebody else's scrip. That's what you do. You don't take him to court. And it's funny that it just comes up here where the wife who loves him very much, would very much like to have his retirement. And she doesn't remember anything either. As Doctor Jain told us, only cocaine yields cocaine results. Not Solercane or Lanacane or Novocain or Coca-Cola or anything to do with coffee or caffeine or anything other than coke.

Okay, does his religion [**46] hide him? Well, no, he had those beliefs since he was a child and he was also in Junior ROTC, in high school that didn't stop him from using drugs back in high school. Is a religion an indicator of law abidingness? Is it okay to play faith for a get out of jail free card -- nah uh. Do people even with true faith make criminal mistakes? Do they or they or criminal actions, do they use drugs? Yeah. Do they commit adultery on their wives? Ask Jessie Jackson about his two year old daughter. Ask Jerry Falwell about the hooker that he got caught with having intercourse with in a car in Palm Springs. Jim Bakker cheating on his taxes. I challenge you in findings to come up with the rest. I made a huge list but I don't have time to go over them.

Is the fact that he's done good work mean that he can't use cocaine, nah uh. Dennis Quaid, prolific actor, needed inpatient treatment. Friends, Matthew Perry, fabulous performer, shows

up every week. Had to go to inpatient treatment for drugs. How about this one, Robert Downey, Jr., wins an Emmy for the performances that he had during the time with which he was actually being arrested, charged and showing up positive for having used cocaine. Sure, [**47] you can function, as Doctor Jain said. You can use it in the morning and you won't know by your testimony in the afternoon if the man sitting next to you could have used it last night and you wouldn't know today. Besides the Accused's samples are consistent with weekend use, not being buzzed in the office.

We gave you various calenders, things to think over and as far as whether or not he was in fact trying to avoid the urinalysis, sure he was. Sure he was. And why wouldn't he? He's got a cocaine problem and it's going to show up in his urine. Sure. And that's where the defense exhibits A, B, C, D, E, whatever, A through D come in. And I was glad that this hearsay was admitted, that you could take a look at it. Because it shows that as of the 22nd, Mr. Varoz had selected the Accused and he didn't test until the 9th. Some of it, I would ask you not to [*191] consider, okay. March 30th, please don't hold that one against the Accused. It appears strongly to be a unit sweep. And we don't think that he tried to avoid a unit sweep. It wasn't his unit. So don't hold that one against him. But let's look at the 26th, and the 28th and the times that he took leave, not a bad idea. And just go get [**48] yourself into class. And you're home free. He was awfully close in the science. One more urination cycle and it would have been out of his system.

It was his time to get caught. And it's now time to convict. He clearly is a weekend cocaine user, on divers occasions. There is no way that that second use of cocaine, or that second urinalysis could have come from the one that began or that was taken on the 9th of April. He is in fact guilty of divers uses of cocaine. The system has worked exactly as planned. And we ask you to find him guilty as charged.

REBUTTAL ARGUMENT BY THE GOVERNMENT

CTC: Well, we sure do have different styles. And I think it actually is going to play for once in the case. I will not shout at you. I will reason with you. I will present evidence and what's fair. I ask you to consider that. And in the overwhelming light of what you know now, the defense's shouting falls and here's why. Yes, we do have to prove that he knowingly and consciously used drugs. But you can infer that in the absence of evidence to the contrary. What is he going to do about those two positive urinalyses? Nothing. Dad, I got pregnant from a toilet seat, twice. No, way. Now, whether [**49] or not he was selected and he read his email is almost academic. Because it's so clear from the urinalyses that he was doing it over and over. But the emails and whether or not he knows, is very clear, he was dodging the test. And he was dodging it because he knew it was in his urine. He dodged it on the 26th, dodged it on the 28th and took a class for the next week. He was good to go. Of course, he knew that that was his duty and of course he knew that his first sergeant wasn't going to be there that week. Now the defense's attempt at persuading you by saying, "Hey, if he knew he was going to take a test, well then, he knew that he knew he had a bullet with his name on it. And he wouldn't have done cocaine." That's why it's illegal. It's addictive. And it's a strong addiction. And it's something that once you've gotten involved in it, you like it in your life and that's where Sergeant Fletcher was at the time. And he thinks he's a pretty smart fellow, Sergeant Fletcher does. He's gotten some real positive feedback in his life about how smart he is. So he thought he knew the test and he knew how to beat it. Except for he miscalculating it by one urination. Why did he consent? Well, [**50] he thought it was going to be negative. It's Tuesday, it should have been out by then, unless he was doing it on Saturday night or a big batch on Friday. Lab errors and mistakes, Doctor Jain, a cheerleader for Brooks. Hah, Ha, Ha. That's rich. Doctor Jain is involved in inspecting the lab. He's one the folks who look into it to see, and mark them down when their naughty. When they're doing the inspections for whether or not there's QCs or whether or not there's conspicuously posted who gets in and who gets out signs. Now the tracking numbers changing from 2 to 7, was it caught at the Brooks lab? I don't know. Do you care, no. If

that's the best they can point to, it's a pretty super test. Doesn't shake anyone's confidence in sending their urine sample over. You know that the lab tests, and I'm showing you Prosecution Exhibit 5 for example, the lab doesn't test for the base's number of 228. The lab tests from their bar codes and their scanner. So what's on the bottle, other than the Accused's social, isn't what the lab goes by. It makes pretty good sense that they wouldn't catch that. If they didn't, they didn't. The Basalt Study is just my favorite. I have a package of Sweat'N Low [**51] here. I'm going to dump it all out. Now, we're talking about in the Basalt study, 1/20th of a package of Sweat'N Low, so let's see, oops I dropped some, a little tiny bit. It's back on now. Let's see what happens when we take a 20th from the package of Sweat'N Low --

[*192] CDC: Your Honor, I'm going to object regarding this, how that she's going to divide this into 1/20th.

MJ: Sustained.

CTC: Well, member's, you've got Sweat'N Low. You can think about it. You can take 1/20th except for don't take 1/10th of it and line it out and see if it doesn't look just like Miami Vice. Why would you take a 1/10th of it, because street purity is only about 50 percent. It looks exactly like what a drug user would stick up his nose. Under the Basalt Study it wasn't even about that. The Basalt Study was about catching and orally ingested cocaine in urine, and how do we know that? Because Doctor Jain and Doctor Basalt worked together. And they are professional associates and well acquainted with all the procedures. And that's on the test. No, you can't take that much orally even dissolved in a liquid and not feel it.

CDC: Objection, Your Honor. Facts not in evidence.

MJ: Overruled.

CTC: You get a numb [**52] mouth. You get a racing heart. You get increased alertness. And that is what you get and that is what Doctor Jain testified to. And that's just a little amount. But certainly, if you do the test you'll see. Are you scared of your pizza delivery guy now? I don't think so. Drug users like their drugs. They're not going to be the cocaine fairy jumping around giving it away as an Easter gift. Who's going to give away cocaine? It's contraband. It's hard to come by. It's a very expensive item, and it's very dangerous to get it from the kind of people who sell it. They don't give that away. Plus, it's addictive, so you want to hang onto it. Twice, the cocaine fairy visits him twice? No way. Now the part about the Accused lying is really funny because the defense attorney who is the one with the overpowering and yelling and cutting people off cross examinations and the wild argument that he just gave you --

MJ: Five minutes.

CTC: -- okay. He's the one that could have scared a witness and freaked them out. Me, I won't cut them off. I'll apologize if I do.

CDC: Objection, Your Honor, improper argument.

MJ: Sustained. Don't comment on the character of the defense attorney.

CTC: I'm commenting [**53] -- yes, Your Honor, I'm commenting on myself though, sir.

MJ: Just comply.

CTC: Well, ask yourselves, do I scare you? Am I going to --

CDC: Again, objection, Your Honor.

MJ: Overruled.

CTC: Will I cause you to lie?

MJ: Sustained.

CTC: Now --

MJ: Hold on a second. I'm sustaining the objection. We're not trying the character of counsel.

CTC: Yes, Your Honor.

MJ: Talk about the evidence.

CTC: Well, and then when the Accused gets up on the stand and he lies who in fact was asking him the question? His own lawyer. Not me. And that was the first lie. Well, bladder and kidney problems, that's another phony distraction. Colonel Torrent's stipulation of expected testimony shows that there was no way that any medications or bladder and kidney problems could possibly have caused a positive result. Like Doctor Jain testified, cocaine tests for cocaine metabolites, nothing else. And when you come down to the end of this case, there's just nothing that the defense can tell you, there's nothing that I can tell you that the evidence doesn't already show you. If you take urine from the Accused on a Monday or a Tuesday, it's going to show up positive for cocaine. And you need to find him [**54] guilty as charged. And we ask you to do just that. Thank you.

DISSENTBY: CRAWFORD

DISSENT: CRAWFORD, Judge (dissenting):

While I agree that trial counsel's argument was at times improper and unprofessional, there is nothing to indicate that any such error materially prejudiced Appellant's substantial rights. Thus, whether or not defense counsel's objections are preserved for [*193] appeal, I agree with the United States Air Force Court of Criminal Appeals (CCA) that "viewed in the context of the case as a whole, including the strength of the government's evidence . . . the prosecution argument did not 'undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.'" United States v. Fletcher, 2004 CCA LEXIS 46 at *17, No. ACM 34945 (A.F. Ct. Crim. App. Feb. 27, 2004). For this reason, I find that any improprieties by trial counsel in this case were harmless, and I therefore respectfully dissent.

Objections by Defense Counsel

As noted, defense counsel remained silent during the Government's primary findings argument, and made only two objections relevant here during the Government's rebuttal. The military judge promptly sustained both objections, and admonished trial counsel [**55] not to remark further on defense counsel's character. There were no objections to the remaining three categories of alleged prosecutorial misconduct.

Significantly, this Court has previously noted that "'the lack of defense objection is relevant to a determination of prejudice' because the lack of an objection 'is some measure of the minimal impact of a prosecutor's improper comment.'" United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)); see also United States v. Doctor, 7 C.M.A. 126, 135, 21 C.M.R. 252, 261 (1956) ("It is a little difficult for us to find misconduct which compels a reversal when it purportedly arises out of an argument which had so little impact on defense counsel that they sat silently by and failed

to mention it . . . at the time of trial.").

Here, aside from the probable minimal impact of trial counsel's remarks, defense counsel had independent reasons to believe that any objections would be futile. Trial counsel's references to religious figures, for example, were "fair response" defense witness testimony concerning Appellant's affiliation [**56] with the Baptist church and his living a "Christian life." Gilley, 56 M.J. at 120. Other courts have found harmless error under a theory of "invited response" where the Government included religious statements in the closing argument. See, e.g., Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998) (biblical references by prosecution were invited by appellant's testimony concerning his salvation while in prison awaiting trial, and statement that Satan beguiled him into committing the murder); Painy v. Horn, 2003 U.S. Dist. LEXIS 14742, at *152, 2003 WL 22017231, at *53 (E.D. Pa. 2003) (prosecutor's statement that defendant was the "representative of Satan who committed this act" was invited by defense counsel's remark that "someone, some representative of Lucifer or Satan went into that house and did this unconscionable deed.").

Strength of the Government's Case

In finding plain error below, the majority assigns undue significance to the Government's findings argument, and not enough weight to the trial as a whole. Trial counsel's allegedly improper comments are limited to twenty-one pages of the transcript, among [**57] what the majority characterizes as "an otherwise long and uneventful trial." Whether or not eventful, the CCA concluded -- and I agree -- that the Government's case against Appellant was strong. Notwithstanding Appellant's efforts to attack the laboratory and the results of his two drug tests, the CCA found:

> The uncontroverted testimony of [Dr. Jain] established that the urine testing was done properly, that any mistakes attributable to the laboratory were minimal and did not impugn the reliability of the results, and that the two tests were sufficiently far apart so as to reflect two separate and distinct ingestions of cocaine.

Fletcher, 2004 CCA LEXIS 46 at *15, No. ACM 34945.

By contrast, Appellant's innocent ingestion theory was relatively weak. The members could very reasonably have dismissed Appellant's suggestion that the cocaine he ingested was placed in his food by a drug-handling chef: "Is it so preposterous that here in Cocoa Beach . . . a cook, a chef, a bartender, the delivery person using cocaine . . . could be using [it] on food preparation surfaces. It [*194] could be in a bar and people wiping it clean and it falling into glasses. . . ." As the CCA noted, "appellant's [**58] own testimony provided no reason seriously to believe or even suspect that an unknowing ingestion had occurred." Fletcher, 2004 CCA LEXIS 46 at *15, No. ACM 34945. We have previously considered the plausibility of an appellant's defense theory in determining prejudice from error. See e.g., United States v. Walker, 42 M.J. 67, 74 (C.A.A.F. 1995) (finding "patently feeble" appellant's innocent ingestion theory based on "consumption of 'crumb cake' during a drinking party," testimony that "his lips were 'numb and tingly,' and the subsequent discovery that a drug dealer attended the party."); United States v. Brooks, 26 M.J. 28, 29 (C.M.A. 1988) (considering appellant's "weak" theory of the case and "implausible" suggestion that the Army investigator's confidential informant planted evidence on him in determining harmlessness). Appellant's failure to seriously challenge the Government's case against him

is relevant to my determination that he suffered no material prejudice from trial counsel's comments.

Limiting Instructions

In addition to the strong case against Appellant, the military judge took appropriate steps to limit any potential harm resulting [**59] from trial counsel's remarks. After the findings argument, the military judge instructed the members: "Remember, that the arguments of counsel are not evidence, but they may assist you in forming your view of the evidence. . . . It is your own independent recollection of the evidence that you must rely upon in deciding the facts in the case." Jurors generally, and perhaps our "blue ribbon" military panels particularly, are presumed to follow a military judge's instructions. Nothing demonstrates to me that the members in this case were unwilling to or incapable of understanding and complying with the instruction above.

Plain Error

Finally, for the same reasons that Appellant cannot show material prejudice to his substantial rights under Article 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a) (2000), he cannot succeed on plain error.

> Before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously [**60] affects the fairness, integrity, or public reputation of judicial proceedings."

United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000) (Crawford, C.J., concurring) (quoting Johnson v. United States, 520 U.S. 461, 466-67, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997)) (citation omitted). As I stated in Kho, I see no difference between an error that "materially prejudices . . . substantial rights" under Article 59(a), and an error that "affects substantial rights," as contemplated in Johnson. Kho, 54 M.J. at 66. Therefore, the facts of Appellant's case, applied to the above test, do not require this Court to take corrective action. For these reasons, I respectfully dissent.

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