

**RECORD OF TRIAL
COVER SHEET**

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

SALIM AHMED HAMDAN

ALSO KNOWN AS:

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

No. 040004

VOLUME ____ OF ____ TOTAL VOLUMES

**6TH VOLUME OF REVIEW EXHIBITS (RE)—RE 34-58
FOR NOVEMBER 8, 2004 SESSION
(REDACTED VERSION)**

United States v. Salim Ahmed Hamdan, NO. 040004

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

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

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

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III*	DoD Decisions on Commissions including Appointing Authority orders and decisions
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REVIEW EXHIBIT 22-A-1

Review Exhibit (RE) 22-A-1 has two parts—a sealed portion and an unsealed portion.

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UNITED STATES

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REQUEST FOR
) WITNESS ON MERITS/SENTENCING:
) MUHAMMED ALI QASSIM
) AL-QAL'A
)
) 26 October 2004
)

1. Witness Request – Muhammed Ali Qassim al-Qal'a - US. v. Hamdan.

2. Muhammed Ali Qassim al-Qal'a is the witness's name; we are unaware of any aliases. We are unaware of any mailing address for this witness. Muhammed Ali Qassim al-Qal'a is a Yemeni citizen and resident of the capital city of Sana'a in the vicinity of Yarmouk Station, Sheri Tunis and may be contacted through the International Committee for the Red Cross or through Defense Counsel. The phone number for contact with Mr. al-Qal'a is 011-967-73292705. We are unaware of any e-mail address for this witness. Mr. al-Qal'a speaks only Arabic with a Yemeni dialect and will require the use of a translator.

3. Mr. Muhammed Ali Qassim al-Qal'a is the brother-in-law to the defendant. The witness has had significant personal contact with the defendant. Mr. al-Qal'a can testify to the circumstances of the defendant's marriage, stated attitudes regarding Al-Qaeda, the defendant's reaction upon learning of the bombing of the USS COLE, the defendant's reasons for returning to Afghanistan in the December 2000, the Defendant's character for truthfulness, and peacefulness. More specifically, the defendant's brother-in-law's testimony is expected to include (but is not limited to) the following information.

- Religious/Cultural beliefs – That Salim Hamdan is not a fundamentalist, while he may be Arabic, Yemeni, and a Muslim, he is not an extremist. For example, Salim Hamdan enjoyed parties with friends and family. He was and continues to be supportive of women's rights generally in Yemen and around the world, but specifically he encouraged his wife to vote in the elections in Yemen. Further, Mr. Hamdan's brother-in-law will testify that Mr. Hamdan would routinely help his wife with household chores, a character trait not found in an extremist Muslim man. Mr. Hamdan's brother-in-law and other male friends and family would tease and counsel Mr. Hamdan from helping his wife. Finally that while Mr. Hamdan did attend mosque on Fridays as required, he would not go beyond that in terms of outwardly practicing the faith. This is relevant to the Defense case because it directly contravenes the Government's assertion that Mr. Hamdan is in anyway a fundamentalist or extremist.
- Reputation in community – That Salim Hamdan was never a member of Al-Queda and never supported any members of Al-Queda. In fact, Mr. Hamdan's brother-in-law will testify that just the opposite, Mr. Hamdan was always non-political and certainly not anti-American. This is relevant to the Defense case because it directly contravenes the

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Government's assertion that Mr. Hamdan is a member of or supported Al-Qaeda in any way.

- Interest in fighting – That Salim Hamdan was never interested in fighting for or against anyone. Mr. Hamdan's brother-in-law will testify that he had a conversation with Salim Hamdan wherein he expressed his (Mohammed's) interest in going to Afghanistan to join Muslim fighters. In response, Salim Hamdan counseled against this because it wasn't safe and that the only reason Mr. Hamdan was in Afghanistan was for the work.
- Reason why Mr. Hamdan and family were in AF in 2000/2001 – That when Mr. Hamdan and his wife left Afghanistan and traveled to Yemen for Mohammed's wedding in 2000, the entire family was looking for a vehicle to procure for Mr. Hamdan so that he could remain in Yemen and start a taxi service. In that year, Mr. Hamdan's father-in-law was very sick and was expected to die. So the family went to Saudi Arabia to participate in the Haji so that the father could accomplish this pillar of Islam before his death. While the family was in Saudi Arabia, the Yemeni security forces went to their communal home in Yemen. Mohammed was in Yemen and believed that the reason for the Security Forces visit was to arrest Mr. Hamdan as he had been traveling to Afghanistan and the Yemeni Government was randomly rounding up men after the Cole bombing. As a result of this belief, Mohammed had a conversation with Mr. Hamdan and told him not to return to Yemen from Saudi Arabia. The family traveling with Mr. Hamdan in Saudi Arabia agreed and the family decided that it was best for Mr. Hamdan to return to Afghanistan with his wife and children until the authorities in Yemen had finalized their investigation into the USS Cole bombing.

4. Detailed Defense Counsel has spoken to Mr. al-Qal'a through a translator and Mr. al-Qal'a has verbally stated his intentions and his desire to testify on Mr. Hamdan's behalf.

5. The testimony of Mr. al-Qal'a is to be used for Mr. Hamdan's case-in-chief, as well as sentencing and potential rebuttal. We are not intending to call this witness in any hearing or motion prior to commencing trial, but reserve that ability should circumstances change.

6. Detailed Defense Counsel last spoke with Mr. al-Qal'a via a translator on 4 October 2004 and this communication was via phone. During this conversation Mr. al-Qal'a reconfirmed that he and his other family members would be available to testify at Mr. Hamdan's trial in December.

7. Detailed Defense Counsel requests that Mr. al-Qal'a be present to testify on Mr. Hamdan's behalf. The Defense does not agree to an alternative to live testimony.

8. No other witness can be called to attest to the facts known by Mr. al-Qal'a. Further, this witness is not cumulative to anyone else who the Government or the Defense may call.

9. This is a lay witness request.

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10. We submit no other matters for your consideration.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, U.S. Navy
Detailed Military Defense Counsel
Office of Military Commissions

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3

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.

6. Response to paragraph 7. POM 10, paragraph 4g requires the requestor to state whether they agree to an alternative to live testimony to present what is described in the synopsis, "or the reasons why such an alternative is NOT acceptable." The POM goes on to say that "It is unnecessary to state that live testimony is better than an alternative. . ." Given the requirements of paragraph 4g, the Prosecution is perplexed that the request was found to be in compliance with POM 10. Paragraph 7 of the request simply states that the witness be present and claims that the Defense "does not agree to an alternative to live testimony." That's all. No mention whatsoever is made of reasons why alternatives are not acceptable as specifically required by the POM. Because the Defense has not complied with the requirements of POM 10 at this time, the Prosecution cannot take a position on the feasibility of taking this testimony by alternative methods.

7. Response to paragraph 8. The Defense states that no other witness *can* be called to attest to the facts known by this witness. This is not even internally consistent with the Defense's own submissions for two other witnesses they have requested from Yemen. Cumulative with the proffered testimony of this witness, Taqia Muhsin al-Ansi and Umat al-Subur 'Ali Qassim al-Qai'a are also proffered to provide testimony concerning:

- a. the Accused's character for peacefulness;
- b. the Accused's character for truthfulness;
- c. the circumstances of the Accused's marriage; and
- d. the Accused's attitude towards al Qaida.

The Prosecution fully acknowledges that the Accused cannot be required to testify. However, it is misleading to state that no other witness *can* be called to attest to these same facts.

8. Response to paragraph 9. The Prosecution has no objections or supplements to this paragraph.

9. Conclusion. For the reasons mentioned above, the Prosecution requests that this witness be denied. The proffer is insufficient to adequately make an assessment and appears to be cumulative with the proffered testimony of other witnesses. Alternatively, the Prosecution asks that this witness, currently located in Yemen, be allowed to testify in a manner other than appearing personally.


Commander, U.S. Navy
Prosecutor

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2

UNITED STATES OF AMERICA
v.
SALIM AHMED HAMDAN

DEFENSE REPLY TO
PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: MUHAMMED ALI
QASSIM AL-QAL'A
D 31

28 October 2004

The Defense in the above-captioned case hereby files the following reply and request for the production of the above witness. In support of this request, the Defense answers the Prosecution's response as follows:

1. Reply to Prosecution Response to paragraph 3. Mr. Hamdan's words and actions are directly relevant to his mental state and are tend to rebut any circumstantial or direct evidence that Mr. Hamdan had entered into an a criminal agreement with Osama Bin Laden.
2. Reply to Prosecution Response to paragraph 7. The Defense does not believe that alternative to live testimony are feasible in this case further the defense would not agree to such alternatives. The witness will offer testimony tending to rebut the core of the Prosecution's case. The Defense, however, is aware that the witness is a family member of the accused and that witness bias will undoubtedly be at issue. As such the Commissions ability to assess the witness credibility is essential to a fair proceeding
3. Reply to Prosecution Response to paragraph 8. The Prosecution mischaracterizes the Defense assertion that the witness is not cumulative. The witness is offered for unique factual testimony. The fact that portion of the witness testimony overlaps does not change this fact nor does the Prosecution's assertion that Mr. Hamdan could testify to the facts in question. Such a rule is not in keeping with Mr. Hamdan's right to present a defense. If testimony of this witness is somehow "cumulative," and therefore excludable, it would guarantee the exclusion of virtually all of the evidence being sought to be introduced by the prosecution in this trial. To infer that Mr. Hamdan's potential testimony is any way related to this issue is singularly in appropriate and demonstrates a complete absence of an understanding of judicial principals and if adopted would preclude the need for the production of any witness

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4. Conclusion. For the reasons set out in it request for production of the witness and this reply, the Defense requests the production of this witness

Charles D. Swift
Lieutenant Commander, U.S. Navy
Detailed Defense Counsel

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UNITED STATES

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REQUEST FOR
) WITNESS ON MERITS/SENTENCING:
) TAQI'A MUHSIN AL-ANSI
)
) 26 October 2004
)

1. Witness Request – Taqia Muhsin al-Ansi - US. v. Hamdan.

2. Taqia Muhsin al-Ansi is the witness's name. We are unaware of an alias. We are unaware of any mailing address but we do know that she is a resident of the capital city of Sana'a and resides with her son, Mr. Al-Qal'a, another witness requested by the Defense. She may be contacted through the International Committee for the Red Cross or through Defense Counsel. The phone number for contact with this witness is 011-967-73292705. We are unaware of any e-mail address for this witness. This witness speaks only Arabic with a Yemeni dialect and will require the use of a translator.

3. Mrs. Taqia Muhsin al-Ansi is the mother-in-law to the defendant. She has had significant personal contact with Mr. Hamdan. Mrs. al-Ansi can testify as to the reputation of the defendant's character among the community, the reason for the defendant returning to Afghanistan in 2000, the defendant's character for truthfulness, and the defendant's character for peacefulness. More specifically, the defendant's mother-in-law's testimony is expected to include (but is not limited to) the following information.

- Character in the community and character for peacefulness. That Mr. Hamdan had a very caring personality and her opinion was that Mr. Hamdan had a very large heart and would always care for her. For example, after first being introduced into the family, Mr. Hamdan's mother-in-law (not yet his mother-in-law) became very sick and was in the hospital for an extended period of time. Mr. Hamdan was at her side in the hospital and later in the home, making sure she had everything she needed including water, food, and medicine. That no one in the family spent as much time with her during this time as Mr. Hamdan. Further, his reputation in the community was similar, that Mr. Hamdan was always very caring towards others in the community and was not afraid to show his affection towards his family when he was in the community. In addition to caring for his mother-in-law, Mr. Hamdan was often helping his wife in the kitchen and with other household chores. That he encouraged all the women of the family to exercise their rights, including the right to vote. That he would take his wife out to dinner, and that he would take the entire family out to dinner. He would often risk teasing from the men in the family for his behavior but he would defend his actions and explain that all men should treat their families in the same manner. This is relevant to the Defense case because it directly contravenes the Government's case that Mr. Hamdan is a violent and hostile person.

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- Reason for returning to Afghanistan in 2000. That Mr. Hamdan had accompanied his parents-in-law to Saudi Arabia for the Haji when his father-in-law was sick and nearing death. During this time, the Yemeni authorities arrived at the family home in Yemen and it was rumored that they were looking for men to arrest as part of the investigation into the USS Cole bombing in order to satisfy the U.S. As a result of this and before the family returned to Yemen, the family sat down and had a family discussion regarding whether Mr. Hamdan should return to Yemen with his wife (their daughter) as previously planned. The family decided that it would be best if Mr. Hamdan took his wife and children back to Afghanistan rather than return to Yemen. This is relevant to the defense case because it directly contravenes the Government's assertion that Mr. Hamdan was in Afghanistan for any Al-Qaeda related purpose.

4. Detailed Defense Counsel has spoken to Mrs. al-Ansi through a translator and Mrs. al-Ansi has verbally stated her intentions and her desire to testify on Mr. Hamdan's behalf.

5. We anticipate calling this witness in the Defense case-in-chief and sentencing proceedings. We do not anticipate calling this witness for any preliminary or evidentiary hearings however, we reserve the right to call her in such case should circumstances change and require us to do so.

6. Detailed Defense Counsel last spoke with Mrs. al-Ansi via a translator on July 24 and this communication was in person. Also, when Detailed Defense Counsel last spoke with Mrs. al-Ansi she stated she would be available to testify at Mr. Hamdan's trial in December.

7. Detailed Defense Counsel requests that Mrs. al-Ansi be present to testify on Mr. Hamdan's behalf. We do not agree to an alternative to live testimony because that would deprive the finders of fact and law from asking this witness substantive questions the counsel may not anticipate.

8. No other witness can be called to attest to the facts known by Mrs. al-Ansi. In other words, her testimony is not cumulative to any other witness who will be called by the Government or the Defense.

9. This is a lay witness.

10. We do not submit any other matters for your consideration.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, U.S. Navy
Detailed Military Defense Counsel
Office of Military Commissions

Exhibit 35A

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: TAAQI'A MUHSIN AL-
ANSI

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
 2. Response to paragraph 3. . The Prosecution does not believe the content of the proffer is sufficient. To assess the probative value of the testimony and take a meaningful position on whether the person should be produced for live witness testimony, it adds little to the analysis to merely state that she knows "the reason for the defendant returning to Afghanistan in 2000 (unable to assess the probative value without knowing the reason).
- Additionally, because much of the testimony will relate to second-hand knowledge and merely repeating what the Accused allegedly told her, we do feel this impacts the analysis in paragraphs 7 and 8.
3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
 4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.
 5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.
 6. Response to paragraph 7. POM 10, paragraph 4g requires the requestor to state whether they agree to an alternative to live testimony to present what is described in the synopsis, "or the reasons why such an alternative is NOT acceptable." The POM goes on

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to say that "It is unnecessary to state that live testimony is better than an alternative. . ." The Defense has arguably set out a reason why depositions and stipulations cannot be used, however this stated reason would apply to every potential witness in these proceedings. Their stated concerns do not address the viability of video teleconference (VTC) or telephonic communication with this witness¹. Because the Defense has not complied with the requirements of POM 10 at this time, the Prosecution cannot take a position on the feasibility of taking this testimony by alternative methods.

7. Response to paragraph 8. The Defense states that no other witness *can* be called to attest to the facts known by this witness. This is not even internally consistent with the Defense's own submissions for two other witnesses they have requested from Yemen. Cumulative with the proffered testimony of this witness, Taqia Muhsin al-Ansi and Muhammad Ali Qassim al-Qal'a are also proffered to provide testimony concerning:

- a. the Accused's character for peacefulness;
- b. the Accused's character for truthfulness; and
- c. the Accused's reason for returning to Afghanistan in December 2000.

The Prosecution fully acknowledges that the Accused cannot be required to testify. However, it is misleading to state that no other witness *can* be called to attest to these same facts.

8. Response to paragraph 9. The Prosecution has no objections or supplements to this paragraph.

9. Conclusion. For the reasons mentioned above, the Prosecution requests that this witness be denied. The proffer is insufficient to adequately make an assessment and appears to be cumulative with the proffered testimony of other witnesses. Alternatively, the Prosecution asks that this witness, currently located in Yemen, be allowed to testify in a manner other than appearing personally.


Commander, U.S. Navy
Prosecutor

¹ It is the Prosecutions position that the stated reason for needing the witness live is tantamount to saying "live testimony is better than an alternative," which is specifically mentioned in the POM as being insufficient grounds for a live-witness request. We assert that the Defense has not complied in any way with POM 10's requirement regarding this paragraph.

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UNITED STATES OF AMERICA
v.
SALIM AHMED HAMDAN

**Defense Reply to
PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: TAQI'A MUHSIN AL-
ANSI
D 32**

28 October 2004

The Defense in the above-captioned case hereby files the following reply and request for the production of the above witness. In support of this request, the Defense answers the Prosecution's response as follows:

1. Reply to Prosecution Response to paragraph 3. Mr. Hamdan's words and actions are directly relevant to his mental state and are tend to rebut any circumstantial or direct evidence that Mr. Hamdan had entered into an a criminal agreement with Osama Bin Laden.
2. Reply to Prosecution Response to paragraph 7. The Defense does not believe that alternative to live testimony are feasible in this case further the defense would not agree to such alternatives. The witness will offer testimony tending to rebut the core of the Prosecution's case. The Defense, however, is aware that the witness is a family member of the accused and that witness bias will undoubtedly be at issue. As such the Commissions ability to assess the witness credibility is essential to a fair proceeding
3. Reply to Prosecution Response to paragraph 8. The Prosecution mischaracterizes the Defense assertion that the witness is not cumulative. The witness is offered for unique factual testimony. The fact that portion of the witness testimony overlaps does not change this fact nor does the Prosecution's assertion that Mr. Hamdan could testify to the facts in question. Such a rule is not in keeping with Mr. Hamdan's right to present a defense. If testimony of this witness is somehow "cumulative," and therefore excludable, it would guarantee the exclusion of virtually all of the evidence being sought to be introduced by the prosecution in this trial. To infer that Mr. Hamdan's potential testimony is any way related to this issue is singularly in appropriate and demonstrates a complete absence of an understanding of judicial principals and if adopted would preclude the need for the production of any witness

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4. Conclusion. For the reasons set out in it request for production of the witness and this reply, the Defense requests the production of this witness

Charles D. Swift
Lieutenant Commander, U.S. Navy
Detailed Defense Counsel

Review Exhibit 35C

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REQUEST FOR RELIEF:
) BILL OF PARTICULARS AND
) DUPLICITY

) 29 October 2004
)
)

1. Relief Sought. That the Government provides the Defense and Commission Members with the specific elements that it believes it must prove in order to prove up the charge of conspiracy against Mr. Hamdan, and to sever the triable offenses as listed in the conspiracy specification and charge.

2. Facts

a. On 13 July 2004, Mr. Hamdan was charged with a single specification and charge of conspiracy.

b. The conspiracy charge includes the countries of Afghanistan, Pakistan, Yemen and "other countries." The conspiracy charge includes the timeframe of on or about (no day specified) February 1996 to on or about 24 November 2001. The conspiracy charge alleges Mr. Hamdan conspired with Usama Bin Laden, Saif al Adel, Dr. Zawahari, Muhammad Atef and "other members and associates of the al Qaida organization, known and unknown." The conspiracy charge alleges agreement to commit certain offenses: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism."

c. Where "findings are vague and ambiguous and failed to reflect what facts constituted the offense" the result is a "lack of proper review." U.S. v. Walters, 58 MJ 391 (CAAF 2003).

d. It is improper for the Government to seek, at one and the same time, (a conviction against an accused) with a general course of misconduct over a stated period of time and to select from that... a specific act to be alleged as a separate offense." U.S. v. Maynazarian, 12 USCMA 484 (1961).

e. When the defense is seeking a specific time/date/place, it should file a bill of particulars. U.S. v. Lewis, 51 MJ 376 (CAAF 1999).

f. The charge and its specification as currently written is both vague and duplicitous. The Defense is not aware of the specific time/date (missing day) and place ("other countries") in the offense. Further, the charge and its specification alleges triable offenses as part of the conspiracy offense, but are not separate offenses and as such have no specific elements attached to them to prove up the conspiracy charge.

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3. Legal Authority Cited.

- a. U.S. v. Walters, 58 MJ 391 (CAAF 2003)
- b. U.S. v. Maynazarian, 12 USCMA 484 (1961)
- c. U.S. v. Lewis, 51 MJ 376 (CAAF 1999)

4. Why Relief Is Necessary. To inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for the military commission, to avoid or minimize the danger of surprise at the time of the military commission, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense.

KRISTINE M. AUTORINO, Capt, USAF
Detailed Defense Counsel
Office of Military Commissions

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g. On 24 September 2004, the Prosecution provided an additional 6 pages to the Defense in an effort to meet its discovery obligation. Included in this discovery was the disclosure of the Prosecution's potential law enforcement witnesses.

h. On 6 October 2004, the Prosecution provided an additional 245 pages to the Defense in an effort to meet its discovery obligation.

i. On 19 October 2004, the Prosecution provided an additional 81 pages to the Defense in an effort to meet its discovery obligation. Additional prosecution witnesses were disclosed at that time.

j. On 28 October 2004, the Prosecution provided an additional 39 pages to the Defense in an effort to meet its discovery obligation. Additional prosecution witnesses were disclosed at that time.

k. The Prosecution continues diligently to provide discovery as quickly as it gains information and the authority from controlling agencies to release it. The Prosecution has provided more access to information than Commission law requires.

5. Legal Authority Cited:

a. RCM 906

b. United States v. Alex, 791 F.Supp. 723 (N.D. IL 1992)

c. United States v. Mobley, 31 M.J. 273 (C.M.A. 1990)

d. United States v. Slubowski, 5 M.J. 882 (N.C.M.R. 1978)

e. United States v. Walters, 58 M.J. 391 (C.A.A.F. 2003)

f. United States v. Maynazarian, 12 USCMA 484 (C.M.A. 1961)

g. United States v. Lewis, 51 M.J. 376 (C.A.A.F. 1999)

h. United States v. Williams, 40 M.J. 379 (C.M.A. 1994)

i. United States v. Tanner, 279 F.Supp. 457 (N.D. IL 1967)

j. MCI No. 2

k. U.S. v. Verrecchia, 196 F.3d 294 (1st Cir. 1999)

l. Braverman v. United States, 317 U.S. 49 (1942)

6. Discussion:

Although lacking in particularity itself, the Defense's Motion seems actually to be two motions. The first appears to be a motion for a bill of particulars seeking a "specific time/date"¹ and "place."² Additionally, the Defense seeks "the specific elements that [the government] believes it must prove in order to prove up the charge of conspiracy against Mr. Hamdan."³ The second motion seems to be a motion for severance on the grounds of duplicity. Both motions should be denied.

a. Bill of Particulars

Commission law does not specifically provide for bills of particulars but the standard is universally the same.

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

See Discussion to RCM 906(b)(6). Similarly, Rule 7(f) of the Federal Rules of Criminal Procedure authorizes a federal court to order the filing of a bill of particulars whenever the indictment fails to sufficiently apprise the defendant of the charges in the indictment so that he can prepare an adequate defense. See United States v. Alex, 791 F.Supp. 723, 727 (N.D. IL 1992). However, while an accused is entitled to know the factual details of the offense with which he is charged, "he is not entitled to know the details of how the offense will be proved." Id. Moreover, "[a] bill of particulars should not be used to conduct discovery of the Government's theory of the case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial." See United States v. Mobley, 31 M.J. 273, 278 (C.M.A. 1990). Finally, if the defense counsel already possesses the information they seek, having received it in discovery, then there is no need for a bill of particulars. See United States v. Slubowski, 5 M.J. 882, 885 (N.C.M.R. 1978).

Defense bases their request for time/date and place on three cases that have nothing to do with a party's right to a bill of particulars. In United States v. Walters, 58 M.J. 391 (2003), the Court of Appeals for the Armed Forces overturned a conviction and dismissed the charge because the military panel had changed a specification that accused the appellant of committing a crime on divers occasions to "on one occasion," without specifying which occasion, of those presented by the prosecution at trial, the appellant had committed. Id. at 394. The dismissal had nothing to do with a failure of the

¹ Defense Motion at paragraph 2f.

² Id.

³ Defense Motion at paragraph 1.

pleading. Rather, the dismissal was the result of the fact that the panel's findings did not permit the appellate court to conduct its statutory review because they could not discern which occasion the accused had been convicted of. Id. at 397. Similarly, United States v. Maynazarian, 12 U.S.C.M.A. 484 (C.M.A. 1961), was not about particularized pleading requirements but stands, instead, for the general proposition that one cannot be convicted of committing a crime several times during a given time period while also being convicted of committing one instance of the same crime within the same time period. Finally, Defense reliance on United States v. Lewis, 51 M.J. 376 (C.A.A.F. 1999) is equally misplaced. Lewis dealt with a trial court wrongfully prohibiting a defense counsel from presenting an affirmative defense.

Courts have ruled directly on the issues that the Defense raises. With regard to desiring a particular date, “[c]ourts have consistently held that unless the date is an essential element of the offense, an exact date need not be alleged.” See United States v. Williams, 40 M.J. 379, 382 (C.M.A. 1994). Thus, because date is not an essential element of conspiracy under commission law, the defense is not entitled to a bill of particulars furnishing a precise date on which the offense occurred. Regarding the desire of knowing place, the Defense is entitled to that information. See United States v. Tanner, 279 F.Supp. 457, 475 (N.D. IL 1967). However, as was noted above, the Defense is not entitled to a bill of particulars to gain information that they already have. The charge sheet and the discovery turned over to the defense clearly indicate that the countries known to the Prosecution where acts occurred in furtherance of the Al Qaida conspiracy are Afghanistan, Pakistan, Yemen, Kenya, Tanzania, and the United States of America. A bill of particulars will divulge no additional information.

A bill of particulars is similarly unwarranted to answer what elements the Prosecution believes it has to prove to convict the Accused. Those elements are clearly pronounced in MCI No. 2 and are, like all other entitled particulars sought by the defense, already in their possession.

6) Conspiracy

a. Elements.

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

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

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

MCI No. 2, paragraph 6c(6).

“The decision to grant or deny a motion for a bill of particulars is within the sound discretion of the judge.” See Williams, 40 M.J. at 381, footnote 4. Because the defense is both not entitled to the information they seek and already in possession of the information they seek, this commission should exercise that discretion by denying the Defense’s request for a bill of particulars.

b. Severance and Duplicity.

Similarly to bills of particulars, the federal and military justice standards regarding duplicity track closely with one another. See United States v. Verrecchia, 196 F.3d 294, 297 (1st Cir. 1999)(“Duplicity is the joining in a single count of two or more distinct and separate offenses.”) and the discussion to RCM 906(b)(5) (“A duplicitous specification is one which alleges two or more separate offenses.”) The prohibition against duplicitous counts or specifications arises primarily out of a concern that a jury or panel may find a defendant guilty on a count or specification without having reached a unanimous verdict on the commission of any particular offense. See Verrecchia, 196 F.3d at 297.

The Defense claims that the charge against the Accused actually states five different conspiracies and cites no case law in addition to that previously discussed. Without reviewing each of the Defense’s cited cases again, it is sufficient to say that none address duplicity in conspiracy charges. The United States Supreme Court directly addressed this issue in 1942. In Braverman v. United States, 317 U.S. 49 (1942), two defendants were convicted of seven counts of conspiracy. Id. at 51. At trial, the defendants moved essentially to have the counts merged into one conspiracy. Id. The prosecution in the case took the position that the seven counts of the indictment charged, as distinct offenses, the several illegal objects of one continuing conspiracy. Id. Furthermore, the prosecution asserted that if the jury found such a conspiracy it might find the defendants guilty of as many offenses as it had illegal objects, and that for each such offense the statutory penalty could be imposed. Id. The Court held that, indeed, the defendants had been improperly charged and sentenced. “[A] single agreement to commit an offense does not become several conspiracies because it continues over a period of time and . . . there may be such a single continuing agreement to commit several offenses.” Id. at 52 (citations omitted). The Court went on to say that there are times when there are multiple agreements to violate multiple laws and, in those cases, charging and sentencing multiple conspiracies is appropriate, but that when only a single agreement is entered into, the conspirators are guilty of only one conspiracy. Id.

Because, as is clear in the charge sheet and accompanying discovery, the Accused took part in one global conspiracy, it would actually be inappropriate under Braverman to charge multiple conspiracies. As such, the Defense’s motion to sever must be denied.

c. Conclusion

The Accused is sufficiently informed and his request for a bill of particulars should be denied. Additionally, the Defense's Motion to Sever must be denied because granting the motion would compel inappropriate charging.

7. Attachments: None

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: None


Captain, U.S. Army
Prosecutor

Review Exhibit 36-B, Page 6 of 6 Pages

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE REPLY TO
) PROSECUTION'S RESPONSE TO
) D33 (BILL OF PARTICULARS)
)
) 7 November 2004
)

1. Relief Requested. Grant D33 and order the Prosecution to provide the Defense with a Bill of Particulars.

2. Facts. (Reply to Prosecution's Facts in their Response to D33, 5 Nov 04)

a. The Defense has only received a 3-page charge sheet, not 4, as the Prosecution contends. That 3-page charge sheet is rife with the most general allegations. The descriptions of the overt acts are vague and broad. The Prosecution admits the countries "currently known" to the Prosecution are in the charge sheet, but in fact the conspiracy charge does not list the "United States, Kenya, and Tanzania" as the Prosecution's Response claims. However, the charge sheet does list "other countries," and only now in its Response to D33 has the Prosecution specified the United States, Kenya, and Tanzania. Indeed, the Prosecution response ironically explains precisely the reason why such a bill of particulars is required, here and elsewhere.

b.-j. The Defense agrees the Prosecution has provided volumes of paper over the past year to the Defense. However, whether or not the Prosecution is meeting its obligations under the Military Commission Discovery rules is really only known to them, as they are the keepers of the information and they are supposed to release documentation to the Defense. Indeed, the Prosecution has continually denied access to documentation and other information we have requested by citing that they are complying with the rules of discovery in the military commission process. More importantly, the number of pages of discovery the Prosecution has provided is absolutely immaterial when it is not relevant to the case of Mr. Hamdan. In other words, the Defense is confident the Prosecution could provide Mr. Hamdan with 10,000 more pages of "discovery" but they may still not answer the questions of:

- When? (did the meeting of the minds allegedly take place),
- How? (did Mr. Hamdan conspire with anyone to commit any triable offense) and,
- What? (overt actions did Mr. Hamdan do to further the conspiracy).

k. The Defense disagrees. We have not yet been provided any discovery regarding the CSRT of Mr. Hamdan on 3 October 2004. We were only told of the CSRT decision while we were arguing our case in *federal* court on 25 Oct 04. That is simply one example of information we know the Prosecution has control over and has not yet released to the Defense. The Prosecution only knows whether or not they are holding information it has control over and is not releasing to us.

3. Legal Authority.

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- a. U.S. v. Williams, 40 MJ 379 (CMA 1994)
- b. Braverman v. United States, 317 U.S. 49 (1942)
- c. Albernaz v. United States, 450 U.S. 333 (1981)
- d. Kotteakos v. United States, 328 U.S. 750 (1946)
- e. United States v. Hess, 124 U.S. 483 (1888)
- f. U.S. v. Ramirez, 54 F. Supp. 2d 25, 30 (D.C. Crt 1999).
- g. U.S. v. Johnson, 225 F. Supp. 2d 982 (N.D. Iowa 2002)
- h. U.S. v. Bin Laden, 92 F.Supp.2d 225 (S.D.N.Y. 2000)

4. Why Relief is Necessary.

- a. The Defense is seeking particular specifications for the following reasons.

1. Affirmative Defenses. The Defense is obligated to provide notice of any affirmative defenses when Mr. Hamdan makes his plea to the charge. It is impossible to provide notice of those defenses without specificity. The Defense must be apprised of the dates and the correlating actions allegedly committed before Mr. Hamdan can enter his plea and provide notice of any affirmative defenses. “Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.” United States v. Hess, 124 U.S. 483, 487 (1888)

2. Timing in Relation to Acts in Furtherance of the Conspiracy. The date of the conspiracy is an essential element to the charge because the conspiracy to commit a triable offense must happen before the triable offense actually takes place. In this case, the Prosecution has not provided the Defense with any information regarding when the meeting of the minds took place and in regards to which triable offense.

3. One or More Conspiracies. The Defense seeks a date because we do not know if there is one conspiracy for all triable offenses listed in the current charge, or if there are several conspiracies for each triable offense. That information is absolutely necessary under decisions of the Supreme Court of the United States.

In a serious mistake, the Prosecution cites the decision of Braverman v. United States, 317 U.S. 49 (1942) for the contention that there can be “multiple agreements to violate multiple laws” under a single conspiracy charge. Pros. Resp. at 5. But they neglect to notify the Commission that the Supreme Court of the United States has moved a long way since 1942 and expressly confined Braverman to cases in which a **single statute has been violated**. In

Albernaz v. United States, 450 U.S. 333, 339-40 (1981) (citations omitted) the Supreme Court held:

Our conclusion in this regard is not inconsistent with our earlier decision in Braverman v. United States, 317 U.S. 49 (1942), on which petitioners rely so heavily. ... "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." 317 U.S., at 53, 63 S.Ct., at 101. Braverman, however, does not support petitioners' position. Unlike the instant case or this Court's later decision in American Tobacco, the conspiratorial agreement in Braverman, although it had many objectives, violated but a single statute.

Moreover, the Prosecution's citation to Braverman is irrelevant in any event. Four years later, the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946) threw out a conspiracy charge because the Prosecution had shown multiple conspiracies instead of a single one. In writing that opinion, the Justices carefully explained why specifications were needed in large conspiracy cases such as this one. This is the conclusion of the landmark majority opinion:

We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere, extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass.

328 U.S. 750, 776-77 (1946) (citations omitted). This was particularly the case when the decision maker was not trained in law:

It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference.

Id. at 769. In short, Kotteakos requires the specifications, and nothing in the earlier Braverman decision qualifies that rule.

4. Relative to Which Countries. The Defense seeks a date specific because we do not know if the conspiracy pertained to specific attacks in specific countries and if so, which countries. In the case of U.S. v. Bin Laden, 92 F.Supp.2d 225 (S.D.N.Y. 2000) the court analyzed the requirements for charges in terrorist cases. The Court stated:

Once one focuses, however, on the details of a particular case, it becomes apparent that the foregoing, oft-repeated generalities [regarding when bills of particulars should be granted] provide little guidance. The line that distinguishes one defendant's request to be apprised of necessary specifics about the charges against him from another's request for evidentiary detail is one that is quite difficult to draw. It is no solution to rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars.

Moreover, to whatever limited degree prior decisions are helpful as a general matter when resolving demands for a bill of particulars, they are particularly unilluminating in this case. The geographical scope of the conspiracies charged in the Indictment is unusually vast. The Indictment alleges overt acts in furtherance of those conspiracies that occurred in Afghanistan, Pakistan, the Sudan, Somalia, Kenya, Tanzania, Malaysia, the Philippines, Yemen the United Kingdom, Canada, California, Florida, Texas, and New York.

The breadth and duration of the criminal conduct with which the alleged conspirators are accused is similarly widespread. The Indictment alleges activity, occurring over a period of ten years, that ranges from detonating explosives, to training Somali rebels, to transporting weapons, to establishing businesses, to lecturing on Islamic law, to writing letters, and to traveling, as overt acts in furtherance of the charged conspiracies.

We are hesitant, therefore, to place any significant weight on the conclusions reached in earlier cases in which courts were presented with an indictment alleging a more specific type of criminal conduct, occurring over a shorter period of time, in a more circumscribed geographical area. Although we express no view at this time as to whether the Indictment comports with the requirements of due process, we recognize that it does impose a seemingly unprecedented and unique burden on the Defendants and their counsel in trying to answer the charges that have been made against them. *Id.* At 233-235.

5. Existence of Overt Act. The Prosecution must specify what, if any, overt act took place by Mr. Hamdan, or anyone else that they seek to rely upon at trial. It would be impossible to defend against thousands of conceivable overt acts. The Defenses is entitled to contest and rebut any overt act/triable offense relied upon by the Prosecutor.

6. Object Offenses. The conspiracy charge lists 5 triable offenses. The Prosecution has provided no detail about the offenses.

- Who (civilians) was attacked? When and where?
- What civilian objects were attacked? When and where?
- What murder by an unprivileged belligerent took place? When and where, and by whom?
- What destruction of property occurred? When, where, and by whom?
- What terrorism? When, where, and by whom?

It is impossible to defend against the charge without knowing the details of the listed triable offenses as part of the charge. A 3-page general charge sheet with no specificity does not even come close.

7. Specific date is Essential Element. The Prosecution relies upon U.S. v. Williams, 40 MJ 379 (CMA 1994), for their argument that conspiracy charges do not require an exact date. In Williams, the charge sheet specified a two-month window, “[t]hus, he knew that the Government was going to focus on those months as opposed to the remaining 13 months during which appellant lived in the child’s house.” *Id.* at 382. Further, Williams is distinguishable from the case at hand because Williams specified with extreme particularity the action allegedly taken place (graphic allegation of sexual assault on minor) and the precise location of the offense (Quarters 914-I, Moyer Road, Ft. Belvoir, VA). Instead of Williams, the commission should look to Ramirez involving facts similar to here, alleged conspiracy consisting of multiple persons over a period of approximately one year. The court held that the defendants were “entitled to a bill of particulars setting forth the names of all persons the government would claim at trial were co-conspirators (whether or not they will be called as trial witnesses), the approximate dates and locations of any meetings or conversations not already identified in the indictment in which each defendant allegedly participated, and the approximate date on which each defendant allegedly joined the conspiracy.” U.S. v. Ramirez, 54 F. Supp. 2d 25, 30 (D.C. Crt 1999).

b. The Defense seeks particularity with regard to facts in the Prosecution’s charge sheet. In the Prosecution’s response, they referred to a plain-face charge based on the general allegations, the charge, and the overt acts with regard to the charge. The Defense would like to know if the Government believes that by satisfying any of the General Allegations, they have somehow proven the charge, or do they also believe that they have to prove the specific facts as outlined under the conspiracy charge as overt acts. The courts have held that the defense is entitled to a bill of particulars setting out the date, time, and place of each overt act of which the government intends to comply. See generally, U.S. v. Johnson, 225 F. Supp. 2d 982 (N.D. Iowa 2002)

c. In the end, the Defense does not seek discovery the Government has already provided. Of course the Defense does seek all information relevant to the case of Mr. Hamdan, and we can only take the Government’s word that they have provided and shall continue to provide all relevant discovery. The issue is not discovery. Further, the Defense is not seeking the Prosecution’s actual work-product in proving the charge. The Defense is aware the Prosecution intends to offer as evidence anything they believe is “probative to a reasonable person” and we intend to object to any evidence the Defense believes is not relevant or probative to a reasonable person. The issue is not theme/theory/work-product. The Defense seeks specificity –

particularity – so that Mr. Hamdan can comply with the rules regarding affirmative defenses and can appropriately prepare his case including pleas and strategy decisions. As the charge sheet is currently written, Mr. Hamdan has no idea what conspiracy took place with regard to which, if any, triable offense.

CHARLES D. SWIFT
LCDR, USN
Detailed Military Defense Counsel
Office of Military Commissions

NEAL KATYAL
Civilian Defense Counsel

D25 MOTION (DENIED BY P.O.)

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004

UNITED STATES

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING
) ON GENEVA CONVENTIONS
) AND COMMON ARTICLE 3:
) ANNE-MARIE SLAUGHTER

)
) 18 October 2004
)

1. Witness Request -- Anne-Marie Slaughter -- U.S. v. Hamdan.
2. Anne -Marie Slaughter is the Dean of the Woodrow Wilson School of Foreign Affairs at Princeton University. Her telephone number is 609-258-4800. Her e-mail address is slaughter@princeton.edu.
3. Dean Slaughter is the President of the American Society of International Law. She is the nation's preeminent expert on international law. She has published widely in the field. Dean Slaughter will explain why the military commission as it is presently formed violates current international law and is thus not properly constituted and void.
4. Civilian Defense Counsel has spoken with Dean Slaughter and has read her publications.
5. The testimony of Dean Slaughter is to be used for Mr. Hamdan's motion regarding two motions: Article 103 of the Geneva Convention (D15) and Common Article 3 of the Geneva Convention (D23). She may also be referenced in the motion for dismissal for lack of subject-matter jurisdiction (D17).
6. Civilian Defense Counsel had a phone conversation with Dean Slaughter on 8 October 2004, and she indicated that she would be available on 8 November 2004 to testify at Guantanamo.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Dean Slaughter, as the leading expert in international law in America today. Dean Slaughter would be in a position to react to the arguments advanced in the proceedings by both sides as to the international law violations, if any, for the Military Commissions and how they bear on the proceedings of the commissions. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to the relationship between international law and military commissions. Dean Slaughter is the leading expert in the field.
9. This is an expert witness request. Dean Slaughter's views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the

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influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Anne-Marie Slaughter – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

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2.

9. This is an expert witness request. Dean Slaughter's views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

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Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

Keith Hodges
Assistant to the Presiding Officer.

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ANNE-MARIE SLAUGHTER

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EMPLOYMENT

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1993-94
Professor of Law and International Relations
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1989-93
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1988-89
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1984-88
Assistant to Professor Abram Chayes: Legal assistance on a variety of international cases, including litigation involving Nicaragua, the Philippines, Egypt, and the Marshall Islands. Selecting and editing materials on strategic weapons management (1985)

Writing and editing materials for a course in International Legal Process (1985)

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Ford Fellow in European Society and Western Security, The Center for International Affairs, Harvard University

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HONORS

Invited Lecturer, Hague Academy of International Law, Millennial Lectures, Summer 2000.

Invited Lecturer, Nordic Academy of International Law, Summer 2000.

Francis Deak Prize, awarded by the AMERICAN JOURNAL OF INTERNATIONAL LAW for *International Law and International Relations Theory: A Dual Agenda* (prize shared with Steven Ratner), 1994.

Allen Chair Professor, T.C. Williams School of Law, University of Richmond, 1994.

Francis Deak Prize, awarded by the AMERICAN JOURNAL OF INTERNATIONAL LAW for *The Alien Tort Statute and Judiciary Act of 1789: A Badge of Honor*, 1990.

Russell Baker Scholar, University of Chicago Law School, 1990.

Certificate of Distinction in Teaching, Harvard-Danforth Center for Teaching and Learning, 1984.

Princeton University Daniel M. Sachs Memorial Scholarship (for two years of study at Oxford University) Phi Beta Kappa, 1980.

Woodrow Wilson School R.W. van de Velde Award, 1979.

BOOKS AND JOURNAL SYMPOSIA

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Restoration and Reunification: Eisenhower's German Policy in REEVALUATING EISENHOWER: AMERICAN FOREIGN POLICY IN THE FIFTIES (Richard A. Melanson and David Mayers, eds., 1987).

COMMENTARY

Frequent press, radio, and television interviews on international tribunals, terrorism, and international law.

"Al-Qaeda Should Be Tried Before the World," *The New York Times*, November 17, 2001.

"Terrorism and Justice: An International Tribunal Comprising US and Islamic Judiciary Should Be Set Up to Try Terrorists," *The Financial Times* (London), October 12, 2001.

"A Defining Moment in the Parsing of War," *The Washington Post*, September 16, 2001.

"Sue Terrorists, Not Terrorist States," (with David Bosco), *The Washington Post*, October 28, 2000.

"On a Foreign Death Row," *The Washington Post*, April 14, 1998.

BOOK REVIEWS

Are Foreign Affairs Different? 1980 HARVARD LAW REVIEW 106 (1993) (reviewing THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

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Book Note, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 671 (1993) (reviewing ELIZABETH ZOLLER, DROIT DES RELATIONS EXTÉRIEURES (1992).

Book Note, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 166 (1993) (reviewing MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).

Book Note, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 415 (1992) (reviewing LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990).

OTHER ACTIVITIES

Presenter and participant at over 100 conferences, debates, and public events a year.

Member, Council on Foreign Relations

Chair, Term Membership Committee, Council on Foreign Relations

Member, Task Force on the Expansion of NATO, Council on Foreign Relations

Faculty Member, MIT Seminar XXI

Trustee, World Peace Foundation

Member, Board of Editors, *International Organization*

Member, Board of Editors, *American Journal of International Law*

Member, Advisory Board, *UCLA Journal of International Law and Foreign Affairs*

Member, Board of Advisors, *Virginia Journal of International Law*

Member, Board of Advisors, *Columbia Journal of European Law*

Member, Editorial Advisory Board, *Texas International Law Journal*

Chair, American Society of International Law (ASIL) Committee on Annual Awards (1999-2000)

Co-Chair, Research Committee, American Society of International Law (ASIL)

Co-Chair, Program Committee for the 1994 Annual Meeting of the American Society of International Law (ASIL)

Member, Executive Council, American Society of International Law (ASIL), 1992-94

Member, Organizing Committee, Trilateral Project among the American Society of International Law (ASIL), the Japanese Association of International Law, and the Canadian Council on International Law

Member, Committee on International Security Studies, American Academy of Arts and Sciences

Term Member, Council on Foreign Relations, 1987-1992

Member, Executive Committee, Chicago Committee on Foreign Relations

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Member, Strategy Committee, Project on Justice in Times of Transition, John F. Kennedy School of Government

Hauser Center Faculty Fellow, Harvard University

Affiliate for European Studies, Harvard University

Member, Standing Committee on European Studies, Harvard University

Member, Executive Committee, Weatherhead Center for International Affairs, Harvard University

Co-Chair, ABA Committee on Public International Law

Member, ABA Standing Committee on World Order Under Law, 1992-1995

Member, Advisory Council, Princeton University Department of Politics

Periodic Lecturer, American Council of the United Nations (ACUNS)

International Regimes Database, Advisory Committee

Member, International Law Association

Member, International Council, Institute for Global Legal Studies of the School of Law of Washington University in St. Louis

Member, Organizing Committee, Chicago Lawyers Committee for International Human Rights

Coordinator, Foreign Policy Issues Network, Dukakis for President, August 1987 to January 1988

PERSONAL

Formerly Anne-Marie Burley

Languages: fluent French, semi-fluent German, reading knowledge of Spanish

[END]

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**D25 Hamdan Defense Supplement to synopsis - Slaughter. 21
Oct 04**

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Anne-Marie SLAUGHTER
SYNOPSIS OF WITNESS' TESTIMONY

1. I am the Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University. I also served as President of the American Society of International Law for a two year term ending in March 2004.
2. I received a J.D. from Harvard Law School and an M.Phil. and D.Phil. in International Relations from Oxford University. My B.A. is from Princeton University.
3. I have taught courses in international litigation, international regulatory cooperation, public international law, and international law and international relations. I have written over fifty articles in the area of international law and international relations, and have twice received the Francis Deak Award for best article by a younger scholar in the *American Journal of International Law*. My writings include work on international legal regimes, human rights, transnational regulatory cooperation, universal jurisdiction, the Act of State doctrine, the effectiveness of supranational adjudication, the European Court of Justice, judicial globalization, international criminal law, international administrative law, and the legalization of international regimes.
4. I serve on the Board of Directors of the United States Council on Foreign Relations and the World Peace Foundation. I have also served on the Board of Editors for numerous international journals, including the *American Journal of International Law* and the journal *International Organization*.
5. If called before the Tribunal, I would testify as the applicability of the Geneva Conventions to this case. I would testify that the Geneva Conventions include a presumption that a combatant captured by a foreign government is protected by the conventions until and unless proven otherwise through a judicial proceeding.

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Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War makes clear that "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." As all captured combatants are presumed to be protected, any judicial status determination must comply with the obligations set forth in the Conventions. Hence, the protections of the Convention must, at the least, apply up through a judicial status determination.

6. In addition, I would testify to the intention of the drafters of the Conventions to include the widest possible definition of protected persons. The categories of protected persons enumerated in Article 4 of the Convention represent what was, in 1949, the broadest conceivable definition of enemy combatants given the nature of warfare as it was then known. The Additional Protocols of 1977 continued the tradition of extending protection to the broadest possible conception of civilians and enemy combatant detainees. This intent suggests that the scope of protected combatants should be construed broadly in this case.
7. Third, I would testify that, even if a particular individual is not protected by the text of the Convention itself or has been determined to be a non-protected combatant after a judicial process, customary international law nonetheless offers a broad range of protections regulating the detention of and judicial processes against combatants. While not drawn specifically from the text of the Geneva Conventions, the relevant body of customary international rules incorporates many of the protections afforded in the Conventions themselves.
8. In short, all individuals captured in a conflict by a foreign government are accorded a minimum standard of treatment. For example, the right to a free and fair trial is recognized around the globe, by all major political, social, religious, and cultural systems. The Universal Declaration of Human Rights states that everyone "is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." Even in times of war, Common Article 3 to the Geneva Conventions requires that anyone accused of a crime, be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples." The International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights, the Cairo Declaration on Human Rights in Islam, and the Charter of the Fundamental Rights of the European Union all contain similar guarantees of judicial process. The customary rules which have arisen from these diverse treaties and a long history of state practice require that, even where the Geneva Conventions do not specifically apply, the general principles embodied in those conventions remain applicable.
9. Finally, I would testify that both the Geneva Conventions and the relevant rules of customary international law are binding on US Courts and on military commissions set up by the United States government. The United States ratified

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the Geneva Conventions in 1955 and, in accordance with Article IV of the US Constitution, the Conventions constitute "the Supreme Law of the Land." Furthermore, US Courts have long held that they are bound by customary international law as well as international treaties.

10. The arguments I would present to the tribunal are highly relevant to the case at hand. A critical question in this case is whether defendant, a citizen of Yemen captured in Afghanistan, is protected by the Geneva Conventions. The scope of the conventions' protections, the intent of the drafters, and the relevant customary legal rules have direct bearing on defendant's legal status. Furthermore, whether US courts are bound to apply and uphold these rules is essential to determining the relevant law the tribunal must apply.
11. To date I have not addressed these particular issues in print in my published work. While I have written on the legal responses to terrorism, the principle of civilian inviolability, and the use of courts in prosecuting war criminals and terrorists, the issues raised in this case and outlined above have not been the focus of my published writings to date. In addition, my presentation would involve responding to new claims raised by the Government subsequent to any of my previous publications.

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D25 Response

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: ANNE-MARIE
SLAUGHTER

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Dean Slaughter stated her views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

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Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Defense asserts that Dean Slaughter is available to testify at Guantanamo on November 8, 2004. While we do not know the travel availability of Dean Slaughter, it is our understanding that ingress and egress to Guantanamo is usually at least a three day process. Furthermore, November 8th is a Monday and we are not aware of any flights into Guantanamo on Sundays.

6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).

7. Response to paragraph 8. The Defense states that "No other witness can be called to attest to the relationship between international law and military commissions." It appears from the proffers for Professor Danner (who has knowledge based on her academic writings and teachings, which focus on the history, development, and substance of international criminal law, including the laws of war) and Professor Paust (presented as an expert on both military commissions and international law) that this witness is cumulative.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness. None is cited.

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9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live "law expert" witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.


Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because her views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain her view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Dean's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Dean Slaughter is in no way cumulative with that of any other witness. Dean Slaughter is the foremost expert on the meaning and reach of the Geneva Conventions. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether she is the only possible expert. The defense notes that the Dean is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks

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the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Dean Slaughter's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Dean Slaughter when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

5. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

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We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

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D25 Decision By P.O.

D25 Hamdan Decision.txt

From: Hodges, Keith H. CIV (L)
Sent: Friday, October 29, 2004 3:00 PM
To: 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'; Hodges, Keith H. CIV (L)
Cc: [REDACTED] CDR, DoD OGC; Swann, Robert, COL, DoD OGC; [REDACTED] LtCol, DoD OGC; Hodges, Keith; [REDACTED] COL, DoD OGC; [REDACTED] Cpt, DoD OGC; [REDACTED] GYSgt, DoD OGC; Gunn, Will, Col, DoD OGC; Brownback, Peter E. COL (L)
Subject: US v. Hamdan, Decision of the Presiding Officer, D25

United States v. Hamdan

Decision of the Presiding Officer, D25

The Presiding Officer has denied the request for production of Anne Marie Slaughter as a witness. The Presiding Officer did not find that she is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

Keith Hodges
Assistant to the Presiding Officers

[REDACTED]

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9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Bruce Ackerman – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

Keith Hodges
Assistant to the Presiding Officer.

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BRUCE ARNOLD ACKERMAN

Curriculum Vitae

Date of Birth: August 19, 1943

Marital Status: Married, two children

Present Position: Sterling Professor of Law and Political Science, Yale University, July 1, 1987 -

Past Positions: (1) Law Clerk, Judge Henry J. Friendly, U.S. Court of Appeals, 1967-8

(2) Law Clerk, Justice John M. Harlan U. S. Supreme Court, 1968-9

(3) Assistant Professor of Law, University of Pennsylvania Law School, 1969-71

(4) Visiting Assistant Professor of Law and Senior Fellow, Yale Law School, 1971-72

(5) Associate Professor of Law & Public Policy Analysis, University of Pennsylvania, 1972-73

(6) Professor of Law and Public Policy Analysis, University of Pennsylvania, 1973-74

(7) Professor of Law, Yale University, 1974-82

(8) Beekman Professor of Law and Philosophy, Columbia University, 1982-87

Education: (1) B.A. (summa cum laude), Harvard College, 1964
(2) LL.B. (with honors), Yale Law School, 1967

Languages: German, Spanish, French

Professional Affiliations: Member, Pennsylvania Bar; Member, American Law Institute

Fields: Political philosophy, American constitutional law, comparative law and politics, taxation and welfare, environmental law, law and economics, property.

Honors: American Philosophical Society, Henry Phillips Prize in Jurisprudence ("for

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lifetime achievement"); Fellow, American Academy of Arts and Sciences; Fellow, Collegium Budapest, Fall 2002; Fellow, Center for Advanced Study in the Behavioral Sciences, Spring 2002; Fellow, Woodrow Wilson Center, 1995-96; Fellow, Wissenschaftskolleg, Berlin 1991-92; Guggenheim Fellowship, 1985-86, Rockefeller Fellow in the Humanities, 1976-7; 1982 Henderson Prize of the Harvard School for *The Uncertain Search for Environmental Quality* as the best book on "law and government published during the years 1972 through 1980"; 1981 Gavel Award of the American Bar Association for *Social Justice in the Liberal State*.

Other Awards

and Positions: 2001-02 Jorde Lecture, Yale University and University of California, Berkeley; 2000 Moffett Lecture, Princeton University; 1999 Marks Lecture, University of Arizona; 1999 Terrell Lecture, University of Texas; 1997 Hart Lecture, Georgetown University Law School; 1996 McCorkle Lecture, University of Virginia; 1994 Order of the Coif, Inaugural Lecture, University of California, Berkeley; 1993 University of Connecticut Law Review Award; 1990 Friedrich Lecture, Harvard University; 1987 Leary Lecture, University of Utah; 1986 Currie Lecture, Duke University; 1984 Harris Lecture, University of Indiana; 1983 Storrs Lecture, Yale University.

Kyoto Seminar in American Studies, July, 2000; Visiting Professor, University of Rome, May, 1984; Research Scholar, International Institute for Applied Systems Analysis, Vienna, Austria, Summer 1982; Visiting Professor, Environmental Protection Agency, May 1979.

Grants from National Science Foundation, Council on Law Related Studies.

Order of the Coif; Phi Beta Kappa.

Publications:

I. Books:

1. *The Uncertain Search for Environmental Quality* (with Rose-Ackerman, Sawyer and Henderson), Free Press: 1974
2. *Private Property and the Constitution*, Yale University Press: 1977.
3. *Social Justice in the Liberal State*, Yale University Press: 1980. Italian: Il Mulino, 1984; Spanish: Centro de Estudios Constitucionales, 1993.
4. *Clean Coal/Dirty Air* (with Hassler) Yale University Press: 1981.

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5. *Reconstructing American Law*, Harvard University Press: 1984. Spanish: *Del Realismo Al Constructivismo Juridico*, Ariel: (1989)
6. *We the People*, Vol 1: *Foundations*, Harvard University Press: 1991. French: *Au Nom du Peuple*, Calmann-Levy, 1998.
7. *The Future of Liberal Revolution*, Yale University Press: 1992. German: *Ein neuer Anfang fuer Europa*, Siedler: 1993. Spanish: Ariel, 1995. Polish: Terminus, 1996.
8. *Is NAFTA Constitutional?* (with David Golove), Harvard University Press: 1995.
9. *We the People*, Vol 2: *Transformations*, Harvard University Press: 1998.
10. *The Case Against Lameduck Impeachment*, Seven Stories Press: 1999.
11. *The Stakeholder Society* (with Anne Alstott), Yale University Press: 1999. (German translation: Campus, 2001)
12. *La Politica del Dialogo Liberal*, Gedisa: 1999
13. *Voting with Dollars* (with Ian Ayres), Yale University Press: 2002.
14. *Deliberation Day* (with James Fishkin), in progress.
15. *America On the Brink*, in progress.

II. Edited Volumes

1. Editor, *Economic Foundations of Property Law*, Little Brown: 1975 (2d ed. with Robert Ellickson and Carol Rose, 1995; 3rd ed. 2002).
2. Editor, *Bush v. Gore: The Question of Legitimacy*, Yale University Press: 2002.

III. Articles:

1. Regulating Slum Housing Markets on Behalf of the Poor, *Yale Law Journal*, vol. 80, pp. 1093-1197 (1971)

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2. More on Slum Housing and Redistribution Policy, *Yale Law Journal*, vol. 82, pp. 1194-1207 (1973)
3. The Uncertain Search for Environmental Policy: Part I with James Sawyer), *University of Pennsylvania Law Review*, vol. 120, pp. 419-503 (1972); Part II (with Rose-Ackerman and Henderson), *University of Pennsylvania Law Review*, vol. 121, pp. 1225-1308 (1973).
4. Law and the Modern Mind, *Daedalus*, pp. 119-131 (1974)
5. The Jurisprudence of Just Compensation, *Environmental Law*, vol. 7, pp. 509-519 (1977)
6. The Structure of Subchapter C: An Anthropological Comment, *Yale Law Journal*, vol. 87, pp. 436-446 (1977)
7. Four Questions for Legal Theory, *Nomos*, vol. 22, pp. 351-375 (1980)
8. Beyond the New Deal: Coal and the Clean Air Act (with William Hassler), *Yale Law Journal*, vol. 89, pp. 1466-1571 (1980)
9. The Marketplace of Ideas, *Yale Law Journal*, vol. 90, pp. 1131-1148 (1981)
10. Beyond the New Deal: Reply (with William T. Hassler), *Yale Law Journal*, vol. 90, pp. 1412-1434 (1981)
11. What is Neutral about Neutrality?, *Ethics*, vol. 93, pp. 372-390 (1983)
12. On Getting What We Don't Deserve, *Social Philosophy and Policy*, vol. 1, pp. 60-70 (1983)
13. Foreword: Law in an Activist State, *Yale Law Journal*, vol. 92, pp. 1-45 (1983) (Dutch: Het recht in een activistische staat, *Staatkundig jaarboek, 1983-1984*, pp. 313-328, Leiden, December 1983).
14. Canada at the Constitutional Crossroads (with Robert Charney), *University of Toronto Law Journal*, vol. 34, pp. 117-135 (1984)
15. Storrs Lectures: Discovering the Constitution, *Yale Law Journal*, vol. 93, pp. 1013-1072 (1984)

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16. Beyond Carolene Products, *Harvard Law Review*, vol. 98, pp. 713-46 (1985)
17. Toward a Theory of Statutory Evolution: The Federalization of Environmental Law (with Donald Elliott and John Millian), *Journal of Law, Economics, Organization*, Vol. 1, pp. 313-340 (1985)
18. Foreword: Talking and Trading, *Columbia Law Review*, vol. 85, pp. 899-903 (1985)
19. Cost Benefit and the Constitution, in Roger Noll (ed.), *Regulatory Policy and the Social Sciences*, pp. 351-357 (1985)
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Testimony on the Appointment of Electors, Delivered to Special Committees of the House and Senate of the State of Florida, December 11, 2000

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D26 Hamdan Defense Supplement. 21 Oct 04.

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer: These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the specter of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Synopsis of Testimony
Professor Bruce Ackerman

Professor Ackerman is Sterling Professor of Law and Political Science. He is a member of the American Law Institute, and the recipient of the American Philosophical Society's Henry Phillips Prize for lifetime achievement in Jurisprudence.

This Award, which has been granted only twenty times in more than a century, singled out for special commendation Professor Ackerman's two volume work on the Constitution, *We the People*. Professor Ackerman proposes to bring this work, which analyzes the role of the separation of powers at times of crisis, to bear on his analysis of the constitutionality of President Bush's order on military commissions as applied to Mr. Hamdan. He will argue that precedents generated during the Civil War and Second War, are not properly interpreted as applicable to the distinctive problems arising in the present conflicts.

He also proposes to use his recent essay on "The Emergency Constitution," 113 *Yale Law Journal* 1029-1091 (2004), as a supplementary framework for analyzing the fundamental constitutional issues involved. This essay has already been recognized as a basic contribution to the field in a Symposium published in the June 2004 issue of the *Yale Law Journal*.

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Professor Ackerman has not yet published anything bringing these historical and constitutional analyses to bear on the current problem, and so his testimony on the separation of powers will provide the military commission with constitutional perspectives that cannot readily be obtained in standard legal publications. His testimony is directly relevant to this commission, in that it will explain why Mr. Hamdan is facing a military commission that is not justified in American history or its Constitution. Because the history spans over 200 years, oral testimony is particularly important so that Professor Ackerman can tailor his presentation to questions about time periods of specific interest to the Commission Members.

Professor Ackerman will also argue that the President's Order violates the equal protection clause in exempting citizens from the jurisdiction of the military commissions. Both citizens and non-citizens are equally capable of committing war crimes, and the decision to try these offenses under two entirely different procedures lacks the rational basis required by the Equal Protection Clause. The decision is particularly invidious, and requires more strict scrutiny, when it exempts citizens who might otherwise use the democratic process to insist on reform of the military commission's procedures. This argument builds on Professor Ackerman's scholarly work on the equal protection clause, most notably his essay, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985). A Lexis search reveals that this essay has been a reference point in the scholarly literature, with 288 citations to its credit. Once again, there is no scholarly essay applying Professor Ackerman's doctrinal arguments to the case at hand. His testimony will provide the commission with a unique opportunity to consider the charges against Mr. Hamdan and their standing under the Constitution.

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Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Defense asserts that Professor Ackerman is available to testify live at Guantanamo Bay, Cuba on 10 November 2004. While we do not know the travel availability of Professor Ackerman, we do note that there is a normal three day turnaround for ingress and egress from Guantanamo.

6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).

7. Response to paragraph 8. The Defense states that no other witness can be called because Professor Ackerman is the "leading" scholar in these fields. Suffice it to say that even if Professor Ackerman is the "leading" expert in his field, he is not the only expert.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness. Furthermore, failure to contemplate all the questions that the Commission may ask (the Defense assertion as to why he must testify in person), does not logically make sense in relation to why he could not testify over the phone or by video teleconferencing. In relation to this reason there does not appear to be any difference based simply on the mode used to provide the testimony.

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9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live "law expert" witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.


Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because her views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain her view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Dean's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Dean Slaughter is in no way cumulative with that of any other witness. Dean Slaughter is the foremost expert on the meaning and reach of the Geneva Conventions. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether she is the only possible expert. The defense notes that the Dean is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks

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the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Dean Slaughter's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Dean Slaughter when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

5. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

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We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

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D26 Hamdan - Decision

From: Hodges, Keith H. CIV (L)

Sent: Friday, October 29, 2004 3:02 PM

To: Hodges, Keith H. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katya'

CC:

[REDACTED]
[REDACTED] Hodges, Keith
[REDACTED]
OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)
Subject: US v. Hamdan, Decision of the Presiding Officer, D26

United States v. Hamdan
Decision of the Presiding Officer, D26

The Presiding Officer has denied the request for production of Bruce Ackerman as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

Keith Hodges
[REDACTED]

UNITED STATES OF AMERICA

v.

HAMDAN

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**DEFENSE MOTION -
THE ENTIRE COMMISSION
TO GRANT PRODUCTION OF
WITNESS DENIED IN D 27**

GEORGE FLETCHER

October 29, 2004

The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert happens to be the foremost expert in America on criminal law, and, in particular, the doctrine of conspiracy. Hamdan is charged with a sole count of conspiracy; Fletcher is Cardozo Professor of Law, Columbia University Law School. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

- a. Motion by the defense for the production of the above witness.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to this motion.
- d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By:

Neal Katyal
Civilian Defense Counsel

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D27 MOTION (DENIED BY PD)

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004.

UNITED STATES	)	DEFENSE REQUEST FOR
	)	WITNESS IN MOTION HEARING ON
	)	SUBJECT-MATTER JURISDICTION:
v.	)	GEORGE FLETCHER
)	
SALIM AHMED HAMDAN	)	18 October 2004
)	

1. Witness Request – George Fletcher – U.S. v. Hamdan.
2. George Fletcher is Cardozo Professor, Columbia University Law School. His address is 435 West 116th Street, NYC 10027. 212-854-1366. fletcher@law.columbia.edu. He speaks English.
3. George Fletcher is the leading scholar of criminal law in America today. He has published widely on notions of group criminal liability, as well as on military commissions. He has studied Military Commission Instruction No. 2 in detail, and will explain why the charge against Mr. Hamdan is not properly cognizable in a military commission. He will outline the treatment of conspiracy throughout history and is not only an expert on the law, but also on the history of conspiracy prosecutions.
4. Civilian defense counsel has spoken with Professor Fletcher and has read his publications.
5. The testimony of Professor Fletcher is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction (D17). He may also be referenced in the Separation of Powers motion (D20).
6. Civilian defense counsel had e-mail communication with Professor Fletcher on 8 October 2004, and Professor Fletcher indicated that he would be available to testify at Guantanamo during the scheduled time for Mr. Hamdan's motions.
7. Civilian defense counsel believes that the commission would greatly benefit from the live testimony of Professor Fletcher, as the leading expert in criminal law. In particular, Professor Fletcher could provide the commission with his reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this military commission. The Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of American conspiracy law and subject-matter jurisdiction. Professor Fletcher is the leading expert on American criminal law.
9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that

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NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004.

individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Witness – George Fletcher – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

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UNITED STATES

v.

SALIM AHMED HAMDAN

) **IST**
) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING ON
) SUBJECT-MATTER JURISDICTION:
) GEORGE FLETCHER
)
) 11 October 2004
)

1. Witness Request – GEORGE FLETCHER – U.S. v. Hamdan.
2. GEORGE FLETCHER is a professor at Columbia University Law School. His contact information is set forth on his curriculum vitae, which is attached.
3. George Fletcher is the leading scholar of criminal law in America today. He has published widely on notions of group criminal liability, as well as on military commissions. He has studied Military Commission Instruction No. 2 in detail, and will explain why the charge against Mr. Hamdan is not properly cognizable in a military commission. He will outline the treatment of conspiracy throughout history and is not only an expert on the law, but also on the history of conspiracy prosecutions.
4. Civilian defense counsel has spoken with Professor Fletcher and has read his publications.
5. The testimony of Professor Fletcher is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction. He may also be referenced in the Separation of Powers motion.
6. Civilian defense counsel had e-mail communication with Professor Fletcher on 8 October 2004, and Professor Fletcher indicated that he would be available to testify at Guantanamo during the scheduled time for Mr. Hamdan's motions.
7. Civilian defense counsel believes that the commission would greatly benefit from the live testimony of Professor Fletcher, as the leading expert in criminal law. In particular, Professor Fletcher could provide the commission with his reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this military commission. The Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of American conspiracy law and subject-matter jurisdiction. Professor Fletcher is the leading expert on American criminal law.
9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that

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individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

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2

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

Keith Hodges
Assistant to the Presiding Officer.

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D27 - Hamdan Defense Supplement - Fletcher. 21 Oct 04

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Proposition of George Fletcher:

I will testify to the following overall proposition: Background providers, who know of the illegal purposes of a conspiracy to which they provide routine fungible services, are not held liable for having joined the conspiracy. This means that the charge against Mr. Hamdan must be dismissed.

A long line of case going back to Learned Hand's opinion in *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), aff'd 311 U.S. 215 (1940), holds that background providers do not join the conspiracies to which they knowingly provide goods and services. This is most clearly the case in the cases in which the suspect sells goods that the buyers in the conspiracy could easily obtain on the open market. It would make no difference if instead of selling goods, the suspect provides fungible service easily available on the market. The cleaner that cleans and presses the suits belonging to a mafia don does the join the conspiracy merely because he knows of the don's illegal activities. The maid who cleans his house is no closer to having joined – regardless of her knowledge. An illustrative case is *People v. Lauria*, *People v. Lauria*, 251 Ca.App.2d 471, 59 Ca.Rptr.628 (1967), which reverses the prostitution conviction of a telephone answering service that provided services to a call girl ring with full knowledge of the call girls' prostitution. That the owner of the answering service knew of the illegal purpose did not make him part of the conspiracy.

A more difficult line of cases are those of suspect who lease premises to conspirators with full knowledge of their criminal purpose. The most recent precedent in this field is *United States v. Blakenship*, 970 F.2d 283 (7th Cir. 1992), in which Judge Easterbrook, writing for the Seventh Circuit, reversed the conviction of a defendant Lawrence who leased a trailer to a drug ring with full knowledge that the lessee intended to manufacture methamphetamine in the trailer. As Judge Easterbrook writes, "Lawrence knew what Zahm [representing the drug ring] wanted to do in the trailer, but there is a gulf between knowledge and conspiracy." The Court stresses that the "war on drugs" provides no excuse for interpreting and applying the law loosely in order to sweep up as many knowing background players as possible. He criticized the trial judge for mentioning the "war on drugs" as though the broader "war" were relevant to the guilt or innocence of a specific suspect. This admonition is worth repeating with regarding to efforts to persuade

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the court with grim tales about 9/11 and appeals to the "war on terror."

Judge Easterbrook concedes that a lessor might be liable for joining a tightly drawn conspiracy specifically related to the purpose of the lease. For example, in one case, *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990), a lessor was held liable as an accessory to an illegal gambling operation because the success of the determination determined whether he would receive his periodic payments.

Lessors of property with knowledge of intended illegal use come close to the line of liability. But chauffeurs and drivers do not. The driver is in the category of the maid or the answering services who provide fungible, easily replaced services. Of course, there are many cases of drivers held liable as accessories where they drive robbers or hit men to the scene of the crime. They are associates in the criminal plan -- not chauffeurs-for-all-purposes as Hamdan was. Hamdan drove for a thousand different tasks. Even if, as the government alleges, some of these trips end up delivering materials that the terrorists wanted to transfer from one place to another, these were not the run of the mill duties of Hamdan as chauffeur. He drove as a background service, not as a dedicated contribution to a criminal plot in the course of execution.

To hold Hamdan liable as the chauffeur would be like holding a chambermaid liable for homicide because she ironed the shirt that she knew a hit man would wear in engaging in murder for hire. Neither providing a service nor knowledge is sufficient. The critical question is whether the service promotes a specific criminal project. Background services do not promote anything. All criminal enjoyed a hundred different background services -- from buying food to getting the mail. None of these services promote their criminal projects.

The important point to be learned from the cases from *Falcone* to *Blakenship* is that knowledge per se is never enough for a background provider to become a member of a conspiracy. The focus has to be on the action and the degree of contribution and facilitation. That is the only way to probe whether the provider of services associates himself or joins the conspiracy.

My testimony will therefore explain why the charge **MUST** be dismissed, because it does not state a violation of the laws of conspiracy, contrary to the Prosecutor's claims.

Finally, I believe that my live testimony is important. The issues in the case arise as the intersection of criminal and international law. It is hard to find books and major studies in this new field. I am writing a lengthy manuscript on these issues, to be published later with Oxford University Press. The text is an application of the theories of my book *Rethinking Criminal Law* to the field of international criminal law. Therefore there are many things I could say in testimony that are not yet available in print. Finally, I know the MCI2 inside and out and have good things to say about it, in comparison with the Rome Statute. I see the advantages in the approach taken by DOD. I am not biased toward the defense.

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D 27 Response

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: GEORGE FLETCHER

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.

2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Fletcher stated his views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

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Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

Particularly, the area of expertise of this proposed witness falls squarely within the core competency areas of the counsel assigned to this case. In the witness summary, Professor Fletcher intends to tell the court his interpretation of United States conspiracy law. The practitioners assigned to this case deal with this subject routinely in their military practice and should be given the opportunity to present their positions on the matter before resorting to a battle of the experts. Despite the Defense assertion that this expert opinion will not be based on the particular facts at issue in this case or that this expert will not apply the law to Mr. Hamdan's facts, this is exactly what is being done in the proffer for Professor Fletcher.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.
5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.
6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).
7. Response to paragraph 8. The Defense states that "no other witness can be called to attest to notions of American conspiracy law and subject matter jurisdiction." This would seem inconsistent with their request for Professor Danner who is an expert on "laws-of-war conspiracy doctrine." It goes without saying that one who is an expert on "laws of war conspiracy doctrine" would also have to have some expertise in American conspiracy

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law. In fact, Professor Danner has opined that “principles derived from domestic criminal law have played an important role in the development of international criminal law.” Allison Marston Danner and Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, Public Law and Legal Theory Working Paper No. 04-09 available at <http://ssrn.com/abstract=526202>.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.

9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live “law expert” witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.


Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because his views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain his view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Professor Fletcher, as the leading expert on the American criminal law and doctrines of conspiracy, is in no way cumulative with any other witness. Professor Danner's expertise, as explained in the opening brief as well as our Reply to that witness request motion, lies in *international* law, despite the Prosecution's attempt to pretend otherwise by lifting a sentence from a draft co-authored Article of hers that says nothing to the contrary. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether he is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

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5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Fletcher's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Fletcher when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers with a more lenient evidentiary standard) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and

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fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

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D27 - DONIA BY PO

D27 Hamdan - Decision.txt

From: Hodges, Keith H. CIV (L)
Sent: Friday, October 29, 2004 3:04 PM
To: Hodges, Keith H. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal
Katyal'
CC: [REDACTED] CDR, DoD OGC'; [REDACTED]
[REDACTED] 'Hodges, Keith'; [REDACTED]
OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)
Subject: US v. Hamdan, Decision of the Presiding Officer, D27

United States v. Hamdan
Decision of the Presiding Officer, D27

The Presiding Officer has denied the request for production of George Fletcher as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

Keith Hodges
[REDACTED]

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Page 1

UNITED STATES OF AMERICA

v.

HAMDAN

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**DEFENSE MOTION -
THE ENTIRE COMMISSION
TO GRANT PRODUCTION OF
WITNESS DENIED IN D 28**

ALLISON DANNER

October 29, 2004

The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert is a leading scholar about international war crimes tribunals, and, in particular, the doctrine of conspiracy under the laws of war. Hamdan is charged with a sole count of conspiracy; Danner is Assistant Professor of Law, Vanderbilt University Law School. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

- a. Motion by the defense for the production of the above witness.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to this motion.
- d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By:

Neal Katyal
Civilian Defense Counsel

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D28 MOTION (DENIED BY 70)

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004.

UNITED STATES)	
)	
v.	)	DEFENSE REQUEST FOR
	)	WITNESS IN MOTION HEARING ON
	)	SUBJECT-MATTER JURISDICTION:
	)	ALLISON DANNER
SALIM AHMED HAMDAN)	
	)	18 October 2004

1. Witness Request – Allison Danner – U.S. v. Hamdan.
2. Allison Danner is a professor at Vanderbilt University Law School. Her address is Vanderbilt University Law School, Nashville, TN 37203-1181. Her telephone number is 615-322-6762. Her e-mail is allison.danner@law.vanderbilt.edu. She speaks English.
3. Allison Danner is a scholar whose work concentrates on conspiracy law as a violation of the laws of war. She has published extensively on these questions, and has tremendous expertise about group criminality as it concerns the International Trials for the Former Yugoslavia. She will explain why, under International Law and the laws of war, the charge against Mr. Hamdan is not properly cognizable in a military commission.
4. Civilian Defense Counsel has spoken with Professor Danner and has read her publications.
5. The testimony of Professor Danner is to be used for Mr. Hamdan’s motion regarding subject-matter jurisdiction (D17). It will also be referenced in the Lack of Legislative Authority (D20) motion.
6. Civilian Defense Counsel had e-mail communication with Professor Danner on 8 October 2004, and Professor Danner indicated that she would be available to testify at Guantanamo during 10 November 2004.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Danner. Professor Danner’s expertise in the laws of war, and the ways in which the trials for the Former Yugoslavia and Nuremburg have treated group criminality, will illuminate the Military Commission’s treatment of these issues tremendously. She will be in a position to provide her reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this Military Commission. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of international law, laws-of-war conspiracy doctrine and subject-matter jurisdiction.

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9. This is an expert witness request. Her views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the Commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full Commission with the information necessary to make an informed decision. In this respect, the Commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the Commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Allison Danner – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

UNITED STATES

v.

SALIM AHMED HAMDAN

) **IST**
) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING ON
) SUBJECT-MATTER JURISDICTION:
) ALLISON DANNER
)
) 11 October 2004
)

1. Witness Request – ALLISON DANNER – U.S. v. Hamdan.
2. Allison Danner is a professor at Vanderbilt University Law School. Her contact information is set forth on her curriculum vitae, which is attached.
3. Allison Danner is a scholar whose work concentrates on conspiracy law as a violation of the laws of war. She has published extensively on these questions, and has tremendous expertise about group criminality as it concerns the International Trials for the Former Yugoslavia. She will explain why, under International Law and the laws of war, the charge against Mr. Hamdan is not properly cognizable in a military commission. She will testify as to the use of military trials in recent history, with a particular emphasis on those in Yugoslavia and Nuremberg.
4. Civilian Defense Counsel has spoken with Professor Danner and has read her publications.
5. The testimony of Professor Danner is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction. It will also be referenced in the Separation of Powers motion.
6. Civilian Defense Counsel had e-mail communication with Professor Danner on 8 October 2004, and Professor Danner indicated that she would be available to testify at Guantanamo during 10 November 2004.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Danner. Professor Danner's expertise in the laws of war, and the ways in which the trials for the Former Yugoslavia and Nuremberg have treated group criminality, will illuminate the Military Commission's treatment of these issues tremendously. She will be in a position to provide her reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this Military Commission. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of international law, laws-of-war conspiracy doctrine and subject-matter jurisdiction and the recent international experience.

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9. This is an expert witness request. Her views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the Commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full Commission with the information necessary to make an informed decision. In this respect, the Commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the Commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

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The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

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Keith Hodges
Assistant to the Presiding Officer.

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D28 Hamdan - Defense Supplement to witness request - Danner. 21 Oct 04

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Testimony of Professor Allison Danner

Synopsis. I will argue that, to my knowledge, the nature and scope of the conspiracy charge alleged against Mr. Hamdan have no precedent in the statutes or jurisprudence of the International Military Tribunal at Nuremberg (IMT), the International Military Tribunal for the Far East (IMTFE), the related post-World War II national prosecutions, the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), or the International Criminal Court. I will describe the limited use of conspiracy at the IMT, IMTFE, other military prosecutions conducted after World War II, the ICTY, and the ICTR. I will explain that joint criminal enterprise, which has been used at the ICTY, is not the equivalent of conspiracy.

Personal Knowledge and Relevance. I have knowledge of these subjects through my academic writings and teachings, which focus on the history, development, and substance of international criminal law, including the laws of war. This testimony is relevant, because the sole offense alleged against Mr. Hamdan is that of conspiracy. Furthermore, the military commission instructions state that the offenses triable in the commissions both "derive from the law of armed conflict" and are "declarative of existing law." Military Commission Instruction No. 2 at 1-2 (Apr. 30, 2003). It is, therefore, relevant whether conspiracy, as it is alleged in the indictment against Mr. Hamdan, is declarative of existing law. Relevant precedents for this question include international military commissions, such as those held after World War II in Germany and Japan, as well as international criminal tribunals that apply the laws of war. These institutions will be the focus of my testimony. Furthermore, my testimony will respond to arguments recently offered by the United States in U.S. federal court that rely heavily on precedent from the IMT, ICTY, ICTR, and ICC in support of the conspiracy charge alleged against Mr. Hamdan.

Benefit of Testimony. My published writings, while pertaining to the substance of my testimony, do not directly address the question at issue before the Commission—namely whether precedent from international military and criminal tribunals applying the laws of war supports the conspiracy charge alleged in this case. My knowledge of the process

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and substantive decisions rendered at the IMT, IMTFE, ICTY, ICTR, and ICC reflects several years of research into these institutions, based on numerous sources, including judicial decisions, articles, books, and interviews. The historical analysis I will provide will assist the Commission in its job of finding what the law is, by providing information about what the law and practice in this area has been. The testimony I can provide to the Commission based on my expertise in this area will neither be easily available to the Commission nor is captured fully in my published writings.

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D28 Response

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: ALLISON DANNER

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Danner stated her views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

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Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Defense asserts that Professor Danner is available to testify on 10 November 2004. While we do not know the travel availability of Professor Danner, it should be noted that it is usually a several day turnaround in arriving and subsequently departing Guantanamo Bay. It will create difficulties if Professor Danner is solely available on 10 November.

6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).

7. Response to paragraph 8. The Defense states that "no other witness can be called to attest to notions of international law, laws of war conspiracy doctrine and subject matter jurisdiction" This appears internally inconsistent with the other "law" expert requests the Defense has submitted and would appear to be cumulative with the testimony of other proposed witnesses.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.

9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution

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requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live "law expert" witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.

[REDACTED]

Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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D28 Reply

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

DEFENSE REPLY TO
PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: ALLISON DANNER

28 October 2004

1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Danner, insofar as she is one of the foremost experts on the international laws of war, and, particularly the use of the conspiracy doctrine in past military tribunals. That is the sole charge facing Mr. Hamdan. Moreover, Professor Danner has studied in detail the development of the law in the International Tribunal for the Former Yugoslavia.

As the supplemental material makes clear, Professor Danner has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of her testimony, and for this reason, merely incorporating her past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Danner's work into a defense brief is inappropriate for a second reason, because she is not in any way a defense counsel. The whole function of experts about international law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts admit the testimony of professors of international law all the time. The prosecution cites

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irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart of the motions being decided by the commission. And because this commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because her views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain her view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Professor Danner is in no way cumulative with that of Professor Fletcher. Professor Danner is an expert in international law as it relates to conspiracy in war crimes trials; Professor Fletcher is an expert in the domestic law of conspiracy. The prosecution knows the difference, since it relies on, and distorts, both lines of cases.

Furthermore, the defense seeks to call the Professor as an expert in the field of international criminal law and has set out her qualifications. The appropriate test is

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whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether she is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Danner's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Danner when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the

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following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

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D28 Decision

D28 Hamdan - Decision.txt

From: Hodges, Keith H. CIV (L)
Sent: Friday, October 29, 2004 3:06 PM
To: Hodges, Keith H. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal
Katyal'

CC: [REDACTED]

OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)
Subject: US v. Hamdan, Decision of the Presiding Officer, D28

United States v. Hamdan
Decision of the Presiding Officer, D28

The Presiding Officer has denied the request for production of Allison Danner as a witness. The Presiding Officer did not find that she is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

Keith Hodges
[REDACTED]

D29 MOTION

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004

UNITED STATES)
)
	) DEFENSE REQUEST FOR
	) WITNESS IN MOTION HEARING
	) ON UCMJ/MILITARY LAW:
v.	) JORDAN PAUST
)
SALIM AHMED HAMDAN	) 18 October 2004
)

1. Witness Request – Jordan Paust – U.S. v. Hamdan.
2. Jordan Paust is a professor at University of Houston Law School. His address is 100 Law Center, Houston, TX 77204. His telephone number is (713) 743-2100. His e-mail is JPaust@Central.UH.edu. He speaks English.
3. Jordan Paust is the nation’s preeminent expert on American military law and its relationship to military commissions. He has published widely in the field. Professor Paust also examined the constitutionality and legality of military commissions on behalf of the American military when he served as a JAG officer. He will explain why the Military Commission in this case is not properly constituted and void.
4. Civilian Defense Counsel has spoken with Professor Paust and has read his publications and legal brief mentioned in paragraph 3.
5. The testimony of Professor Paust is to be used for Mr. Hamdan’s motion regarding Lack of Legislative Authority (D20) and Article 10 of the UCMJ (D21). It may also be referenced in the Defense Motion for Abatement (D16).
6. Civilian Defense Counsel had e-mail communication with Professor Paust on 8 October 2004, and Professor Paust indicated that he will be telephonically available only during the dates of Mr. Hamdan’s motions.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Paust, as the leading expert in American military law. However, due to Professor Paust’s inability to be present in person due to an already planned trip to Germany, we will accept his testimony telephonically, though we realize that it is an inferior substitute.
8. No other witness can be called to attest to the relationship between American military justice and military commissions. Professor Paust is the leading expert in the field.
9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the

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~~Page~~
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commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Jordan Paust – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

UNITED STATES

v.

SALIM AHMED HAMDAN

) **157**
)
) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING
) ON UCMJ/MILITARY LAW AND
) ABATEMENT:
) JORDAN PAUST
)
) 11 October 2004
)

1. Witness Request – Jordan Paust – U.S. v. Hamdan.
2. Jordan Paust is a professor at University of Houston Law School. His contact information is set forth on his curriculum vitae, which has already been provided to the commission.
3. Jordan Paust is the nation's preeminent expert on American military law and its relationship to military commissions. He has published widely in the field. Professor Paust also examined the constitutionality and legality of military commissions on behalf of the American military when he served as a JAG officer. He will explain why the Military Commission in this case is not properly constituted and void.
4. Civilian Defense Counsel has spoken with Professor Paust and has read his publications.
5. The testimony of Professor Paust is to be used for Mr. Hamdan's motion regarding Separation of Powers and Article 10 of the UCMJ and Abatement.
6. Civilian Defense Counsel had e-mail communication with Professor Paust on 8 October 2004, and Professor Paust indicated that he will be telephonically available only during the dates of Mr. Hamdan's motions.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Paust, as the leading expert in American military law. However, due to Professor Paust's inability to be present in person due to an already planned trip to Germany, we will accept his testimony telephonically, though we realize that it is an inferior substitute.
8. No other witness can be called to attest to the relationship between American military justice and military commissions. Professor Paust is the leading expert in the field.
9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full

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commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

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Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

Keith Hodges
Assistant to the Presiding Officer.

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D29 Hamdan Defense Supplement to synopsis - Paust. 22 Oct 04

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

We note that the Prosecution, here and elsewhere, has cited literally no authority to bar the testimony of experts who inform about the law (let alone the history behind the law) when the body deciding the matter are not all judges trained in the law and selected as such. The International Tribunals for Yugoslavia and Rwanda are staffed by expert judges, with rules set up by the international community in advance. In this respect, the military commission has virtually nothing in common with them, or with the domestic court system. Those other tribunals had the advantage of experts in the drafting of the offenses and procedures for trial and a far more transparent system. And because they have judges trained in the law, there is not nearly the same need to educate them about what the law is. None of that is true here. For that reason, expert witnesses are not only important, but essential. To exclude the leading figures in the nation on these questions will eviscerate the credibility of the commissions.

Synopsis of Testimony by Professor Jordan J. Paust

First, by way of introduction, I will address the nature of the war in Afghanistan after October 7, 2001 for the purpose of demonstrating why it is an international armed conflict between the United States and the members of the armed forces of the Taliban and why, therefore, all of the customary laws of war and the Geneva Conventions are applicable.

Second, I will address why the military commissions at Guantanamo do not have jurisdiction (1) since they are not located within a theater of war or within a war-related occupied territory, and (2) since they are created with an inherent violation of the separation of powers in that they do not comply with the mandate in Article I, Section 8, clause 9 of the United States Constitution. This, in conjunction with the first point, means that the commission must be dismissed because it is improperly constituted and therefore void. That is what I expect to spend the bulk of my testimony discussing. My testimony is relevant because I believe that the commission against Mr. Hamdan must be dismissed.

Some of this is addressed in various law review publications, but none with all of the needed detail and with explanations why some of the now-disclosed previously secret

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DOJ and White House memos to the contrary are incorrect. This is why I need to testify, because I have not published all of this.

As a former CPT, JAG and member of the faculty of TJAG School (1969-1973, and Mobilization Designee at TJAG School 1973-1975), I will add insight into the efforts to draft a military commission during that time period with many needed due process guarantees for prosecution of war crimes, and the applicability of the UCMJ. My view is that the constitutional and military law questions in the Hamdan case are integrally linked together. Both the Constitution and the UCMJ explain why the commission is improperly constituted and void.

I will also be able to address some of the applicable customary laws of war; why common Article 3 of the Geneva Conventions is among the customary laws of war applicable during an international armed conflict; why common Article 1 of the Geneva Conventions precludes claims to deny protections, including due process guarantees, on the basis of alleged necessity, reciprocity, reprisals, or the alleged status of persons detained; why members of the armed forces of the Taliban are prisoners of war under GPW Article 4(A)(1) and (3); why persons detained during the war in Afghanistan (or Iraq) who are not prisoners of war are nonetheless entitled to protections under common Article 3 of the Geneva Conventions, applicable provisions of the Geneva Civilian Convention, and the customary law of war mirrored in Article 75 of Protocol I to the Geneva Conventions.

I will also address why the President's Military Order of November 13, 2001 does not comply and why the present DOD Rules of Procedure set forth in Military Commission Order No. 1 do not comply and why certain rules violate the law.

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CURRICULUM VITAE

JORDAN J. PAUST Phone: (713) 743-2177
Fax: (713) 743-2238
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Education

University of California at Los Angeles
A.B. (1965) (History, Honors)
U.C.L.A. Debate Team

University of California at Los Angeles
J.D. (1968)
#1 Torts
#1 Labor Collective Agreements

University of Virginia
LL.M. (1972)

Yale University
J.S.D. Candidate
--Ford Foundation Fellowship, in residence 1973-1975
BArticles Editor, 3 *Yale Studies in World Public Order* (1976-1977),
now *Yale Journal of International Law*

Teaching Positions

Law Foundation Professor, University of Houston Law Center (1996-)
Co-Director, International Law Institute (1997-)
Professor of Law (1979-1996)
Associate Professor of Law (1975-1978)
(teaching: International Law; International Criminal Law; Seminar: Foreign
Affairs and the Constitution; Seminar: Human Rights; Seminar: Use of Force,
Terrorism, Laws of War). UH Law Alumni Association Faculty Distinction
Award (2003)

Edward Ball Eminent Scholar University Chair in International Law, Florida State
University College of Law (spring 1997)
(taught: International Law, Human Rights)

Fulbright Professor, University of Salzburg (Austria)
Institut für Völkerrecht und Ausländisches Öffentliches Recht (1978-1979)
(taught: faculty seminar in American Jurisprudence and International Law,

CV of Jordan Paust, attachment to D24 (US v. Hicks), Page 1 of 26

attended by international law and philosophy faculty from the Universities of Salzburg and Graz)

Visiting Associate Professor, Indiana University School of Law (Bloomington)
(1976-1977) (taught: Human Rights, Jurisprudence, Property)

Faculty, International & Comparative Law, United States Dep't of Army JAG
School (Jan. 1969-Jan. 1973) (CPT, U.S. Army)
50th Basic Class (1969)
#1 International & Comparative Law; Commandant=s List
Outstanding Educator of America Award (1972)
technical adviser on Dep=t of Army films and materials upgrading law of war
training
Mobilization Designee (1973-1975)

Publications

Books

1. J. Paust & A. Blaustein, *War Crimes Jurisdiction and Due Process: A Case Study of Bangladesh* (1974); extracts reprinted at *The Military in American Society--Cases and Materials* 6-17 to 6-21, 6-46 (D. Zillman, A. Blaustein, E. Sherman, et al., eds., Matthew Bender 1978), and 11 *Vanderbilt Journal of Transnational Law* 1-38 (1978), cited in *The Prosecutor v. Dusko Tadic*, No. IT-94-1-T, International Tribunal for the Former Yugoslavia (1995)
2. J. Paust & A. Blaustein, *The Arab Oil Weapon* (Oceana/Sijthoff 1977)
3. editor, Chapter 6, The Law of Armed Conflict, in *The Military in American Society--Cases and Materials* 6-1 to 6-100 (Matthew Bender 1978)
4. class materials for Constitutional Jurisprudence (photo-offset)
5. J. Paust, *International Law as Law of the United States* (Carolina Academic Press, 2 ed. 2003) (1 ed. 1996)
6. J. Paust, M.C. Bassiouni, et al., *International Criminal Law--Cases and Materials* (Carolina Academic Press 1996); *Teachers= Manual* (1997); *International Criminal LawBCases and Materials* (2 ed. 2000); *Documents Supplement* (2000); *Teachers= Manual* (2001)
7. J. Paust, J. Fitzpatrick, J. Van Dyke, *International Law and Litigation in the U.S.* (West Group, American Casebook Series 2000); *Documents Supplement* (West Group 2000); *Teacher=s Manual* (West Group 2000); Updates on Westlaw, TWEN
8. J Paust, M.C. Bassiouni, et al., *Human Rights Module: Crimes Against Humanity, Genocide, Other Crimes Against Human Rights, and War Crimes* (Carolina Academic Press 2001) (with Documents Section)

Articles, Book Chapters, and Essays

1. Legal Aspects of the My Lai Incident: A Response to Professor Rubin, 50 *Oregon Law Review* 138-152 (1971), reprinted at III *The Vietnam War and International Law* 359-378 (ASIL 1972)
2. After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts, 50 *Texas Law Review* 6-34 (1971), reprinted at IV *The Vietnam War and International Law* 447-475 (ASIL 1976), cited in *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995)
3. My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 *Military Law Review* 99-187 (1972), cited in *United States v. Calley*, 46 CMR 1131, 1183 (1973); extract reprinted at *The Military in American Society--Cases and Materials* 6-42 to 6-44, 6-70 to 6-73 (Matthew Bender 1978), and Superior Orders and Command Responsibility, in III *International Criminal Law: Enforcement* 73-88 (M.C. Bassiouni ed. 1987), and I *International Criminal Law: Crimes* 223-237 (M.C. Bassiouni ed., 2 ed. 1999)
4. Law in a Guerrilla Conflict: Myths, Norms and Human Rights, 3 *Israel Yearbook on Human Rights* 39-77 (1973)
5. Human Rights, Human Relations and Overseas Command, 3 *Army Lawyer* 1-5 (Jan. 1973)
6. letter, command responsibility, 26 *Naval War College Review* 103-107 (Feb. 1973)
7. The Nuclear Decision in World War II -- Truman's Ending and Avoidance of War, 8 *International Lawyer* 160-190 (1974)
8. An Approach to Decision with Regard to Terrorism; and Selected Terroristic Claims Arising from the Arab-Israeli Context, symposium, 7 *Akron Law Review* 397-421 (1974)
9. Terrorism and the International Law of War, 64 *Military Law Review* 1-36 (1974), reprinted at 14 *Revue de Droit Penal Militaire et de Droit de la Guerre* 13-49 (Brussels 1975)
10. The Arab Oil Weapon: A Threat to International Peace, 68 *American Journal of International Law* 410-439 (1974) (with A. Blaustein), reprinted at *Economic Coercion and the New International Economic Order* 123-152 (R. Lillich ed. 1976), *The Arab-Israeli Conflict* 391-420 (J. Moore ed. 1977), and *The Arab Oil Weapon* 67-96 (1977); extracts reprinted at 120 *Congressional Record*, no. 10, at E392-E394 (Feb. 4, 1974), and 26/27 *Middle East Information Series* 83-89 (spring/summer 1974)
11. letter, Some Thoughts on APreliminary Thoughts@ on Terrorism, 68 *American Journal of International Law* 502-503 (1974)
12. An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis, 1 *Yale Studies in World Public Order* 148-218 (1974)
13. comment, Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense APractices@ Inconsistent with Legal Norms?, 4 *Denver Journal of International Law and Policy* 229-235 (1974)
14. paper and remarks, symposium, *International Terrorism* 53-62, 137-138, 142 (Canadian Council of International Law, Ottawa 1974)
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 53. participant, International Legal Conference on Anti-Semitism, Anti-Zionism and the United Nations, New York University School of Law, April 13-15, 1986
 54. panel member, paper, Responding Lawfully to International Terrorism: The Use of Force Abroad, regional meeting of the American Society of International Law, Whittier College of Law, April 18, 1986, printed at 8 *Whittier Law Review* 711-733 (1986)
 55. dinner speech, The Link Between Human Rights and Terrorism and Its Implications Concerning the Law of State Responsibility, Conference on Human Rights and Terrorism, regional meeting of the American Society of International Law, University of Southern California Law Center, March 20, 1987, printed at 11 *Hastings International and Comparative Law Review* 41-54 (1987)
 56. paper, Extradition and United States Prosecution of the *Achille Lauro* Hostage-Takers: Navigating the Hazards, Conference on State-Sponsored International Terrorism, regional meeting of the American Society of International Law, Vanderbilt University School of Law, March 27, 1987, printed at 20 *Vanderbilt Journal of Transnational Law* 235-257 (1987); remarks, *id.* at 346-48, 354, 357-60, 362-63
 57. chair and paper, Conference on Terrorism and the Law: Protecting Americans Abroad, University of Connecticut School of Law, April 8, 1987, An Introduction to and Commentary on Terrorism and the Law, printed at 19 *Connecticut Law Review* 697-749 (1987), extract reprinted at *International Law Anthology* 243 (A. D'Amato ed. 1994)
 58. panel member, International Human Rights and U.S. Courts: Might Congress and Other Legislatures Nurture Needed Progress?, 81 *Proceedings, American Society of International Law* 456-59, 465 (1987); remarks, *id.* at 39-40, 404
 59. foreword, in *Research Methods of International Custom in States' Practice* (D. Wade ed. 1987)
 60. human rights classes for Central American refugees at CARECEN, Houston, Texas, June 16 & 23, 1987
 61. help to plaintiffs in *DeNegri v. Republic of Chile*, Civ. No. 86-3085 (D.D.C.)

- 1987)
62. affidavit filed in *Aidi v. Yaron*, 672 F. Supp. 516 (D.D.C. 1987), addressed *id.* at 519 n.4, reprinted at 5 *The Palestine Yearbook of International Law* 277-286 (1989)
 63. help to plaintiffs in *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)
 64. national report, *Incorporating Human Rights Into Domestic Constitutional Law*, presented at Second World Congress, International Association of Constitutional Law, Paris & Aix-en-Provence, France, Aug. 31 - Sept. 5, 1987
 65. class on nature and sources of international law at University of St. Thomas, Houston, Texas, Sept. 17, 1987
 66. panel member, The U.S. Constitution and Human Rights, Amnesty International-University of Houston Human Rights Week, University of Houston, Sept. 30, 1987
 67. chair, panel on the Bork nomination, University of Houston Law Center, October 6, 1987
 68. prepared draft petition for World Habeas Corpus to the U.N. Commission on Human Rights with respect to political prisoners in South Africa
 69. panel member, Extraterritorial Jurisdiction Over Persecutors, Third Annual International Conference on Holocaust and Human Rights Law, Boston College Law School, April 11, 1988, printed at *A Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 *Houston Journal of International Law* 337-344 (1989)
 70. panel member, History of International Law, 82 *Proceedings, American Society of International Law* 26-30, 39-40 (1988); remarks, *id.* at 394, 475-476
 71. advice and commentary on portions of the Draft Convention on the Rights of the Child, *A Human Dignity, Remedies, and Limitations in the Convention*, in *Independent Commentary: United Nations Convention on the Rights of the Child* 54-56 (C. Cohen ed. 1988), reprinted at 7 *New York Law School Journal of Human Rights* 116-122 (1989)
 72. affidavit filed in 1988 in *Linder, et al. v. Calero Portocarrero, et al.*, 747 F. Supp. 1452 (S.D. Fla. 1990)
 73. panel member, International Law Section, panel on Human Rights and U.S. Foreign Policy, at A.A.L.S. Annual Meeting (1989), printed at *In the Name of Foreign Affairs*, I.L.A. International Practitioner's Notebook 13-16 (April 1989)
 74. panel member, Genocide: The Convention, Domestic Laws and State Responsibility, 83 *Proceedings, American Society of International Law* 316-320, 329-332 (1989)
 75. member, Mission of the International Commission of Jurists (Geneva) to Study the Military Justice System in the West Bank and Gaza (June 25-July 9, 1989), Report printed by the I.C.J. (Geneva 1989), reprinted at 14 *Hastings International and Comparative Law Review* 1-66 (1990)

76. panel member, *The Role of International Law and Supervision in Strengthening Democratic Transitions*, regional meeting of the American Society of International Law, Washington College of Law, American University, March 9, 1990, printed at *International Legal Standards Concerning the Legitimacy of Governmental Power*, @ 5 *The American University Journal of International Law and Policy* 1063-1068 (1990)
77. chair, panel, *Self-Determination and Intervention in Panama*; chair, panel, *Extraterritorial Law Enforcement and the ARceipt@ and Trial of Noriega: Toscanino and Beyond*, 84 *Proceedings, American Society of International Law* 182, 236 (1990) (on CSPAN)
78. comment, *Food As A Weapon*, I.L.A. International Practitioner's Notebook 22 (Feb. 1991)
79. panel member, Special Capitol Hill Session on *AThe Gulf War: Collective Security, War Powers and Laws of War@*; panel member, *ARights of Self-Determination of Peoples in Established States: Southern Africa and the Middle East,@* 85 *Proceedings, American Society of International Law* 13-16, 19-23, 25-26, 28-29, 551-553, 555-556, 560 (1991); remarks, *id.* at 100-101, 208-209
80. concurring and dissenting paper on the Universal Declaration of Human Rights, Human Rights Committee, in *Proceedings and Committee Reports of the American Branch of the I.L.A.* 92-95 (1991-1992)
81. panel member, *ADemocracy and Legitimacy: Is There an Emerging Duty to Ensure a Democratic Government in General or Customary International Law?,@* Joint Conference of the American Society of International Law/Nederlandse Vereniging voor International Recht (July 4-6, 1991, The Hague), printed at *Contemporary International Law Issues: Sharing Pan-European and American Perspectives* 126-130, 139, 140, 178-179 (Holland 1991)
82. paper, *AInterpreting Our Constitution,@* annual meeting of the Policy Sciences Center at Yale Law School (Oct. 18-20, 1991)
83. chair, panel, *After the Gulf War: Critical Issues Regarding International Criminal Law, Human Rights and Peace*, at A.A.L.S. Annual Meeting (1992)
84. panel member, *AInternational War Crimes & the Gulf War@*; panel member, *AShould/Can the U.S. Prosecute Nazi and Future War Criminals?@*; panel member, *ACan the United States Assert Extraterritorial Jurisdiction Over Terrorists and Drug Traffickers?,@* ILSA Regional Meeting, Albany Law School, February 27-28, 1992 (on CSPAN)
85. participant (with prepared commentary) in the working group, International Association of Penal Law & International Scientific and Professional Advisory Council of the Crime Prevention and Criminal Justice Branch of the United Nations meeting with certain members of the U.N. International Law Commission on the I.L.C.'s Draft Code of Crimes Against the Peace and Security of Mankind and an International Criminal Court, Courmayeur, Italy,

March 25-28, 1992

86. panel member, International Human Rights in American Courts, 86 *Proceedings, American Society of International Law* 325-28, 347, 348 (1992); remarks, *id.* at 131-32, 602
87. participant in human rights class for lawyers and paralegals at CARECEN, Houston, in connection with their investigative mission to El Salvador in May, 1992, as part of a U.N. inquiry into human rights violations
88. lecture on human rights and U.S. law to U.S. Dep't of Justice I.N.S. class for Asylum Trainees, Dallas, Texas, May 5, 1992
89. participant and Rapporteur for the Session on the Legal Dimension, World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights, Siracusa, Italy (Dec. 2-5, 1992), a Satellite Conference to the 1993 U.N. World Human Rights Conference
90. entry on AMayaguez: Capture,@ in *Encyclopedia of the American Presidency* (L. Levy & L. Fisher eds., Simon & Schuster 1993)
91. chair, panel, Litigating and Judging International Law Claims in the 1990s, at A.A.L.S. Annual Meeting (1993)
92. panel member, DePaul College of Law, February 25, 1993, printed at AAvoiding 'Fraudulent' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights,@ 42 *DePaul Law Review* 1257-1285 (1993)
93. Reporter, The U.S. Constitution and Judicial Competence to Incorporate International Law, in American Branch of the I.L.A. Report of the Committee on International Law in Domestic Courts (1993)
94. panel member, UHLC Federalist Society panel on the Convention on the Elimination of All Forms of Discrimination Against Women, University of Houston, March 10, 1993
95. panel member, St. John's School of Law, March 12, 1993, printed at AAfter Alvarez-Machain: Abductions, Standing, Denials of Justice, and Unaddressed Human Rights Claims,@ 67 *St. John's Law Review* 551-580 (1993)
96. panel member, Perspectives on War Crimes in Yugoslavia, Marshall-Wythe School of Law, William and Mary, March 30, 1993
97. panel member, An Overview of Applicable Legal Systems: International Criminal Law, Humanitarian Law and Human Rights Law, The Eleanor Roosevelt Institute for Justice and Peace Workshop on Yugoslavia and Beyond, April 3, 1993, regional meeting of the American Society of International Law in Washington, D.C., printed at AApplicability of International Criminal Laws to Events in the Former Yugoslavia,@ 9 *The American University Journal of International Law and Policy* 499-523 (1994)
98. remarks, 87 *Proceedings, American Society of International Law* 222, 243-44 (1993)
99. Reporter, Resolution on Congressional Legislation Concerning Transnational

- Abductions, American Branch of the I.L.A., Human Rights Committee, June 8, 1993, printed at *Proceedings, American Branch of the I.L.A.* 65-66 (1993-1994)
100. speech on Sovereign Immunity at I.C.A. Certification Course for International Arbitrators, Houston, June 12, 1993
 101. speech on State Sponsored Abductions for Trial, during a conference at the Permanent Mission of Mexico to the United Nations, June 24, 1993, cosponsored by the New York Regional Committee of the ASIL, with a draft Declaration on Principles of International Law Concerning State Sponsored Abductions (draft printed at 67 *St. John's Law Review* 579-580 (1993))
 102. affidavit filed in *Jane Doe I & Jane Doe II v. Radovan Karadzic*, (S.D.N.Y. 1993)
 103. AResponse to President's Notes on Missile Attack on Baghdad,@ ASIL Newsletter, Sept. - Oct. 1993, at 4
 104. an Advocate and Counsel for Applicant in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), International Court of Justice (1993-1994)
 105. commentary prepared for Senator Christopher Dodd on the U.N. Draft Statute for an International Criminal Tribunal (Nov. 1993), printed at 140 *Congressional Record* No. 2, at S107-S109 (Jan. 26, 1994)
 106. panel member, The Significance and Determination of Customary International Human Rights Law, University of Georgia School of Law, March 4, 1994, printed at AThe Complex Nature, Sources and Evidences of Customary Human Rights,@ 25 *Georgia Journal of International and Comparative Law* 147-164 (1995/96)
 107. paper, APeace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions,@ presented at Conference on the U.S. Role in U.N. Peacekeeping Missions, Southern Illinois University School of Law, March 25, 1994, printed at 19 *Southern Illinois University Law Journal* 131-151 (1994)
 108. panel member, Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia, 88 *Proceedings, American Society of International Law* 241-243, 254-255, 257 (1994); remarks, *id.* at 172, 347, 437, 481
 109. participant on InterAmicus brief before the Supreme Court of Canada on a rehearing of *Her Majesty the Queen v. Imre Finta* (1994)
 110. expert testimony before Canadian Immigration and Refugee Board re: *In re Mahmoud M. Isa Mohammed*, June 30, 1994, Toronto
 111. help to plaintiffs in *Smith v. The Socialist People's Libyan Arab Jamahiriya, et al.*, C.A. No. 93-2568 (D.D.C.)
 112. prepared Law Professors' Amici Brief in *Kadic, et al. v. Karadzic*, No. 94-9069 (2d Cir. 1994) (70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996))

113. participated in Law Professors' Amici Brief on petition for a Writ of Certiorari in *Princz v. Federal Republic of Germany*, No. 94-909 (1994)
114. panel member, *The Role of the United Nations in the Maintenance of Peace*, University of Georgia School of Law, March 3, 1995, printed at *AU.N. Peace and Security Powers and Related Presidential Powers*, @ 26 *Georgia Journal of International and Comparative Law* 15-28 (1996)
115. panel member, 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability, New York Law School, April 4, 1995, printed at *A Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, @ 12 *New York Law School Journal of Human Rights* 547-569 (1995), cited in *The Prosecutor v. Akayesu*, ICTR-96-4-T (2 Sept. 1998), at para. 566
116. remarks, 89 *Proceedings, American Society of International Law* 289, 310-311, 360 (1995)
117. essay, *Global Treaties Demand War Criminals= Arrest*, *The National Law Journal*, March 11, 1996, at A18, col. 3, reprinted in expanded version in *ASIL International Criminal Law Interest Group Newsletter no.1*, at 6-7 (1996)
118. expert testimony in the Federal Court of Canada, *In the Matter of M. Suresh*, DES-3-95, March 19, 1996, Toronto
119. remarks, 90 *Proceedings, American Society of International Law* 273, 544, 611 (1996)
120. visiting lectures on international law and the domestic legal process at the Mexican Ministry of Foreign Relations (Polanco and Tlatelolco), the Instituto Matias Romero de Estudios Diplomaticos, and the Universidad Nacional Autonoma de Mexico, Mexico City, May 20-21, 1996
121. presentations on international criminal law, Institute of the American Association of Law Libraries, *Contemporary Practice of Public International Law*, Indiana University, Bloomington, July 18, 1996, paper, *International Criminal Law: Introductory Themes*, in *Contemporary Practice of Public International Law* 165-188 (E.G. Schaffer & R. Snyder eds. 1997)
122. chair, panel, *International Human Rights and Humanitarian Law After Bosnia*, annual meeting of the International Law Association, New York, Nov.1, 1996
123. paper, *Alt=s No Defense: Nullum Crimen*, *International Crime and the Gingerbread Man*, @ Albany Law School, November 7, 1996, printed at 60 *Albany Law Review* 657-679 (1997), extract reprinted at *The International Criminal Court*, 13 *Nouvelles Etudes Penales* 275-288 (1997) and 25 *Denver Journal of International Law and Policy* 321-332 (1997)
124. chair, panel, *Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects*, annual meeting of the American Society of International Law, April 11, 1997, printed at 91 *Proceedings, American Society of International Law* 259 (1997)
125. paper, *A Domestic Influence of the International Court of Justice*, @ University

- of Denver College of Law, April 19, 1997, printed at 26 *Denver Journal of International Law and Policy* 787-805 (1999)
126. organized special networking session on Affirmative Action, International Law and Law School Admissions, annual meeting of the Association of American Law Schools, Jan. 9, 1998
 127. affidavit filed in *United States v. Corey*, Cr. No. 96-01019 DAE (D. Haw. 1998)
 128. affidavit filed in *United States v. Haywood*, No. 97-945-CR-MOORE (S.D. Fla. 1998)
 129. moderator, Third Annual Houston Law Review Frankel Lecture panel on Obedience to International Law, April 9, 1998
 130. panel member, paper, *The Permissibility of Affirmative Action in Higher Education Under Human Rights Law*, @ CUNY School of Law, May 2, 1998, printed at 3 *New York City Law Review* 91-103 (1998)
 131. revised the Am. Branch, I.L.A. Committee on a Permanent International Criminal Court Draft Statute for the ICC sections on crimes, leader responsibility, and superior orders (May 1998), printed at 13 *ter Nouvelles Etudes Penales* 4-24 (1998)
 132. prepared portions of plaintiffs=-respondents= brief in *Dubai Petroleum Company, et al. v. Kazi, et al.*, before the Texas Supreme Court (May 18, 1998), and argued before the Court, Sept. 10, 1998B8-0 decision reported at 12 S.W.3d 71 (Tex. 2000)
 133. panel member and moderator, panels on International Humanitarian Law, Third Pan-European International Relations Conference and Meeting with the International Studies Association, Vienna, Austria, Sept. 18-19, 1998; *ACrimes Within the Limited Jurisdiction of the International Criminal Court*, @ printed at *International Humanitarian Law: Origins and Prospects* (J. Carey & R.J. Pritchard eds. 2002)
 134. speech, Human Rights Treaties in the U.S., UNA-USA United Nations Day celebration, Oct. 24, 1998, Albuquerque, New Mexico
 135. speech, Use of the U.N. Charter, the Universal Declaration, and Human Rights Treaties as Law of the United States, UNA-USA and Southern Illinois University U.N. Day celebration, Nov. 2, 1998
 136. chair, panel, The 50th Anniversary of the Genocide Convention, annual meeting of the American Branch of the International Law Association, New York, Nov. 14, 1998
 137. United Nations Consultative Expert Group meeting on International Norms and Standards Relating to Disability, U.C. Berkeley School of Law, Dec. 8-12, 1998; Report of the Expert Group located at www.un.org/esa/socdev/disberk0.htm
 138. moderator, Coif Lecture and Conference on Legal Responses to International Terrorism, University of Houston, March 12, 1999
 139. speech, Incorporation of International Law, Cornell Law School, March 16,

1999

140. panel member, International Criminal Court: Views from Rome, annual meeting of the American Society of International Law, March 25, 1999, remarks in 93 *Proceedings, American Society of International Law* 73-74 (1999)
141. short essay, NATO=s Use of Force in Yugoslavia, 33 *U.N. Law Reports* no. 9, at 114-16 (J. Carey ed. May 1999), also at 2 *Translex, Transnational Law Exchange*, special supp. 2-3 (May 1999)
142. participant re: Report on Proposed Guiding Principles for Combating Impunity for International Crimes (1999)
143. participant in creation of Draft Provisions for an International Protocol on Rights of Persons With Disabilities, Human Rights Committee, American Branch, International Law Association, June 1999 Revised as Draft Convention on Rights of Persons With Disabilities, March, 2000
144. speaker, laws of armed conflict, genocide, and Kosovo, American Red Cross, Austin, Texas, May 24, 1999
145. panel member, United Nations International Meeting on the Convening of a Conference on Measures to Enforce the Geneva Conventions in the Occupied Palestinian Territory, Cairo, Egypt, June 14-15, 1999; paper AApplicability of Geneva Law and Other Laws of Armed Conflict to Protection of Civilians in the West Bank, Gaza and East Jerusalem, extracts printed in UN Press Release GA/PAL/806 (June 1999) and 33 *U.N. Law Reports* no. 11, at 163-164 (1 July 1999)
146. lectures and seminar, Protection of Civilians in Times of Armed Conflict, 27th Annual Session: The Law of Armed Conflict, Institute of International Public Law and International Relations, at Aristotle University, Thessaloniki, Greece, Sept. 13-17, 1999, to be printed in the Institute=s *Thesaurus Acroasium* (2000); speech on NATO and Intervention in Kosovo, at the U.S. Consulate, Thessaloniki, Greece, Sept. 16, 1999
147. guest editorial, Questions Concerning the Final Report to the Prosecutor Regarding NATO Bombings, 34 *U.N. Law Reports* no. 11, at 132-134 (1 July 2000)
148. keynote speech, International Law as Law of the United States: Trends and Prospects, Japanese American Society for Legal Studies symposium, Sept. 17, 2000, University of Tokyo, Japan, printed in Japanese at *Journal of the Japanese American Society for Legal Studies* 13-38 (2001), reprinted in English at 2 *Chinese Journal of International Law* 615-646 (2002)
149. speech, Problematic U.S. Sanctions Efforts in Response to Genocide, Crimes Against Humanity, War Crimes, and Other Human Rights Violations, Sept. 18, 2000, Waseda University, Japan, printed at 3 (2000) *Waseda Proceedings of Comparative Law* 95-119 (2001)
150. speech, Sept. 22, 2000, Law Faculty Colloquium, University of Tokyo, Japan
151. panel member, Economic and International Institutions, and discussion leader, AALS Workshop on Human Rights, Washington, D.C., Oct. 28, 2000
152. paper, Universal Jurisdiction, Universal Responsibility, and Related Principles of International Law, Princeton Project on Universal Jurisdiction, Princeton University, Nov. 9-11, 2000, printed at (Princeton University Press 2001)
153. key note speech, U.S. Dep=t of State sponsored conference with the Iraqi National Congress on Transitional Justice and the Practical Application of Human Rights Advocacy in Iraq, London, England, March 23-24, 2001
154. panel member, The U.S. Lawyer-Statesman at Times of Crisis: Francis Lieber, and panel member, Universal Jurisdiction Under International Criminal Law: Trends and Prospects, annual meeting of the American Society of International Law, Washington, D.C., April 6-7, 2001, first paper printed at 95 *Proceedings, American Society of International Law* 112-115 (2001)
155. panel member, Transnational Corporations and Human Rights in Africa, A.B.A. Section of International Law and Practice meeting, Washington, D.C., April 27, 2001

156. panel member, Addressing Violations of International Law by Non-State Actors, annual meeting of the American Branch of the International Law Association, New York, Oct. 27, 2001; paper ASanctions Against Non-State Actors for Violations of International Law, printed at 8 *ILSA Journal of International & Comparative Law* 417-429 (2002)
157. panel member, paper, AThe Right to Life in Human Rights Law and the Law of War, University of Saskatchewan College of Law, Nov. 3, 2001, printed at 65 *Saskatchewan Law Review* 411-425 (2002)
158. presenter, National Workshop for District Judges II, sponsored by the Federal Judicial Center, San Diego, California, Dec. 3-5, 2001
159. panel member, Use of Force in the Aftermath of September 11th, Cornell Law School, Feb. 14, 2002; paper AUse of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond, printed at 35 *Cornell International Law Journal* 533-557 (2002)
160. panel member, Inside the International Criminal Court, University of Houston Law Center, Feb. 22, 2002
161. panel member, The Definition of Aggression and the ICC, and moderator, panel on The Judicial Response to Terror, annual meeting of the American Society of International Law, Washington, D.C., March 15, 2002, remarks printed at 96 *Proceedings, American Society of International Law* 190-92, 250 (2002)
162. speech on antiterrorism military commissions, Penn State University Dickinson School of Law, March 28, 2002
163. prepared Memorandum *Amicus Curiae* of Law Professors in United States v. John Walker Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002)
164. affidavit filed in Jane Doe I, Jane Doe II, Petit, *et al.* v. Liu Qi, *et al.*, F. Supp.2d (N.D. Cal. 2002)
165. affidavit prepared in People of the State of California v. Romero Vasquez, Sup. Ct., Santa Barbara, July 2002
166. participated in *Amici* brief, Habib v. Bush (No. 02-5284), decided with Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003)
167. lecture, Use of Military Force Against Iraq, Conférence D=Actualité, University of Paris X, France, Nov. 12, 2002
168. panel member, Detention and Due Process Under International Law, Conference on Terrorism and the Military: International Legal Implications, Societe Internationale de Droit Militaire et de Droit de la Guerre, sponsored by the Netherlands Ministry of Defense, The Hague, Netherlands, Nov. 14-15, 2002, paper printed at Terrorism and the Military: International Legal Implications 181-196 (W.P. Heere ed. 2003)
169. co-speaker, Civil Liberties: From Nuremberg to Houston, Holocaust Museum Houston, Nov. 19, 2002
170. panel member, 9-11 and Its Aftermath, International Law Weekend West, at Loyola Law School, Los Angeles, Feb. 7, 2003
171. panel member, symposium on The Judiciary and the War on Terror, at Tulane University School of Law, Feb. 21, 2003
172. presenter, CLE program of the Louisiana Trial Lawyers Association on 9/11: the War at Home, Civil Rights and Civil Liberties in the U.S. Post 9/11, at Loyola University School of Law, Mar. 21, 2003
173. panel member, Legal Responses to Terrorism: Security, Prosecution and Rights, annual meeting of the American Society of International Law, Apr. 3, 2003, paper ADetention, Judicial Review of Detention, and Due Process During Prosecution, 97 *Proceedings, American Society of International Law* 13-18 (2003)
174. prepared Memorandum *Amicus Curiae* of Law Professors in Padilla v. Rumsfeld, Second Circuit Court of Appeals (July 2003)
175. panel member, International Terrorism and International and European Criminal Law, Hague Joint Conference on Contemporary Issues of International Law - 2003, The Hague,

- Netherlands, Jul. 5, 2003; paper, *International Law Concerning Domestic Prosecutions of al Qaeda Attacks*, @ *From Government to Governance* 360-369 (2003)
176. panel member, International Conference on the United Nations and Taiwan, New York, N.Y., Sept. 5, 2003, paper, *AU.N. Principles in Theory and Practice: Time for Taiwanese Self-Determination to Ripen into More Widely Recognized Statehood Status and Membership in the U.N.*? @ to be printed in a book
 177. panel member, International Criminal Justice and Asia, Japanese Society of International Law International Symposium, Unity in Diversity: Asian Perspectives on International Law in the 21st Century, Nagoya, Japan, Oct. 11-12, 2003, paper, *AU.S. Schizophrenia With Respect to Prosecution of Core International Crimes*, @ to be published in a book; updated version at *Japanese Society of International Law Journal* (2004)
 178. panel member, History of International Tribunals, ILSA Conference on International Criminal Law: The Expansion of Individual Rights and Responsibilities for Human Rights Violations, Loyola Law School, New Orleans, Oct. 18, 2003, paper, *ASelective History of International Tribunals and Efforts Prior to Nuremberg*, @ printed in 10 *ILSA Journal of International & Comparative Law* 207-213 (2004)
 179. panel member, Civil Liberties and the War on Terrorism, Conference on International Justice, Wayne State University Law School, Oct. 27, 2003, paper, *AAfter 9/11, >No Neutral Ground= With Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees*, @ to be printed in 50 *Wayne Law Review* (2004)
 180. panel member, International Law panel, Symposium: Do We Need a New Legal Regime After September 11th?, University of Notre Dame Law School, Dec. 5, 2003, paper *APost 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, @ to be printed in 79 *Notre Dame Law Review* 1335-1364 (2004)
 181. panel member, panel on Contemporary Trends in International Human Rights, and Implementation of Human Rights Domestically, International Human Rights Roundtable, Taipei, Taiwan, Dec. 10, 2003, and suggestions concerning the draft Human Rights Act and the laws concerning Taiwan=s Human Rights Commission; meeting with President Chen Dec. 11, 2003
 182. panel member, The New Architecture of International Law After Iraq, annual meeting of the Association of American Law Schools, Atlanta, Georgia, Jan. 4, 2004, paper *AThe U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities*, @ printed in 27 *Suffolk Transnational Law Review* 1 (2004)
 183. panel member, International Tort Litigation, International Law Section of the State Bar of Texas, Feb. 27, 2004
 184. moderator, Conference on Civil Litigation of International Law Violations in U.S. Courts, University of Houston Law Center, Mar. 1, 2004
 185. panel member, Non-State Actors and the Contemporary Legal Order, University of Michigan Law School, Mar. 20, 2004, paper *AThe Reality of Private Rights, Duties, and Participation in the International Legal Process* @ to be printed in 25 *Michigan Journal of International Law* (2004)
 186. helped prepare Brief of *Amici Curiae* International Law Professors in Hamdi v. Rumsfeld, Supreme Court of the United States, Feb. 23, 2004
 187. prepared Brief of *Amici Curiae* International Law Professors in Rumsfeld v. Padilla, Supreme Court of the United States, April 2004
 188. on-line essay *AAbuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply with International Law?*, @ available at <http://jurist.law.pitt.edu/forum/paust1.php> and reprinted on-line at www.nimj.org/commentary

189. on-line essay *The Common Plan to Violate the Geneva Conventions*, available at <http://jurist.law.pitt.edu/forum/paust2.php>
190. panel member, *Terrorism as an International Crime*, Conference on International Cooperation and Counterterrorism, Università Degli Studi di Trento, Italy, May 27-28, 2004
191. panel member, *Military Commissions*, Conference on International Law Challenges: Homeland Security and Combating Terrorism, U.S. Naval War College, June 24, 2004

Other Activities

Fulbright lectures, University of Leiden, the Netherlands, June 12-13, 1979
 Fulbright lectures, University of Florence, Italy, March 26-27, 1979
 Faculty Advisor, *Houston Journal of International Law* (since its inception, 1978 -)
 Board of Editors, on-line *International Law Journal* (2003-)
 Board of Advisors, *Austrian Journal of Public and International Law* (1990 -)
 U.S. Dep't of State Scholar-Diplomat Seminars (1973 & 1975)
 National War College Conference on the Law of War (Dec. 1974)
 Judge, 1972, 1978, 1980, 1981, 1985 ASIL Regional Jessup International Moot Court; Memorial Judge, 1986 ASIL Jessup Regional International Moot Court; Judge, 1996 ASIL Quarterfinals; Judge, 1998 ASIL rounds and Quarterfinals; Judge, 2001 ASIL Regional International Moot Court, final round; Judge, 2001 ASIL World final round; Judge, 2002 ASIL Regional International Moot Court, final round; Judge, 2003 ASIL Regional International Moot Court, final round; Judge, 2004 ASIL Regional International Moot Court, final round
 Research and writing for J.L. Paust & R. Upp, *Business Law* (West Publishing, 1st ed. 1969) (in 4th ed. 1984)
 Interviews: several local, national, and international television (including CNN, CNN Int=1), radio (including NPR), and newspaper interviews over the years

Summer Teaching:

University of Houston (1978) (1980) (1982) (1986)
 International Legal Studies, Salzburg, Austria (1979)

Other Teaching:

International Legal Studies, Salzburg, Austria (1978)
 (short course on U.S. Contracts Law for European attorneys)
 guest lectures, UH Graduate School of Social Work (1994, 1995)

Faculty Committees:

Graduate Legal Studies (1995-1996, 1997-), Chair (2001- 2003); Promotion and Tenure (2003 -);
 Faculty Appointments (2001-); Executive Committee (1998-2000); Library (2000-2001);
 Admissions (1996); Promotion & Tenure (1994-1995); Faculty Development (1993-1994);
 Educational Policies Committee (1994); Self-Study (1991-1992); Chair Subcommittee,
 Personnel (1990-1992); First Year (1991-1993); Admissions (1987-1991); Graduate Studies
 (1987-1988); Leave Committee (1989-1990); Curriculum (1985-1986); Self-Study & Planning
 (1985-1986 & 1991-1992); Personnel (1983-1985); Promotion & Tenure (1981-1983);
 previously: Curriculum; Chair, Library; Chair, Library-sub-committee on faculty teaching and
 research

University Faculty Senate (1994); University Limited Grants Committee (1993-1994);
 University Research Council (1983-1986)
 Co-Director, International Law Institute

Member:

American Society of International Law
 Executive (President=s) Committee (1990-1991)
 Executive Council (1989-1992)
 Organizing Committee: Joint Conference of the ASIL and the Netherlands Society of International Law (1991)
 Annual Meeting Program Committee (1985-1986, 1989)
 Program Chair (1988-1989)
 Human Rights Advocacy Interest Group (founding member, 1985-)
 International Criminal Law Interest Group (founding member, 1992-)
 Co-Chair (1992-)
 Lieber Society on the Law of Armed Conflict
 Executive Committee (2004-)
 Working Group on International Terrorism (1975-1977)

American Branch, International Law Association
 Working Group on U.S. Ratification of Geneva Weapons Protocol (1980-1982)
 Working Group on U.S. Ratification of Geneva Protocols (1979-1980)
 Committee on Human Rights (1983-)
 Committee on International Law in Domestic Courts (1992-1999)
 Committee on a Permanent International Criminal Court (1996-1999)
 Committee on International Terrorism (1983-1990)
 Committee on Armed Conflict (1978-1983)

American Bar Association, Section on International Law
 Committee on International Law and the Use of Force (1975-1978)
 Chair (1975-1978)
 Human Rights Committee (1974)
 Task Force on Teaching International Criminal Law (1993-1994)
 Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals (1994-1996)

American Section, Association Internationale de Droit Penal
 Board of Director (1993-)

Association of American Law Schools
 Chair, Section on International Law (1991-1993)
 Chair-elect, Section on International Law (1990)
 Secretary, Section on International Law (1989)
 executive committee, Section on International Law (1982-1985, 1987, 2001, 2003, 2004)
 nominating committee, Section on International Law (1980)

Center for Human Rights and Constitutional Law
 Legal Advisory Committee, South Africa Constitution
 Watch Commission (1991-1992)

Human Rights Advocates, International, Board of Directors (1979-)
 Human Rights Law Group
 Co-Director, Houston Affiliate (1980-1984)

Independent Commission on Respect for International Law (1985-1988)

Legal Scholars for Human Rights (Venice, Italy)

Advisory Board

Transnational Publishers Advisory Board for the International and Comparative Law Series (2000-)

United Nations Association-USA

Board of Directors, Houston Chapter (1978-1981)

adviser on Houston Area Model U.N. I.C.J. program for high school students (since its inception, 1980-1995) and resource speaker most years

International Arbitrator

Panel Member, International Centers for Arbitration

I.C.A. Certification Course for International Arbitrators (May-June 1993)

Admitted to the Bar

Supreme Court of California (1969)

Federal District Court, Central District of California (1969)

United States Court of Military Appeals (1969)

United States Court of Appeals for the District of Columbia (1980)

United States Court of Appeals for the Fifth Circuit (1998)

United States Court of Appeals for the Seventh Circuit (2003)

United States Supreme Court (1980)

International Court of Justice (1994) (see misc. #104)

D 29 Response

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: JORDAN PAUST

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant.

a. Specific Objections.

To the extent that Professor Paust will testify about the applicability of the Geneva Conventions or other international law, his testimony is cumulative with that of Professor Slaughter by the Defense's own pleadings.

Professor Paust's testimony that the Commission does not have jurisdiction because is not located within a theater of war or within a war-related occupied territory is not relevant because the Defense has made no motion proposing this theory as a grounds for dismissal or any other relief.

Finally, although Professor Paust claims to be willing to testify that the President's Military Order and the DOD Rules of Procedure set forth in MCO No. 1 do not comply, the relevance is not demonstrated because the Defense does not allege what they do not comply with.

b. General Objections.

Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to

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of

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one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Paust stated his views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Defense proffer in paragraph 3 of the request does not address how the testimony proffered is relevant to the motions for which Professor Paust is being requested. Even the supplemental proffer does not appear to specifically address UCMJ Article 10's applicability or the motion to abate the proceedings.

5. Response to paragraph 6. If Professor Paust is deemed to be a necessary witness, we do not object to his testimony being taken over the telephone.

6. Response to paragraph 7. See paragraph (6) above.

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7. Response to paragraph 8. The Defense states that "No other witness can be called to attest to the relationship between American military justice and military commissions." His testimony would seem to overlap however extensively with the proposed testimony of Professor Danner, Dean Slaughter and Professor Ackerman.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.

9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live "law expert" witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.


Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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D 29 Reply

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

DEFENSE REPLY TO
PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: JORDAN PAUST

27 October 2004

1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Paust, who has served as a JAG officer to study military commissions during the Vietnam War, as well as a scholar of International Law with a special expertise in military commissions.

As the supplemental material makes clear, Professor Paust has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of his testimony, and for this reason, merely incorporating his past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Paust's work into a defense brief is inappropriate for a second reason, because he is not in any way a defense counsel. The whole function of experts about the meaning of the law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts admit the testimony of law professors all the time. The prosecution cites irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart of the motions being decided by the commission. And because this commission is the

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trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because his views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain his view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

Professor Paust's testimony about the theatre of war is directly relevant to the motion to dismiss for lack of legislative authority. Indeed, the Defense has relied on Professor Paust's articles in that motion for this specific point.

Professor Paust's testimony in international law is in no way cumulative with Dean Slaughter's. Dean Slaughter will explain, from the perspective of the leading American academic on international law, why the Prosecution has violated the laws of war. Professor Paust, by contrast, will explain, from the standpoint of a former JAG officer, the history of the Geneva Conventions and why they look the way they do.

For these reasons, his testimony is not cumulative with that of any other witness.

2. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

3. Response to paragraph 8. The testimony of Professor Paust is not cumulative with any other witness. Professor Paust brings his military experience to light as an expert in military commissions. No other witness will testify as to the matters that he will discuss.

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Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether he is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

4. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Paust's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Paust when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers with a more lenient evidentiary standard) it is pragmatically advisable to let this expert testify.

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Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

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D 29 Decision

D29 Hamdan - Decision.txt

From: Hodges, Keith H. CIV (L)

Sent: Friday, October 29, 2004 3:07 PM

To: Hodges, Keith H. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'

Cc:

[REDACTED]
[REDACTED] Hodges, Keith; [REDACTED]
[REDACTED]

OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)

Subject: US v. Hamdan, Decision of the Presiding Officer, D29

United States v. Hamdan

Decision of the Presiding Officer, D29

The Presiding Officer has denied the request for production of Jordan Paust as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

Keith Hodges
[REDACTED]
[REDACTED]
[REDACTED]

UNITED STATES OF AMERICA

v.

HAMDAN

**DEFENSE MOTION TO
THE ENTIRE COMMISSION
TO GRANT MOTION FOR
ABATEMENT (D16) /D40**

November 3, 2004

The Defense previously requested that the proceedings in the above case be held in abeyance while the federal judiciary examines the panoply of constitutional, international law, statutory, and military law issues at issue in this case. The issues involved touch the very nerve of justice, and, for this reason, federal court guidance is essential. The request for abatement was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Presidential Order establishing this commission states that the entire commission is to decide all issues of fact and law. Section 4(c)(2) of the Order is explicit, and requires the "military commission sitting as the triers of both fact and law." The defense in D16 has not made a scheduling request, the likes of which can be easily handled by the Presiding Officer in light of his duties under Military Instruction 8. Rather, this is a matter of *law*, for the defense believes that the law and facts *both* require abstention by this commission until the federal judiciary has provided its views of the legal issues to this body.

The Defense in its papers in D16 has explained that the precedent of the United States Supreme Court, both in military commissions, such as *Ex Parte Quirin*, 317 U.S. 1 (1942), and in courts martial, such as *Schlesinger v. Councilman*, 420 U.S. 738 (1975), require federal courts to hear these matters first. The case for abatement is far more important here than in an ordinary court martial, since there are a myriad of novel issues of federal and international law at stake that have not been resolved.

The Defense requests that the entire Commission examine the motion for abatement in D16 and grant that motion. The defense incorporates by reference:

- a. Motion by the defense for abatement (D16)
- b. Decision of the Presiding Officer denying abatement.
- c. The government response to this motion.
- d. The defense reply to this motion.

The defense also requests that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By:

Neal Katyal
Civilian Defense Counsel

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c. On 19 October 2004, the Appointing Authority granted three challenges for cause, including the alternate member. The Appointing Authority did not appoint substitute members or an alternate member(s).

5. Law supporting.

Paragraph 4.A.(1) of Military Commission Order No. 1, places responsibility for the appointment of members to the Military Commission on the Appointing Authority, stating:

“The Appointing Authority shall appoint members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.”

Paragraph 4.A.(2), allows the Appointing Authority discretion in determining the number of members to hear a Commission, stating:

“Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.”

Taken together, these two paragraphs permit the Appointing Authority at the onset to determine the number of members to hear a particular case, to appoint members he believes to be qualified and to where necessary substitute for members removed from trial. The Appointing authority may very well have selected three members at the outset of this trial, plus alternates. But to select five, and then have the group whittled down to three (with no alternates) is to create a system in which challenges to the membership of the panel are radically disfavored and boomerang to hurt the defense.

In any event, the Appointing Authority’s action after trial by Military Commission had commenced in Mr. Hamdan’s case exceeded his authority. The plain language dictates that members, when removed, are replaced by alternate members, thus preventing a change in the overall composition of the Commission based on a challenge by either side or other incapacity of a member. The language is mandatory. The Appointing Authority is permitted to add additional members to fill any vacancy among the members or alternate members, occurring after trial. Taken at its plain language, when a member is challenged, an alternate member is to take his place, necessitating the Appointing Authority appointing a new alternate member. In the case of multiple vacancies, the Appointing Authority would be required to appoint members until such time as the panel returned to its original composition and had at least one alternate member. The Order permits proceedings to happen without the alternate member present, but it most emphatically does not permit the Appointing Authority to fail to appoint an alternate (as

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evidenced by the mandatory “shall”) *nor* does it permit the Appointing Authority to drop the number of voting members after challenges are made.

To read paragraph 4.A. otherwise, creates for Mr. Hamdan the Hobbesian choice of exercising a challenge to his detriment. In Mr. Hamdan’s case, five members were initially detailed. Five members required that the government obtain the concurrence of two-thirds of the members for a verdict of guilty or a vote of guilty by four members. Reduction of this panel by challenge presents the situation where Mr. Hamdan is forced to elect to have the member sit or have the government’s burden correspondingly reduced. For four members, the government would be required to obtain the concurrence of three members and for three members; the government’s burden is further reduced to only two members. In essence, Mr. Hamdan is forced to elect between a member who is unsuited or allowing the member to sit in order to force the government to obtain the member’s concurrence.

While military court-martial may be reduced in number so long as they do not fall below the mandated quorum, such rules are by the President’s Military Order, inapplicable to trial by Military Commission. Furthermore, the very rules for courts martial would *require* the use of 5 members in a trial such as this, since a General court martial has at least five members and must be used when sentences of over one year are being considered. To boot, courts martial include full and vibrant preemptory challenges for both trial and defense. And in a case like the one here, where the commission sits as the judge of both *law and fact*, the need for five members is even greater than it is in the court martial context, where a judge trained in law evaluates the legal arguments. As such, equity would dictate that any reliance on the ability to reduce members after the proceedings began in keeping with Rules for Court-martial also mandated protections contained therein.¹

Paragraph 4.A.(1) clearly intended that Mr. Hamdan not be subject to such a dilemma by providing that an alternate would take the place of any member excused from the case and by mandating that an alternate be appointed to the Commission at all times. While paragraph 4.A.(1) does not require an alternate member to be present at all times, paragraph 4.A.(2) requires that a Commission shall be composed of one or two alternate members. The Appointing Authorities failure to appoint alternate members in the present Commission until the Commission returns to full strength and has an alternate member present violates the plain language and intention of Military Commission Order No. 1.

Independent of whether the Appointing Authority can *post hoc* reduce the number of members after a commission has commenced, the Appointing Authority has also violated the plain language of paragraph (2), which mandates the appointment of an alternate member. While such a member under paragraph (1) is not required to attend all sessions, there is no authority for the continuation of proceedings without an alternate identified. As such under no circumstances

¹ It is of note that in it research the defense has been unable to find any occasion wherein the commission has been composed of as few as three members. See *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals Volumes 1-15*.

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may the Commission as currently composed be found to be properly constituted in accordance with Military Commission Order No. 1.

5. Legal Authority Cited.

a. Military Commission Order (MCO) No. 1, paragraph 4.A.(2)

b. PMO, 13 Nov 01.

c. *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals Volumes 1-15.*

6. Oral argument: Is requested.

7. Witnesses: None.

8. Other: The Defense has not included the Appointing Authorities findings with regards to challenges for cause for Commission members in an effort not to prejudice the Commission members. The Presiding Officer excluded these members during challenges concerning their fitness and the Defense believes that it would be inappropriate to now forward the challenges to these members.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Defense Counsel
Office of Military Commissions

Neal Katyal
Civilian Defense Counsel

Review Exhibit 43-A

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

October 11, 2004

Neal Katyal



Dear Mr. Katyal,

I am pleased to inform you that, based on the information provided and the determination by Defense Security Service, you have been placed in the pool of Qualified Civilian Defense Counsel.

In order to assist detainees whose cases have been referred to trial by Military Commission interested in retaining the services of Civilian Defense Counsel, you are requested to furnish my office with a brief statement of practice (Martindale-Hubbell listing or the equivalent) and your fee schedule for practice before the Military Commissions. These materials are not requirements for eligibility to serve in the pool of Qualified Civilian Defense Counsel and are requested solely to assist individual detainees in their selection of civilian counsel. Such materials are not an endorsement or recommendation of counsel by the Office of the Chief Defense Counsel.

Prior to beginning representation of any detainee you are required to furnish my office with a notice of appearance on behalf of the detainee and a signed copy of the enclosed Standard Form 312 (Non-Disclosure Agreement for Confidential Material). If you have any questions regarding your status or the requested/required documents please do not hesitate to contact my office at [REDACTED]

Sincerely,

Colonel Will A. Gunn (USAF)
Chief Defense Counsel
Office of Military Commissions

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[REDACTED] Received from

Office of Chief Defense
Counsel 24 AUG 2005
Original RE 44
has been lost

TOTAL P.02





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



COMMERCIAL TELEPHONE: [REDACTED]
COMMERCIAL FAX: [REDACTED]
DSN: [REDACTED]

FAX COVERSHEET

CAUTION: Coversheet and attached documentation may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of Chief Defense Counsel.

TO: Mr. [REDACTED] DATE: 24 AUG 05 FAX # [REDACTED]
FROM: LNC [REDACTED] PAGES: 2 INCLUDING COVERSHEET)

COMMENTS: Missing Hamdan Review Exhibit.

Mr. [REDACTED] this is the only letter in our Files signed by Colonel Gunn informing Mr. Katyal that he is qualified to be a Civilian Defense Counsel.

Added to Document
Receipt of Appointment

Review Exhibit 44-A
Page 1 of 1





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

21 September 2004

MEMORANDUM DETAILING DEFENSE COUSEL

TO: Captain Kristine Autorino, USAF

SUBJECT: Detailing of Assistant Detailed Defense Counsel to
United States v. Hamdan

Pursuant to the authority granted to me by my appointment as Chief Defense Counsel, Sections 4C and 5D of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(8) of Military Commission Instruction No. 4, you are hereby detailed and designated as Assistant Detailed Defense Counsel for all matters relating to Military Commission proceedings involving Mr. Hamdan. Your appointment is effective immediately and exists until such time any findings and sentence become final as defined in Section 6(H)(2) of Military Commissions Order No. 1 unless you are excused from representing Mr. Hamdan by me or my successor.

Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions

Copy to:
General Altenburg

Review Exhibit RE46
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Challenges for Cause Decision No. 2004-001 (Unclassified)

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

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

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

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

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

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

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

Military Commission Procedural Provisions on Challenges for Cause

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.⁶

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

§ 836. Art. 36 President may prescribe rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Challenges for Cause in United States Federal Courts

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

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

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

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

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

Id. at 222.

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

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

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

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

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

International Standards for Challenges for Cause

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

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

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

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

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

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

[A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

- A. A judge is not impartial if shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
 - i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
 - ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

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

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

Appointing Authority Standard for Deciding Challenges for Cause

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

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

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

- (1) Has the moving party established a factual basis to support the challenge?
- (2) Does the non-moving party oppose the challenge?
- (3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).
- (4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).
- (5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

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

Consideration of Individual Challenges

LTC C

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

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

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

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

COL S

On 9/11, [REDACTED]

[REDACTED] COL S

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

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

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

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

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

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

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

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

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

COL S: It's separate things.

DC: Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.

COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.

DC: Nothing further, thank you.

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

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

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

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

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

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

LTC T and COL B

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

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

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

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

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

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

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

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

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

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

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Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [REDACTED] and are intimately familiar with the operations and deployments [REDACTED]

[REDACTED] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

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

- (1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;
- (2) As an attorney, he will exert improper influence over the other non-attorney members;
- (3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and
- (4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

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

Presiding Officer's Judge Advocate Status

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

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

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

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

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

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

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

Undue Influence over Non-attorney Members of the Commission

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

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

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court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?

Apparently so.

Is there any member who believes that he would be required to accept, without question, my instruction on the law?

Apparently not.

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

Relationship with the Appointing Authority Creates Appearance of Unfairness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

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

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

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

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

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

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

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

DC: Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC: You have known Mr. Altenburg [since] 1977, 1978?

PO: Yes, sometime in that frame.

DC: And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?

PO: Right, at the JAG school.

DC: And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.

DC: And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?

PO: Right, I did.

DC: And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC: Thirty-three others, in fact?

PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.

DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?

PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

....

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*

PO: *No. You want to ask what I think Mr. Altenburg wants from me?*

P: *Do you know, sir?*

PO: *No, I asked would you like to ask me what I think he wants?*

P: *Yes, sir.*

PO: *Okay. I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*

P: *Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?*

PO: *You all went to law school; right?*

P: *Yes, sir.*

PO: Remember that first semester of law school and everyone is really scared?

P: Yes, sir.

PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.

P: Yes, sir. Nothing further, sir.

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

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

Predisposition on Speedy Trial Motion

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

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DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC: I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC: Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

....

P: Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?

PO: No.

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

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC: To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC: Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC: Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC: No, sir.

PO: How about you?

P: No objection to the tape being sent, sir.

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

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording⁸ of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial? Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.

DC (al Qosi): I don't think it is appropriate either sir.

Chief Prosecutor: We need to stay away from that.

DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--

PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

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

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

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

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

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

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

DECISION

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

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

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

There is no classified annex to this decision.



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

Filings Inventory - US v. Hamdan v. 14, November 7, 2004
Issued in accordance with POM #12. See POM 12 as to counsel responsibilities.

Prosecution (P designations)

Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition Notes	RE
P 6 Motion to Compel Discovery	1 Oct 04 Attchs: See Notes	22 Oct Attchs: See Notes	20 Oct 04	Prosecution's previous reply of 20 Oct adopted as government reply to defense response of 22 Oct. Email attached to Motion electronic file to that affect. Electronic file of Response also includes earlier Def to Pros memo in response to the issue.	
P 7 Motion to Pre-admit Evidence (Starting with 302 dated 1-30-02 (Bates 1-9))	1 Oct 04 0 attchs	18 Oct 04	21 Oct 04 w attch incl in file		
P 8 Prosecution Motion to Preclude Attorney and Legal Commentator Opinion Testimony concerning their Views on the Law	8 Oct 04	14 Oct 04	21 Oct 04		

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Defense (D Designations)

Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition	Notes	RE
D2 Motion for Hearing Before Appointing Authority MOTION	2 Aug 04			Detailed DC advises: "The 2 August Motion was filed with the Appointing Authority but in that it has never been formally answered is not mute (I guess the General Hemingway answered it but that is taken up in my unlawful command influence motion). DDC advised by APO on 5 Oct 04 that if he wants the Commission to do something about this, file with the Commission or risk waiver. DDC says motion is for AA.		
D 13. Motion to Dismiss – Unlawful Command Influence	23 Aug 2004 sep file for 65 pg of atch	24 Aug 04 0 atch		Pros supplement with one page affidavit by BG Hemingway. 28 Oct 04		M: 11 Res: 12
D 14. Motion to Dismiss – Failure to Accord the Accused a Status Review Hearing before a Military Commission	23 Aug 04 40 pg atch sep file	24 Aug 04 0 atch Supplemental attachment filed 5 Nov		21 Sep Memo from DDC to CSRT CA referencing this motion provided by counsel and part of the POs file. PO supplemented with one page CSRT decision sheet. 29 Oct.		M: 13 Res: 14

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition	Notes	RE
D 15 Motion to Dismiss - Violation of Art 103 of third Geneva convention	1 Oct 04 0 attach	15 Oct 04 2 attach incl	26 Oct 04			
D 17 Motion to Dismiss - Failure to state an offense within the subject matter jurisdiction of a military commission and contrary to the recognized laws of war.	1 Oct 04 0 attach	15 Oct 04 3 attchs each sep file 1 2 3	26 Oct 04			
D 18 Motion to Dismiss - Violation of 42 USC Sec. 1981	1 Oct 04 0 attach	15 Oct 04 0 attach	26 Oct 04			
D 19 Motion to Dismiss - Violation of Equal Protection Clause	1 Oct 04 0 attach	15 Oct 04 0 attach	26 Oct 04			
D 20 Motion to Dismiss - Lack of Legislative Authority	1 Oct 04 0 attach	15 Oct 04 0 attach	26 Oct 04			

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition	Notes	RE
D 21 Motion to Dismiss - Article 10 UCMJ	1 Oct 04 1 missing	15 Oct 04 3 incl in file	26 Oct 04	23 Oct. DDC asked to provide copy of Dr Matthews declaration which was a listed attachment in motion. (Email filing the motion noted the attachment was missing.)		
D 22 Motion to Dismiss - Lack of Personal Jurisdiction	1 Oct 04 1 atch incl Missing 1 attach	15 Oct 04 3 sep atchs	26 Oct 04	Motion missing attachment of "CV expert/witness." DDC asked to provide it 23 Oct Note. These lengthy attachments are the same as D17 Response.		
D 23 Motion to Dismiss for Violation of Common Article 3 of the Geneva Conventions	1 Oct 04 3 atch in 1 sep file	15 Oct 04 atch incl in file	26 Oct 04			
D30 Witness Request <u>Umat al-Subur 'Ali Qassim al-Qal'a</u>	21 Oct 04 file includes govt denial	25 Oct 04	28 Oct 04	Erroneously listed as Taqi'a. Changed to correct "Umat" on 26 Oct. APO. Note request for Taqia is at D32. Decision deferred until after counsel appear in Guantanamo, 29 Oct.		
D31 Witness Request Muhammed Ali Qassim al-Qal'a	26 Oct 04	25 Oct 04*	28 Oct 04	*Prosecution adopted its 25 Oct response though filed before the resubmitted defense motion. Decision deferred until after counsel appear in Guantanamo, 29 Oct.		

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition	Notes	RE
D32 Witness Request <u>Taqia Muhsin al-Ansi</u>	26 Oct 04	25 Oct 04*	28 Oct 04	*Prosecution adopted its 25 Oct response though filed before the resubmitted defense motion. Decision deferred until after counsel appear in Guantanamo, 29 Oct.		
D33 Motion for a Bill of Particulars and duplicity	29 Oct 04	5 Nov 04				
D34 Witness Request for Commission Consideration of Witness Request Anne Marie Slaughter (Previously D25)	29 Oct 04		xxx			
D35 Witness Request for Commission Consideration of Witness Request Bruce Ackerman (Previously D26)	29 Oct 04		xxx			
D36 Witness Request for Commission Consideration of Witness Request George Fletcher (Previously D27)	29 Oct 04		xxx			

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Name	Motion Filed	Response Filed	Reply Filed	Status /Comments Disposition	Notes	RE
D37 Witness Request for Commission Consideration of Witness Request Allison Danner (Previously D28)	29 Oct 04		xxx			
D38 Witness Request for Commission Consideration of Witness Request Jordan Paust (Previously D29)	29 Oct 04		xxx			
D39 Defense Motion For Abatement Based On Improperly Constituted Panel	2 Nov 04					
D40 Motion to Abate (reconsideration of D17)	3 Nov 04					
D41 Protective Order (lay witnesses)	19 Oct 04					

PO and C designations

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None

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Inactive Section

Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition Notes	RE
P1. Protective Order (various)	23 Jul 04 (Notice)			This notice was an alert that other motions would be forthcoming as Protected Information Issues were resolved. No action on this document required.	
P2. Conclusive Notice (various)	23 Jul 04 (Notice)			Status: Prosecution and defense advised to use draft procedures in POM 6 to request Conclusive Notice. Disposition: Prosecution need not file motion.	
P3. Pre-admission of Evidence	23 Jul 04 (Notice)			Status: 28 July. Prosecution request for extension to file motions granted until a time closer to trial when discovery is nearer to completion, the parties have had an opportunity to address evidentiary issues, and the issue of pre-admission is more ripe. No action on this document required. Prosecution will file specific motions as required.	

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition Notes	RE
<p>P4. Protective Order: Motion of 30 July- Order 1.</p> <p>1. Unclassified, Sensitive Materials. 2. Classified materials. 3. Books, articles, speeches.</p>	30 Jul 04	Aug 09 04		<p>Status:</p> <p>Disposition: Resolved at GTMO during AUG trial term.</p> <p>No further action required.</p>	
<p>P5. Protective Order: Motion of 30 July- Order 2.</p> <p>Protective Order: Names or other identifying information of investigators or interrogators.</p>	30 Jul 04	Aug 09 2004		<p>Status:</p> <p>Disposition: Resolved at GTMO during AUG trial term.</p> <p>No further action required.</p>	

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition Notes	RE
D-16 Motion to Abate Proceedings	1 Oct 04 0 attach	15 Oct 04 2 attchs incl in file	26 Oct 04	Denied by the PO, 29 Oct.	
D24 Witness Request David Brahms	18 Oct 04			This motion is temporarily placed on the Motions Inventory and will be removed unless the defense complies with directions to file a supplement NLT 22 Oct. Capt Autorino advises that the defense withdraws this motion. 22 Oct No further action required.	
D25 Witness Request Anne Marie Slaughter	18 Oct 04 attchs and supplement in 1 file	25 Oct 04	27 Oct 04	Supplement filed by defense 21 Oct. (Included in same electronic file a motion.) Denied by the Presiding Officer 29 Oct. Resubmitted as motion for the Commission, D34.	
D26 Witness Request Bruce Ackerman	18 Oct 04 attchs and supplement in 1 file	25 Oct 04	27 Oct 04	Supplement filed by defense 21 Oct. Denied by the Presiding Officer 29 Oct. Resubmitted as motion for the Commission, D35.	
D27 Witness Request George Fletcher	18 Oct 04	25 Oct 04	27 Oct 04	Supplement filed by defense 21 Oct. Denied by the Presiding Officer 29 Oct. Resubmitted as motion for the Commission, D36.	

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Name	Motion Filed	Response Submitted	Reply Submitted	Status /Comments Disposition Notes	RE
D28 Witness Request Allison Danner	18 Oct 04	25 Oct 04	28 Oct 04	Supplement filed by defense 21 Oct. Denied by the Presiding Officer 29 Oct Resubmitted as motion for the Commission, D37.	
D29 Witness Request Jordan Paust	18 Oct 04 attchs and supplement in 1 file Less resume in sep file	25 Oct 04	28 Oct 04	Supplement filed by defense 22 Oct. Denied by the Presiding Officer 29 Oct Resubmitted as motion for the Commission, D38.	

Military Commissions Office of the Presiding Officer

October 24, 2004

Official Copies of all Presiding Officer Memoranda

This document contains the official, record copies of all current Presiding Officer Memoranda approved by Colonel Peter E. Brownback, III.

Number	Title	Dated
1	Presiding Officers Memoranda	19 Jul 2004
2-1	Appointment and Role of the Assistant to the Presiding Officers	16 Sep 2004
3	Communications, Contact, and Problem Solving	19 Jul 2004
4-2	Motions Practice*	7 Oct 2004
5	Spectators to Military Commissions	2 Aug 04
6-1	Requesting Conclusive Notice to be Taken	31 Aug 04
7	Access to Evidence and Notice Provisions	12 Aug 04
8	Trial Exhibits	12 Aug 04
9	Obtaining Protective Orders and Requests for Limited Disclosure	4 Oct 04
10	Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony	4 Oct 04
[11]	<i>In development</i> : Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation/Interpretation during Commission Trials	Not Issued
12	Filings Inventory	24 Oct 04

* A typographical error in the previous POM 4-2 has been corrected; the correction is noted in the official copy included herein.

Keith Hodges
Assistant to the Presiding Officers

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Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 1-1 - Presiding Officers Memoranda

This POM supercedes POM # 1 dated 19 July 2004

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer is establishing Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and the Assistant to the Appointing Authority. In general, these POMs are issued to assist the Commission, to include the Presiding Officer, in preparing for and providing a full and fair trial under the provisions of Military Commission Order No. 1, 21 March 2002, paragraph 4A(5), 6A(5), and 6B, and Military Commission Instruction No. 8, paragraph 5.
2. Presiding Officer Memoranda (POMs) will also serve as interim Rules of Commission Trial. POMs will be cancelled when the substance of the POM is incorporated into the Rules.
3. If a counsel objects to a procedure established in any POM, such objections should be made within 7 calendar days directly to the Presiding Officer (with a CC to Mr. Hodges).
4. Future POMs, the Rules of Commission Trials, and communications with counsel may refer to "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.
5. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

Original signed by:

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

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Office of the Presiding Officer
Military Commission

SEP 16, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 2-1 Appointment and Role of the Assistant to the Presiding Officers

This POM supersedes POM # 2, dated July 19, 2004

1. Pursuant to Section 4(D), Military Commission Order No. 1, and Paragraph 3(B)(11), Military Commission Instruction No. 6, an Assistant to the Presiding Officers has been detailed and shall report to the Presiding Officer and work under his supervision to provide advice in the performance of the Presiding Officer's adjudicative functions. The Assistant may act on behalf of the Presiding Officer. The Assistant does not act, and does not have authority to act, on any matter or in any manner, on behalf of the Appointing Authority. (See Appointing Authority Memorandum, SUBJECT Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions, 19 Aug 2004.)

2. Mr. Keith Hodges has been detailed to be the Assistant. His duties are:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on procedural, logistical, and administrative matters and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officer of the Military Commissions, which may require legal or other analysis of procedural, logistical, and administrative matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers to provide advice in the performance of adjudicative functions, *ex parte* if required, with respect to administrative, logistical, and procedural matters. (See ABA Model Code of Judicial Conduct Canon 3B(7)).

d. Act on the Presiding Officer's behalf to make logistical and administrative arrangements.

e. Draft, coordinate, staff, and publish guidelines for Commission Proceedings to include Presiding Officer Memoranda.

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f. Process and manage policy, procedure, and similar actions and activities designed to contribute to the efficient operation of the Commission - both current and future operations.

g. Coordinate the integration of operations that affect in-court proceedings with OMC and JTF and other support personnel - to include the bailiff, security personnel, and court reporters - in providing services to the Commission.

h. To sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, or does direct, except those that under Commission Law can only be performed personally by the Presiding Officer or involve the vote or decision of the Commission.

i. Other duties not listed above which are consistent with improving the processes, procedures, administration, and logistics of the Office of the Presiding Officer and the Commissions and which are not inconsistent with paragraph 3 below.

3. The Assistant is *not* authorized to:

a. Communicate or discuss any matter with any Commission member or alternate member (except the Presiding Officer) other than to arrange for their administrative and logistical needs.

b. Be present during any closed conference of the members.

c. Advise the Presiding Officer concerning the decision of any matter that requires the vote of the Commission; however, the Assistant may prepare those documents and drafts necessary or required to *process, record, and disseminate* any decision by the Commission.

d. Provide any substantive advice to the Presiding Officer on any matter that would require a vote or decision by the entire Commission. This prohibition includes any advice on findings, sentence, or motions or requests which require a vote by the Commission.

4. Except as approved in advance in writing by the Presiding Officer, Mr. Hodges is not permitted to perform any duties for the Federal Law Enforcement Training Center or the Department of Homeland Security that involve: advice to law enforcement concerning an active case or investigation; advice on how to detect, investigate, or prosecute alleged acts of terrorism or violations of international law; or any other matter that would create a perception in the minds of a reasonable person that the Assistant's home agency (the Federal Law Enforcement Training Center/Department of Homeland Security) has any part in the Commission process through the actions of the Assistant.

5. **Any** email which is sent to the Presiding Officer will be CC Mr. Hodges. If counsel believe there is a legal reason not to CC Mr. Hodges, counsel shall include that reason in the email to the Presiding Officer.

Original signed by:

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

Office of the Presiding Officer
Military Commission

July 19, 2004

**SUBJECT: Presiding Officers Memorandum (POM) # 3 - Communications,
Contact, and Problem Solving**

1. This POM establishes procedures concerning how counsel are to communicate with the Presiding Officer and the Assistant to the Presiding Officer (Mr. Hodges.) The Presiding Officer desires not only to avoid ex parte communications, but to ensure the accused receives a full and fair trial, that procedural matters leading to trial be handled efficiently, and that when counsel need to communicate with the Presiding Officer, it can be done efficiently and expeditiously.

2. The preferred method of communication with the Presiding Officer is email with CCs to opposing counsel and the Assistant. The following email protocols will be followed.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject whenever possible.

c. Identify, in the body of the email, each attachment being sent.

d. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF). Save the email you send in the event there is an issue as to the version of attachments being referred to.

e. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

f. Be attentive to the size of attachments. Send multiple emails with fewer attachments if necessary. Avoid archiving (WinZip) when possible.

g. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

f. If any addressee notices an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email.

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3. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

4. The Presiding Officer is responsible to insure that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not being, in her/his opinion, satisfactorily addressed by opposing counsel or by the Appointing Authority must present the problem to the Presiding Officer.

Original signed by:

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

Office of the Presiding Officer
Military Commission

7 October 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4-2: Motions Practice

(Corrected 24 Oct 04 to change the second para 7c to para 7d.)

This POM supercedes POM # 4-1 issued 12 Aug 2004

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, for any type of relief, or for the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. This POM is issued UP DOD MCO No. 1, paragraphs 4A(5)(a)-(d) and 6A(5), and MCI No. 8, paragraph 5. The following definitions apply.

a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

b. A "motion" is the original request from the moving party - the party requesting the relief.

c. A "response" is the opponent's answer to a motion.

d. A "reply" is the moving party's answer to a response.

e. A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.

g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

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(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

- (1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.
 - (2) A concise statement of the relief sought.
 - (3) (Optional): An overview of the substance of the motion.
 - (4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.
 - (5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.
 - (6) The name(s) of the file(s) attached to the email that are included in support of the motion.
 - (7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.
 - (8) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited to the Commission. (Note also paragraph 12 below as to required attachments.)
 - (9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.
 - (10) Additional information not required to be set forth as above.
- e d. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.
8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[[(Government) (Defense)] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

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(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

d. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited that was not previously provided in printed form to the Commission.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

e. The special request for relief will include counsel's statement and rationale concerning whether the Presiding Officer may grant the relief on his own or if the relief sought can be granted solely by the full commission.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone, or

c. The motion requires action by the full commission.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

20. A notice of motion is not a motion, and it does not place an issue or matter before the Commission for decision. If a party files a notice of motion but does not file a motion, the Commission will not take any action on the underlying issue.

21. Various matters have been presented to the Appointing Authority for his decision and/or action. A request to the Appointing Authority is not a request for the Commission to take action or grant relief.

a. If a party wishes the Commission to grant relief or take action on a matter which has been raised with, or is currently before, the Appointing Authority the party must file a motion or request for other relief in accordance with this POM.

b. If a party has requested the Appointing Authority to grant relief or take action, and that request is denied, the party may request the Commission grant the same or different relief by filing a motion or request for other relief in accordance with this POM. All filings and other matters exchanged between the party and the Appointing Authority will be forward with the motion or request for other relief.

Original Signed by:

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

Office of the Presiding Officer
Military Commission

August 2, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 5 - Spectators to Military Commissions

1. Commission Law provides for open Commission proceedings except when the Presiding Officer determines otherwise. Commission Law also charges the Presiding Officer to maintain the decorum and dignity of all Commission proceedings.
2. The attached document, "Decorum for Spectators Attending Military Commissions," shall be in force whenever the Commission holds proceedings open to spectators. The attachment may be used by bailiffs, security personnel, those with Public Affairs responsibilities, and other Commission personnel to inform spectators and potential spectators of the conduct and attire expected.
3. There are other rules that pertain to media personnel that have been prepared and disseminated by Public Affairs representatives. The attachment does not limit or change rules that are applicable to the media.

Original Signed by:

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

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Decorum for Spectators Attending Military Commissions

The decorum and dignity to be observed by all at the proceedings of this Military Commission will be the same as that observed in federal courts of the United States.

Spectators, including members of the media, are encouraged to attend all open Commission proceedings. The proceedings may be closed by the Presiding Officer for security or other reasons.

The following rules apply to all military commission observers in the courtroom. Failure to follow these rules may result in being denied access to the courtroom, and could result in a charge of contempt of court and expulsion from commission-related activities at Guantanamo Bay, Cuba.

a. All military commission observers must wear appropriate attire. Generally, casual business attire is appropriate for civilians. Examples of acceptable casual business attire include: long-pants, knee-length skirts, collared shirts with sleeves, and covered-toe shoes. Inappropriate attire would include, but is not limited to, the following: shorts, sleeve-less shirts (tank tops, halter tops, etc.), denim jeans, T-shirts, mini skirts, any accessories or other clothing attire with political slogans, sneakers or tennis shoes, and sandals. Individuals wearing inappropriate attire will not be permitted to observe courtroom proceedings in the courtroom.

b. No distractions are permitted during active court sessions to include, but not limited to: talking, eating, drinking, chewing gum, standing and stretching, sleeping, using tobacco products, or other disruptions. Due to the hot and humid environment in Guantanamo Bay, bottled water with a re-closable lid will be permitted in the courtroom. No other beverages are permitted in the courtroom while commissions are in active session.

c. Entering and exiting the courtroom will be limited to extreme emergencies, and every attempt should be made to take bathroom breaks during court recesses.

d. Military commission observers are not permitted to interact with trial participants either during active sessions or breaks in the proceedings. Trial participants include: the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, and other personnel assisting in the conduct of military commissions. Military commission observers are also expected to respect the privacy of other military commission observers during trial recesses and not press for unsolicited interactions.

e. Computers, laptops, PDIs, PDAs, pagers, cell phones, Walkmans, audio recorders, video recorders, cameras, and any and all other types of electronic or battery operated devices are not permitted in the courtroom during sessions. Not only can these devices be distracting to others in the courtroom, but they pose a substantial

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security risk. Notebooks, pens, pencils, and paper are permitted for note taking, but not sketching or artistic renditions of observations.

g. It is improper for anyone to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. For the same reason, signs, placards, leaflets, brochures, clothing, or similar items that could convey a message about the proceedings are also not allowed in the courtroom or in the courtroom's vicinity.

h. As is customary in courts, spectators will rise when the Commission as a whole, or the Presiding Officer alone, enters or depart the courtroom.

i. Members of the media are reminded they have agreed to certain rules established by the Public Affairs staff.

Commission officials know that spectators appreciate the need for security in any public building, and we ask that you cooperate with security personnel when they screen spectators and their property.

BY DIRECTION OF THE PRESIDING OFFICER, MILITARY COMMISSION

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Office of the Presiding Officer
Military Commission

August 31, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 6-1, Requesting Conclusive Notice to be Taken

1. This POM supersedes POM 6 dated 12 August 2004.
2. Military Commission Order 1 permits the Commission to take conclusive notice. This POM establishes the process for such requests. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c) and paragraph 6D(4).
3. When Counsel are aware they will request the Commission to take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Commission's taking conclusive notice of a certain fact. It is unnecessary to involve the Presiding Officer, the Assistant, or the Commission while Counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.
4. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Commission on merits, sentencing (if such proceedings are required,) or both.
5. If counsel have agreed to take conclusive notice (or enter into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the Counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, Chief and Deputies of the Prosecution and the Defense, the Presiding Officer, and the Assistant. At the trial where the conclusive notice or a stipulation is to be used, the counsel offering the stipulation or conclusive notice is responsible for presenting the conclusive notice or stipulation to the Commission.
6. If Counsel desires that the Commission take conclusive notice, but s/he is unable to obtain the agreement of opposing Counsel, the Counsel desiring that conclusive notice be taken shall:
 - a. Send an email to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel, and Chief and Deputies of the Prosecution and the Defense.
 - b. The body of the email, or an attachment, shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject] [Us v. last name of Accused]." The subject line of the email shall be the same as the title.

c. The content of the email, whether in the body or an attachment, shall contain the following matters in separate numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested. See paragraph 4 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Commission in resolving the matter.

7. The counsel receiving a request as stated in paragraph 6 shall:

a. Within three duty days of receiving the email in paragraph 6 above (the definition of "received" shall be as provided in POM #4-1), the Opposing party shall "reply all" to the email set out in paragraph 6 above and answer in the following, separately numbered paragraphs:

(1). That the responding Counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the Counsel disagrees:

(a). The reasons therefore.

(b). Any contrary sources not cited by the requesting Counsel.

(c). Other information to assist the Commission in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless there is a legal basis why the Commission should reserve decision on the matter until oral argument can be heard.

8. Replies by the requesting party. Counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 7 above unless it is to withdraw the request for conclusive notice. If additional information is needed, the Commission, acting thru the Presiding Officer for administrative ease, will request it.

9. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to Counsel that a party will not agree to a request that conclusive notice be taken, that Counsel shall send a request as provided in paragraph 6 above.

c. If Counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 6 above.

10. Stipulations of fact. While Counsel are free to use stipulations of fact in lieu of agreeing on the taking of conclusive notice, the Commission has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original Signed by:

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

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 7 - Access to Evidence and Notice Provisions

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain access to evidence. Failure to provide access to evidence as provided for by Commission Law can result in parties not being able to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer. This POM is issued under the provisions of MCO No. 1: paragraph 4A(5)(a), (b), and (c); paragraph 6A(5), including subparagraphs (a), (c), and (d); and paragraph 6B(1) and (2).

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law, and parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing has not complied with an access to evidence requirement.

b. Establishes time frames for providing access or notifications when modification of the time frames is within the discretion of the Presiding Officer.

c. Does not address requests for witnesses or "investigative or other resources." (MCO #1, Section 5H.)

d. Does not modify those procedures established by Commission Law with respect to Protected Information.

e. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Basic principles:

a. When parties comply with access to evidence requirements and the parties provide what Commission Law requires at the time stated by Commission Law, POMs, or orders of the Presiding Officer, the access to evidence process will not ordinarily require involvement by the Presiding Officer or the Assistant.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with access to evidence requirements. The parties should provide that access in the manner required, and at the time required, as set out in Commission Law, POMs, orders of the Presiding Officer, or otherwise by direction of the Presiding Officer. There is

ordinarily no reason for the Presiding Officer or the Assistant to receive copies or access to that information that is the subject of complying with access to evidence requirements unless a dispute arises as to whether a party is entitled to access to evidence.

c. To avoid unnecessary disputes at trial concerning whether access has been given to certain information, the parties should have procedures to ensure they are able to demonstrate that access has been given to evidence. Because much access to evidence has probably been given before the publication of this POM, it is advisable for the parties to prepare lists of what has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, Docketing Request ORDERS, other ORDERS, or other direction. In the absence of direction by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example in the case of a missed notification, it is professionally courteous to ask opposing counsel to provide the notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that should be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

- (1). A notice requirement was due, and the notice has not been given, despite a reminder.
- (2). Access to evidence was required, and the access was not given, despite a reminder.
- (3). Access was requested and denied by the opposing party.

c. When any of the situations listed in paragraph 7b, or other issues involving access to evidence arise, the party will prepare a *special request for relief* using the format generally as provided in POM #4. The email request to the Presiding Officer, Assistant, opposing counsel, and the Chief Prosecution and Defense and their deputies shall contain the information below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum:

- (1). Style of the case.

(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 has not been received as of the date of the request to the Presiding Officer.

(b). If a party was required to give access and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(c). If counsel requested access and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(d). In every case of required access, or a request for access that was denied, how the documents are necessary and why the requesting party believes the requested evidence is reasonably available. (MCO #1, Section 5H.)

Original Signed by:

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

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 8 - Trial Exhibits

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c).

2. Definitions:

a. Exhibit:

(1). A document or object, appropriately marked, that is presented, given, or shown to the Presiding Officer, other Commission Members, or a witness during a session of the Commission.

(2). A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3). Other documents or objects that the Presiding Officer directs be marked as an exhibit.

b. Prosecution or Defense Exhibits for identification are exhibits sponsored by a party and (1) intended to be considered on the merits or sentencing, if sentencing proceedings are required, but either not yet offered into evidence, or offered into evidence and not received, or (2) not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing if sentencing proceedings are required.

d. Review Exhibits are those exhibits:

(1). Presented to the Presiding Officer or other Commission members for consideration on a matter other than the issue of guilt or innocence, or a sentence if there are sentencing proceedings. Motions, briefs, responses, replies, checklists, and other writings used during motions practice are among the most common form of Review Exhibits.

(2). The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like.

e. Attachments are documents referred in, and attached to, a Review Exhibit. Prosecution and Defense exhibits shall not have pages marked as attachments unless so marked in the original form of the exhibit.

f. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual purpose exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record.
Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits.
Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any exhibit referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any exhibit that is displayed during an open session for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form in which the exhibit shall be included in the record.

d. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, during a session of the Commission, it shall be first shown to the opposing counsel so opposing counsel knows the item and its marking.

4. How exhibits are to be marked. See attachment B.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That *IS* permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: "Let the record reflect that the Prosecution marked, but did not offer or mention, the following Prosecution Exhibits: 3, 6, and 11."

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. PE 1 and 3 for ID are not received. PE 2 for ID is received. Once received, what was PE 2 for ID is PE 2.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offers into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification)]."

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of whether an exhibit has been offered or received. Counsel may, and are encouraged to, confirm with the reporter and the Presiding Officer of the status of an exhibit.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, or the Commission, all exhibits that have been mentioned on the record, offered, or received, and all Review Exhibits, shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer shall secure all exhibits until the next session.

8. Sample form. Counsel are welcome to use the form at attachment A to assist in marking and managing their exhibits.

Original Signed by:

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

Attachment B, Presiding Officers Memorandum # 8, Trial Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	Examples	
	First Page - Single Page Exhibit	Multiple Page Exhibits
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification <i>OR</i> PE 1 for identification <i>OR</i> PE 1 for ID	<i>First page:</i> PE 1 for ID Page 1 of 24 <i>Subsequent pages:</i> 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 <i>OR</i> DE A for identification <i>OR</i> DE A for ID	<i>First page:</i> DE A for ID Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through for Identification <i>OR</i> for ID.	<i>First page:</i> Mark through on first page. <i>Subsequent pages:</i> No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 <i>OR</i> RE 1	<i>First page:</i> RE 1, Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 <i>OR</i> Attachment A to RE 3	<i>First page:</i> Attachment 1 to RE 3, page 1 of 3 <i>Subsequent pages:</i> 2 of 3, 3 of 3.
II. Classified Exhibits		
Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.		
III. Protected Information		
Mark the same as I, adding the words on the first page or cover sheet "Protected Information."		

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Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 9 - Obtaining Protective Orders and Requests for Limited Disclosure

1. This POM addresses Protective Orders and Limited Disclosure pursuant to Section 6D(5), Military Commission Order No. 1. Whether a Protective Order is granted or disclosure is limited is a decision for the Presiding Officer without involvement of other Commission members. See Section 5, Military Commission Instruction # 8 dated 31 August 2004.

2. **Protective Orders - generally.** As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. **When counsel agree to a Protective Order.** Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done by email, or if during the course of a Commission session, in writing.

4. **When counsel do not agree to a Protective Order.** If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order to the Presiding Officer for signature along with the below information in writing. The below information may be transmitted in any format convenient to include in the body of an email:

(1). Why the order is necessary.

(2). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the requested information to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

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c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the Detailed civilian counsel, prior to signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. Limited disclosure requests. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer the following materials. An Order for the Presiding Officer's signature directing limited disclosure that contains the following information:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

Original Signed by:

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

POM 9, Page 2

Review Exhibit 49
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Office of the Presiding Officer
Military Commission

October 4, 2004

**SUBJECT: Presiding Officers Memorandum (POM) # 10 - Witness Requests,
Requests to Depose a Witness, and Alternatives to Live Testimony**

1. This POM governs how counsel may obtain a decision from the Presiding Officer, or the Commission, to obtain witnesses or alternatives to live testimony. It also contains the procedure to request to depose a witness.

2. This POM establishes the procedures for requesting the Commission to produce a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution or the Appointing Authority. While this POM does not stipulate the format *for an initial request to the Prosecution or the Appointing Authority*, it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Commission may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the government, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer or the Commission.

3. A request, or noting that a particular witness is needed (or needs or should be deposed), in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary or should be deposed on a motion or other filing, not only should that be addressed in accordance with POM #4-1, but *the counsel is also required to file a request* in accordance with this POM.

4. If the defense requests, and the prosecution has denied, a defense request, the defense shall within 3 duty days of learning of the government's denial - or when there has been inaction by the government on the request for 3 duty days - submit a "Request for Witness (or a Request for a Deposition)" as outlined below to opposing counsel, the Presiding Officer, and the Assistant. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request (or Request for a Deposition) - [Name of Witness] - US. v. [Name of Case]. Counsel may forward the request either by attachment or in the body of an email. Each of the below items shall be in a separate, numbered paragraph:

a. Paragraph 1: {Style.} A formal document is unnecessary. An attachment or email shall be styled: Witness Request (or Request for a deposition) - [Name of Witness] - US. v. [Name of Case].

b. Paragraph 2: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

c. Paragraph 3: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

d. Paragraph 4: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated?

e. Paragraph 5: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

f. Paragraph 6: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

g. Paragraph 7: Whether the requestor would agree to an alternative to live testimony to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

- (1). Conclusive notice.
- (2). Stipulation of fact.
- (3). Stipulation of expected testimony.
- (4). Telephonic.
- (5). Audio-visual.
- (6). Video taped deposition.
- (7). Video-taped interview.
- (8). Written statement.

h. Paragraph 8: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

i. Paragraph 9 If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by appending a *curriculum vitae* to the request. This

should also include a statement of law as to why the expert is necessary or allowable on the matter in question.

j. Paragraph 10: Other matters necessary to resolution of the request.

5. Action by the government upon receipt of a request - government agreement. If the government and defense agree that the witness should be produced or deposed, the government need not prepare a response to the request. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (conclusive notice, stipulation, or statement), the parties will immediately prepare the agreed upon writing. Once agreement has been reached on the request (and the writing), the prosecution shall notify opposing counsel, the Presiding Officer, and the Assistant that agreement has been reached.

6. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or does not agree to a deposition, or if the government and defense cannot agree on the wording of any writing that will be a substitute, the government will prepare a response within 3 duty days of receiving a request and file it with opposing counsel, the Presiding Officer, and the Assistant. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

7. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 business days before the session in which the witness is first needed to testify.

8. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

9. If the Presiding Officer does not approve the request, the defense shall give notice within 3 duty days if they intend to request the entire Commission to grant the request in accordance with MCO #1, Section 6D(2)(a).

Signed by:

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

POM 11, SUBJECT: "Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation/Interpretation during Commission Trials," is in developmental stages and has not been issued as of 24 Oct 2004.

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Office of the Presiding Officer
Military Commission

October 24, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 12 - Filings Inventory

Note -- On the effective date of this POM, POM 11 was in the developmental stage and had not yet been issued.

1. The Presiding Officer previously adopted a process so that documents (e.g., motions, witness request, other filings) could be filed by email. See POMs 3, 4-2, 6, 7, and 10. This process was adopted because:

- a. Most items filed with the Commission are prepared in electronic form.
- b. Documents not in electronic form can be easily converted into an electronic file.
- c. The counsel, Assistant, members, court reporters, Presiding Officer and those who need to file and receive filings are often in geographically diverse locations.
- d. Electronic filing enables counsel anywhere in the world with email access (to include web based accounts) to make and receive filings.
- e. Service of filings by mail or courier is slow and expensive. Some filings are made to and from Guantanamo Bay, Cuba where service by mail is impractical.
- f. Electronic filing is fast, reliable, efficient and creates an electronic file that can be efficiently and quickly shared with others.
- g. Electronic filing creates and retains a precise record of dates and times on which filings and other actions took place.

2. A problem is that electronic filing enables parties to send emails or "CC" (carbon copy) emails to anyone. If a filing is sent to many, it is sometimes difficult to know who the intended or action recipient is. Similarly, those who receive large numbers of emails may overlook an email that was intended for them specifically.

3. This POM establishes a requirement for the Assistant to maintain a "Filings Inventory" (in progress, prior to the date of this POM, as a "Motions Inventory.") The purpose of the Filings Inventory is to make clear what filings (motions, responses, replies, attachments, and other filings) are before the Presiding Officer or the Commission. The *NOTES* section on previously issued Motions Inventory is superseded by this POM.

POM 12, Page 1

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4. Establishing the Filings Inventory. The Assistant shall establish a Filings Inventory for each case referred to the Commission reflecting those filings pending before the Presiding Officer or the Commission.

a. As soon as the first filing on an issue is received, the Assistant shall assign a *filing designation* with one of 4 below categories followed by a number:

P for a filing or series of filings initiated by the prosecution.

D for a filing or series of filings initiated by the defense.

PO for a filing or series of filings initiated/directed by the Presiding Officer.

C for a filing or series of filings initiated/directed by the Commission as a body.

Other categories may be added at a later time.

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number *EX*: PE2, D4, PO1, C1) shall be unique for each case and the designation shall not be reused.

c. To identify a specific document that was filed, the filing designation may add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned by the Assistant.

d. The Filings Inventory shall also contain a listing of filings that had a designation but are no longer active before the Commission or the Presiding Officer. These items shall be placed in the inactive section of the Filings Inventory.

5. Filing designation and future communications or filings. Once a filing designation has been assigned, all future communications - written or by email - to that series of filings will use the filing designation as a reference. This includes adding the file designations to the style of all filings and the file names to ALL attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "*P2 Jones - Defense Response.*"

* The filename of the attachment in the above email should read "*P2 Jones - Defense Response.*"

* The filename of a document that is an attachment to the response should read "*P2 Jones - Defense Response - attachment - CV of Dr Smith.*"

Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

6. Distribution of the Filings Inventory.

a. As soon as practical after the Assistant receives a filing, the Assistant shall reply advising that the Filings Inventory has been annotated. In the case of a filing that initiates a new issue or motion, the Assistant shall also provide the filing designation.

b. At the request of any party, the Assistant shall provide a copy of the current Filings Inventory as soon as practical.

c. The Assistant shall from time to time, or when directed by the Presiding Officer, distribute copies of the Filings Inventory.

d. The Presiding Officer shall ensure that a copy of the current Filings Inventory is attached at the beginning of each session of the Commission as a Review Exhibit so that parties are free to refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear precisely which filing or issue is being addressed.

7. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure what filings have been received by the Presiding Officer or the Commission, and therefore what matters are pending before the Presiding Officer or the Commission.

a. Counsel will examine each Filings Inventory as it is received and notify the Assistant, Presiding Officer, and opposing counsel of any discrepancies within one duty day.

b. If counsel believe they have submitted a filing that is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Assistant, Presiding Officer, and opposing counsel noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above, the Presiding Officer or the Commission may elect not to consider that filing before the Presiding Officer or the Commission.

8. Filings in the Inactive Section of the Filings Inventory. If a filing is moved to the inactive section of a Filings Inventory due to the decision of the Presiding Officer, and counsel wish that the full Commission review the decision as one that the full Commission is empowered to decide, that counsel shall file a motion to have the Commission consider the matter. (This motion shall receive a new filing designation.) The new filing:

a. Shall contain as an attachment ALL previous filings (and their attachments) by ALL parties on the matter as well as the decision of the Presiding Officer that moved the action to the inactive section of the Filings Inventory.

b. Be styled and filed in accordance with POM 4-2.

c. Contain in the body of the motion that:

(1). The party wishes that the previous and attached (and listed) filings be considered by the entire Commission,

(2). The authority - to include the section of Commission Law if applicable - that indicates the matter is one that the full Commission must or may decide, and

(3). The reasons why the Presiding Officer's actions in moving the action to the inactive section were in error.

d. Responses and replies shall follow the procedure established in POM 4-2 except:

(1). Given the matter has been previously examined by counsel, the time to respond or reply shall be 2 duty days,

(2). Counsel may submit a response in the body of an email if only to say they adopt the matters they previously submitted on the matter before the matter was moved to the inactive section, and

(3). If the response is limited to only adopting matters previously submitted, no reply shall be allowed.

9. Objections to this POM. Counsel who object to the procedures in this POM must do so not later than 3 duty days after the effective date following the procedures in POM 4-2. A notice of motion is not required.

Original Signed by:

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

POM 12, Page 4

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Office of the Presiding Officer
Military Commission

August 31, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 1 – Location of Closed Sessions

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

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

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

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

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

Signed by:

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

CF: All Trial and Defense Counsel:

US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

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

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

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

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

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

John D. Altenburg Jr.
Appointing Authority
for Military Commissions

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Office of the Presiding Officer
Military Commission

September 1, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 2 - Closed Conferences

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

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

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

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

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

Signed by:

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

CF: All Trial and Defense Counsel:

US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

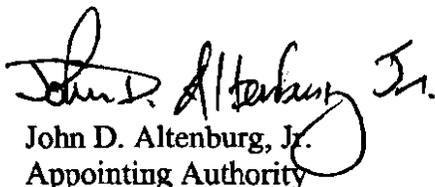
MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for
United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul

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

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

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

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


John D. Altenburg, Jr.
Appointing Authority

for Military Commissions

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Office of the Presiding Officer
Military Commission

September 2, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

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

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

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

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

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

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

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

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

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

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

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

Signed by:

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

CF: All Trial and Defense Counsel:

US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

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

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

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

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

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

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

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Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 4 – Necessary Instructions

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

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

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

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

5. Instructions on Merits.

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

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

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

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

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

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

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

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

6. Instructions on Motions

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

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

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

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

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

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

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

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

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

7. Instructions on sentencing.

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

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

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

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

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

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

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

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

Signed by:

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

CF: All Trial and Defense Counsel:

US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

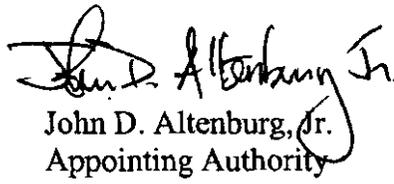
MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for
United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul

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

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

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

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



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

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Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 5 – Role of the Alternate Member

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer “deems appropriate.”
2. Is the instruction at enclosure 1, concerning the participation of the alternate member, correct?
3. Is the instruction (in bold and underlined) at enclosure 2, concerning whether an alternate member may ask questions, correct?
4. Is the law in the instruction at enclosure 3, concerning an alternate member who becomes a member, correct?
5. If an alternate member is not permitted to ask questions or have others do so on his behalf, and the alternate later becomes a member, may this member then recall previous witnesses for the sole purpose of asking questions he could have, but was not allowed to, ask while an alternate member?

Signed by:

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

CF: All Trial and Defense Counsel:

US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

3 Encls

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

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Enclosure 1

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

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

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

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Enclosure 2

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

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

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

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

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

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

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Enclosure 3

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

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

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

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

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

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

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

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

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

John D. Altenburg (Jr.)
Appointing Authority
for Military Commissions

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Office of the Presiding Officer
Military Commission

October 30, 2004

MEMORANDUM FOR COUNSEL in US v. HAMDAN and US v. HICKS

SUBJECT: Necessary Instructions by the Presiding Officer

1. References:

- a. The President's Military Order, 13 November 2001
- b. Military Commission Order # 1, 21 March 2002
- c. Military Commission Instruction #8, 31 August 2004
- d. Memorandum, Presiding Officer to Appointing Authority, Subject: Interlocutory Question #4, dated 2 September 2004
- e. Memorandum, Appointing Authority to Presiding Officer, Subject: Request for Guidance Submitted as "Interlocutory Question 4", dated 6 October 2004

2. Under the PMO, the Commission is charged with deciding all questions of law and fact. The PMO also stated that there would be a Presiding Officer and named functions for the Presiding Officer. One dictionary definition of presiding is "to exercise guidance, direction or control." I have used that definition in creating this memorandum.

3. The requirement to have a judge advocate on the Commission, which is not in conflict with the PMO, was added by the MCO. The MCO also established several other functions for the Presiding Officer, none of which seem to be in conflict with the PMO.

4. The referenced paragraph of MCI#8 requires the Presiding Officer to give necessary instructions to the Commission. The term necessary is not further defined.

5. The primary function of the Commission is to give a full and fair trial to the persons brought before it. The President stated that the military commission would sit as triers of law and fact. Consequently, I have decided that a proper interpretation of the term "necessary" is those instructions which the PMO would require of any commissioned officer, judge advocate or not, who was named the Presiding Officer.

6. I will not instruct the members on the law. Instructions in a prior session, which so stated, will be withdrawn on the record. The members will be asked on the record if they understand that I am not giving them instructions on the law - whether in open or closed sessions or during discussions and/or deliberations.

7. I will participate in all discussions, deliberations and decisions by the Commission on all questions of law and fact. During all discussions, deliberations, and decisions, I will certainly use my knowledge, skill, and training, as will the other members of the Commission.

Peter E. Brownback III
COL, JA
Presiding Officer

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE SUPPLEMENT TO
) DEFENSE REPLIES D34-D38
)
)
)

) 7 November 2004
)
)

1. Timeliness. This supplement is filed in a timely manner based on decision of the Presiding Officer's email notification to the Hamdan Defense Team on 7 November 2004.

2. Matter addressed. The Presiding Officer on behalf of the Commission requests that the Defense team explain the following statements contained in Defenses replies to Prosecutions denial of a request for production of six expert witnesses.

a. Failure to produce (name of particular witness) is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony.

b. That the members could be influenced to rule against the Defense due to possible additional disruption in their professional lives.

The Defense below explains why this language responded to the Prosecution's legal claims. It was an explanation of how concerns as to the appearance of impropriety could be averted on or around 27 October through some logistical scheduling decisions. The comments were directed to the situation as it stood on 27 October and were not intended as arguments to the present. As such, the matter has now been overtaken by events, and the Defense wishes to withdraw the paragraph referred to by the Presiding Officer.

3. Facts

a. On 1 October 2004, the Defense filed motions D15-D23, in conjunction with these motions, the Defense gave notice of its intent to call expert witnesses (now the subject of D34-D38).

b. On 8 October 2004, the Prosecution filed a motion to preclude the above expert testimony as a matter of law.

c. On 18 October 2004, the Defense submitted requests for the production of the above expert witnesses in accordance with POM #10.

d. On 25 October 2004, the Prosecution submitted a response and notice of denial of the Defense's request for the production of expert witnesses.

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e. The Prosecution's Response contained a statement that the Defense was not in compliance with POM #10, because the Defense had not shown law requiring the production of the witness.

f. On 27 October 2004, the Defense submitted the replies to the Prosecution's Response and notice of its intent not to produce the witness.

g. In its reply of 27 October 2004, the Defense answered the Prosecution's assertion that the Defense had not demonstrated a legal requirement for the production of the witness. The Defense's answer to the Prosecution's assertion concluded with the following language: "indeed, the failure to produce Dean Slaughter when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires the Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision."

4. Discussion. The issue of whether to permit the testimony of expert witnesses on the law before this Military Commission has been contentious and confused from the onset. The Defense disagrees with the Commission's assertion that the language in question was an assertion of fact. Rather, the language is rebuttal argument to the Prosecution's assertion that there is no legal requirement for the production of the witnesses. The Defense, from the outset, has argued that the experts in question should have been produced for the upcoming hearings in order to avoid delay if their testimony is judged admissible. The Prosecution, by contrast, believes that the witnesses should not be produced until and unless the Commission determines that their testimony is admissible. It is an inescapable conclusion from the Prosecution's argument that a delay would be necessary were the commission to permit the calling of expert witnesses.

The closing paragraph of the Defense's rebuttal addresses the practical effect of implementing the Prosecution's choice not to produce the witnesses during the 8 November session. The calculated choice referred to is that of the Prosecution's unilateral determination that the witnesses would not be produced. The reference to the effects of delay were directed to point out a looming issue that could be averted by a decision to permit the expert witnesses to be *produced* at Guantanamo on 8 November. Had the commission decided to permit the witnesses to travel to Guantanamo at the time of the 27 October filing, argument as to the admissibility of the expert testimony could have then taken place, and an affirmative decision as to the expert would then have culminated in immediate testimony by the expert. Without the presence of the witnesses during the 8 November session, by necessity, a delay would be inevitable in the legal argument on the motions should the commission permit the testimony of the witnesses.

The very last sentence of the 27 October Reply, on the appearance of prejudice, explains the real-world effect of not permitting the experts to come to the 8 November Session. Nothing in that sentence was meant to suggest, as the Presiding Officer's email today mentioned, that the

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“members could be influenced to rule against the Defense due to possible additional disruption in their professional and personal lives.” Rather, the language was directed to the possibility that, if the witnesses were not present on 8 November, the factual circumstances inherent in the location of Guantanamo would raise a concern about the appearance of impropriety.

It is well settled that when counsel raise questions as to the appearance of impropriety, it is not meant to be an attack on the individual decisionmakers themselves. As the Supreme Court put it in *Young v. United States*, 107 S.Ct. 2124, 2140 (1987), “A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. “[J]ustice must satisfy the appearance of justice.” “As this Court has frequently reiterated . . . the “appearance of impropriety” is viewed not from the client's position, but rather from that of the knowledgeable public.” *Perillo v. Advisory Committee on Professional Ethics*, 416 A. 2d 801, 805 n.1 (N.J. 1980).

For these reasons, even when judges, jurors, and counsel are understood to be acting in a completely lawful and proper manner, appearance of impropriety challenges are accepted. For example, in *Norton v. Tallhassee Mem. Hosp.*, 511 F. Supp. 777, 780 (N.D. Fla. 1981), a Commissioner’s law firm was barred from handling a case “even though the firm handles the case with complete propriety, as we assume it would” because it “would create an appearance of impropriety.” See also *Fresci v. Grand Coal Venture*, 564 F. Supp. 414, 418 n.3 (S.D.N.Y. 1983) (stating that even “proper conduct” can create an appearance of impropriety).

Undersigned counsel fully respect the oaths taken by members of the commission both as Members and as commissioned officers in the United States Armed Forces. Yet we are also aware that the issue of military commissions has the potential to stoke the flames of criticism. Some of that criticism is unwarranted. Our language on 27 October was meant to suggest a way to avoid some of that criticism by producing the witnesses, but not ruling on their admissibility until oral argument on P8. In any event, undersigned counsel recognize that the concern in that motion has now been overtaken by events, and we wish to withdraw the paragraph for those reasons.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Defense Counsel
Office of Military Commissions

Neal Katyal
Civilian Defense Counsel

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

October 27, 2004

MEMORANDUM FOR LIEUTENANT COLONEL [REDACTED] USA
COMMANDER [REDACTED] USN

SUBJECT: Addendum to Detailed Prosecutors Memorandum of July 28, 2004

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated, in addition to those prosecutors named in my July 28, 2004 memorandum, as follows:

United States v. Hicks

Additional Detailed Assistant Prosecutors: Lieutenant Colonel [REDACTED] Commander [REDACTED]

United States v. Hamdan

Additional Detailed Assistant Prosecutor: Lieutenant Colonel [REDACTED]

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [REDACTED]



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

November 5, 2004

MEMORANDUM FOR COMMANDER [REDACTED] USN
LIEUTENANT COLONEL [REDACTED] USMC
CAPTAIN [REDACTED] USA
LIEUTENANT [REDACTED] USN

SUBJECT: Detailed Prosecutors - U.S. v. Hamdan

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No.1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the below named counsel is detailed and designated, in addition to those prosecutors named in my July 28, 2004 and October 27, 2004 memorandums, as follows:

United States v. Hamdan

Additional Detailed Assistant Prosecutor: Lieutenant [REDACTED]

ROBERT L. SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [REDACTED]