

procedures defines most plainly the type of arbitrary and capricious behavior that deprives the commission process of any claim to legitimacy. If the government is free to disregard the rules – which themselves have in large part been created from whole cloth – it has promulgated for this commission, then, in effect there are no rules at all, and such a “system” makes a mockery of the pursuit of justice via fair and impartial proceedings.

Nor can the prosecution hide behind the Supreme Court’s statements in *Madsen v. Kinsella* to justify the government’s arbitrary behavior. Regardless whether or not procedures for one military commission can be altered for a subsequent commission constituted in response to a different armed conflict, once procedures for a specific commission and conflict are established, the government must abide by them.

In this case, systematically excluding officers in the pay grades of O-3 and below constitutes *per se* unlawful command influence. Allowing such influence to invade the commission selection process invalidates all claims the government makes to providing Mr. Hicks with a fair trial. The only adequate remedy is dismissal of all charges.

4. Evidence: The testimony of expert witnesses.
5. Relief Requested: The defense requests that all charges be dismissed.
6. The defense requests oral argument on this motion.

By: _____
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