

**RECORD OF TRIAL
COVER SHEET**

**IN THE
MILITARY COMMISSION
CASE OF**

**UNITED STATES
V.
DAVID M. HICKS**

ALSO KNOWN AS:

**ABU MUSLIM AL AUSTRILI
MUHAMMED DAWOOD**

No. 040001

VOLUME ____ OF ____ VOLUMES

**3RD VOLUME OF REVIEW EXHIBITS (RE): RES 21-34
NOVEMBER 1-3, 2004 SESSIONS
(REDACTED VERSION)**

United States v. David M. Hicks

INDEX OF VOLUMES

[A detailed index for each volume is included within the particular volume concerned]

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 Appointing Authority will certify the records concerning this case. The volumes of the record of trial will receive their final numbering just prior to this certification.

<u>VOLUME NUMBER</u>	<u>SUBSTANCE OF CONTENTS</u>
I*	Military Commission Primary References (President’s Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: <i>Rasul v. Bush</i> , 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950); <i>In re Yamashita</i> , 327 U.S. 1 (1946); <i>Ex Parte Quirin</i> , 317 U.S. 1 (1942); <i>Ex Parte Milligan</i> , 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions, as well as DoD administrative documentation
IV*	Federal Litigation at U.S. Supreme Court and D.C. Circuit, involving <i>Hamdan v. Rumsfeld</i>
V*	Federal Litigation at U.S. District Courts
VI*	Transcript (25 August and 1-3 November 2004 sessions)
VII*	Review Exhibits 1-16 (25 August 2004 session)
VIII*	Review Exhibits 13** -20 (1-3 November 2004 session)
IX*	Review Exhibits 21-34 (1-3 November 2004 session)
X*	Review Exhibits 35 to 77 (1-3 November 2004 Session)

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

** Review Exhibits 13 to 16 were issued at both the Aug. and Nov. 2004 sessions.

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

1ST VOLUME OF REVIEW EXHIBITS

<u>RE 1</u>	Appointment of Military Commission Members, 25 Jun 04	<u>1</u>
<u>RE 2</u>	Presidential Reason to Believe Determination, 3 Jul 03	<u>2</u>
<u>RE 3</u>	Detail of Prosecutors, 28 Jul 04	<u>3</u>
<u>RE 4</u>	Chief Defense Counsel denies request for particular military defense counsel, 13 Aug 04	<u>4</u>
<u>RE 5</u>	Chief Defense Counsel details military defense counsel, 23 Jul 04	<u>6</u>
	<u>RE 5a</u> Chief Defense Counsel describes duties of detailed military defense counsel, 28 Nov 03	<u>7</u>
	<u>RE 5b</u> Chief Defense Counsel details assistant military defense counsel, 28 Jul 04	<u>9</u>
<u>RE 6</u>	Chief Defense Counsel informs civilian defense counsel of authorization to represent accused, 12 Jan 04	<u>10</u>
<u>RE 7</u>	Defense objection to presence of security personnel in hearing room, 23 Aug 04	<u>11</u>
<u>RE 8</u>	Charges referred to trial	<u>13</u>
<u>RE 9</u>	Presiding Officer's Biographical Summary (13 pages)	<u>18</u>
	Written Voir Dire of Presiding Officer	<u>18</u>
	<u>RE 9a</u> From Draft Trial Guide	<u>20</u>
	<u>RE 9b</u> Relationship with other personnel	<u>22</u>
	<u>RE 9c</u> Answers to questionnaire Number 2	<u>24</u>
	<u>RE 9d</u> Relationship with Mr. H_____	<u>26</u>
	<u>RE 9e</u> Military Commissions	<u>28</u>
<u>RE 10</u>	Transcript of Voir Dire from <i>U.S. v. Hamdan</i> hearing (101 pages)	<u>31</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 11</u> Classified Transcript from U.S. v. Hamdan hearing	<u>132</u>
<u>RE 12</u> Nominations for Presiding Officer (1 page)	<u>133</u>
<u>RE 13</u> Responses to Questionnaires from Commission Members	<u>135</u>
<u>RE 13a</u> COL S_____ (13 pages) (sealed)	<u>135</u>
<u>RE 13b</u> COL B_____ (13 pages) (sealed)	<u>148</u>
<u>RE 13c</u> COL B_____ (14 pages) (sealed)	<u>161</u>
<u>RE 13d</u> LtCol T_____ (13 pages) (sealed)	<u>175</u>
<u>RE 14</u> Instructions delivered to commission members prior to start of hearing (7 pages)	<u>201</u>
<u>RE 15</u> Defense request for continuance, 20 Aug 04 (21 Pages)	<u>208</u>
<u>RE 15a</u> Motion (4 pages)	<u>208</u>
<u>RE 15b</u> DoD Statement on Defense Detainee Meetings, 23 Jul 03 (1 page)	<u>212</u>
<u>RE 15c</u> DoD Statement on Australian Detainee Meetings, 23 Jul 03 (2 pages)	<u>213</u>
<u>RE 15d</u> DoD Statement on U.S. and Australian Agreements on Detainees, 25 Nov 03 (2 pages)	<u>215</u>
<u>RE 15e</u> Memorandum from BG Hemingway to MAJ Mori DoD assurances to Australia about right to civilian counsel and right to defense counsel assistance, 3 December 2003 (1 page)	<u>217</u>
<u>RE 15f</u> Transcript from Australian Legal and Constitutional Legislation Committee, 16 Feb 04 (7 pages)	<u>218</u>
<u>RE 15g</u> Article—Five British Detainees to go Home, 19 Feb 04 (2 pages)	<u>225</u>
<u>RE 15h</u> Article—British Official Rips U.S. Guantanamo Plan,	<u>227</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
24 Jun 04 (1 page)	
<u>RE 15i</u> Article—Blair Says Talks Continuing Over Guantanamo Britons, 30 Jun 04 (1 page)	<u>228</u>
<u>RE 16</u> Prosecution Response to Defense Request for Continuance, 24 Aug 04 (3 pages)	<u>229</u>
<u>RE 16a</u> Article—Prime Minister Says He’s Satisfied Guantanamo Bay Offers Australian Style Justice, 23 Aug 04 (2 pages)	<u>232</u>
<u>RE 16b</u> Talking Points—Protective Order (1 page)	<u>234</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

2ND VOLUME OF EXHIBITS

REVIEW EXHIBITS FROM NOVEMBER 2004 SESSION

Description of Exhibit **PAGE No.**

<u>RE 13</u> Defense motion to present expert testimony and opinions pertaining to the law of war	<u>1</u>
<u>RE 13a</u> Prosecution filing (5 pages)	<u>1</u>
<u>RE 13b</u> Defense filing (7 pages)	<u>6</u>
<u>RE 13c</u> Prosecution reply (3 pages)	<u>13</u>
<u>RE 14</u> Defense motion to preclude Presiding Officer or assistant from providing to the Commission legal advice or instruction on the law	<u>16</u>
<u>RE 14a</u> Defense filing (4 pages)	<u>16</u>
<u>RE 14b</u> Prosecution filing (7 pages)	<u>20</u>
<u>RE 14c</u> Defense withdraws motion (1 page)	<u>29</u>
<u>RE 15</u> Defense motion to dismiss charges because there is no jurisdiction	<u>30</u>
<u>RE 15a</u> Defense filing (3 pages-not including attachments)	<u>30</u>
Attachment 1-1949 Geneva Convention, Articles 1-2 (1 page)	<u>33</u>
Attachment 2-Protocol II (1977) to 1949 Geneva Convention, Articles 1-2 (1 page)	<u>34</u>
Attachment 3-U.S. Department of State; Profile. "Background Note: Afghanistan" (August 2004) (14 pages)	<u>35</u>
Attachment 4-BBC News, "Karzai takes power in Kabul" (22 December 2001) (2 pages)	<u>49</u>
Attachment 5-CNN, "Whitbeck: Afghanistan Historic Day" (22 December 2001) (1 page)	<u>51</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

<u>Description of Exhibit</u>	<u>PAGE No.</u>
<u>RE 15b</u> Prosecution filing (7 pages)	<u>52</u>
<u>RE 15c</u> Defense Reply (4 pages)	<u>59</u>
<u>RE 16</u> Defense motion to dismiss because accused was subjected to improper pretrial restraint under international law	<u>63</u>
<u>RE 16a</u> Defense filing (6 pages-not including attachments)	<u>63</u>
Attachment 1—Canadian Constitution Article 1982 (1), Part I (2 pages)	<u>69</u>
Attachment 2—Universal Declaration of Human Rights, Preamble and Articles 1-13 (3 pages)	<u>71</u>
Attachment 3—Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11; Articles 1-5 (4 pages)	<u>74</u>
Attachment 4—American Convention on Human Rights, “Pact of San Jose, Costa Rica” Preamble and Articles 1-7 (4 pages)	<u>80</u>
Attachment 5—International Covenant on Civil and Political Rights, Articles 9 and 14 from Office of the High Commissioner for Human Rights (4 pages)	<u>83</u>
Attachment 6—Executive Order 13107 “Implementation of Human Rights Treaties” (1998), Sections 1-2 (1 page)	<u>86</u>
Attachment 7—Manfred Nowak, United Nations Covenant on Civil and Political Rights: CCPR Commentary (1993), p. 172 “Liberty and Security of Persons” (1 page)	<u>87</u>
Attachment 8—U.S. Department of Defense News Briefing, Secretary of Defense Interview (21 March 2002) (8 pages)	<u>88</u>
Attachment 9—United States Government Letter to the United Nations (2 April 2003), Civil and Political Rights, Including the Questions of: Torture and Detention, Letter is addressed to the United Nations Office at Geneva, Secretariat of the Commission on Human Rights (5 pages)	<u>96</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Attachment 10—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 75 (3 pages)	<u>101</u>
Attachment 11—United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32 Resolution 43/173 (9 December 1988) (2 pages)	<u>104</u>
Attachment 12—Human Rights Committee, “Torres v. Finland,” Communication No. 291/1988 : Finland. (5 April 1990); CCPR/C/38/D/29 1/1988 (Jurisprudence) (5 pages)	<u>106</u>
Attachment 13—Inter-American Commission on Human Rights, “The Situation of Human Rights in Cuba, Seventh Report” (4 October 1983) (2 pages)	<u>111</u>
Attachment 14—European Court of Human Rights, "Brogan and Others v. The United Kingdom" (29 November 1988) (2 pages)	<u>113</u>
Attachment 15--General Comment 13, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Document, Human Rights Instrument (12 May 2004) (6 pages)	<u>115</u>
Attachment 16—Claude Pilloud et al, Commentary on the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949 (1987) (3 pages)	<u>121</u>
Attachment 17—Secretary of Defense, Interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002 (3 pages)	<u>124</u>
Attachment 18—General Comment 8, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/I/Rev.7 (12 May 2004) (3 pages)	<u>127</u>
<u>RE 16b</u> Prosecution filing (9 pages)	<u>130</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 16c</u> Defense Reply (4 pages)	<u>139</u>
<u>RE 17</u> Defense motion to dismiss because accused is located in Guantanamo, Cuba	<u>145</u>
<u>RE 17a</u> Defense filing (3 pages-not including attachments)	<u>145</u>
Attachment 1—William Winthrop, “Military Law and Precedent,” Vo1. 2 (1896) p. 836 (2 pages)	<u>148</u>
Attachment 2— <i>In re Yamashita</i> , 327 U.S. 1, 10 (1946) (2 pages)	<u>150</u>
<u>RE 17b</u> Prosecution filing (9 pages)	<u>152</u>
Attachment 1—Memorandum for the Presiding Officer, dated 5 October 2004, Subject: Request for authority submitted as “Interlocutory Question 1” by Appointing Authority (1 page)	<u>158</u>
Attachment 2--Remarks as Delivered by Secretary of Defense Rumsfeld, October 4,2004 (4 pages)	<u>159</u>
<u>RE 18</u> Defense motion for bill of particulars	<u>163</u>
<u>RE 18a</u> Defense filing (2 pages)	<u>163</u>
<u>RE 18b</u> Prosecution filing (6 pages)	<u>165</u>
<u>RE 18c</u> Defense Reply (3 pages)	<u>171</u>
<u>RE 19</u> Defense motion to dismiss because accused was denied his right to a speedy trial	<u>174</u>
<u>RE 19a</u> Defense filing (6 pages-not including attachments)	<u>174</u>
Attachment 1—International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49; Articles 9 & 14 (4 pages)	<u>180</u>
Attachment 2—Protocol Additional to the Geneva	<u>184</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (3 pages)	
Attachment 3—Commander, Naval Legal Service Command Instruction, 5800(1)(E) (19 Feb 2002) (2 pages)	<u>187</u>
Attachment 4—“Senators Urge Decision on Disposition of Guantanamo Detainees,” (12 Dec 2003) (1 page)	<u>189</u>
Attachment 5—“Guantanamo Trials Coming Too Slowly, Says McCain after Visit,” USA Today (1 Dec 2003) (2 pages)	<u>190</u>
Attachment 6—DoD News Release, “DOD Statement on Australian Detainee Meetings” (23 Jul 2003) (1 page)	<u>192</u>
Attachment 7—DoD News Release, “U.S. and Australia Announce Agreements on Guantanamo Detainees” (25 Nov 2003) (2 pages)	<u>193</u>
Attachment 8—Defense Motion for Access to Counsel in Rasul et al v. Bush et al, in the United States District Court, District of Columbia (4 March 2002) (3 pages)	<u>195</u>
Attachment 9—Letter from Stephen Kenny, addressed to President George W. Bush (18 Feb 2002) (2 pages)	<u>198</u>
Attachment 10—DoD News Release, “Transfer of French Detainees Complete” (27 July 2004) (1 page)	<u>200</u>
<u>RE 19b</u> Prosecution filings (8 pages)	<u>201</u>
Attachment 1-Secretary of Defense Speech to Council on Foreign Relations (4 Oct 2004) (4 pages)	<u>209</u>
<u>RE 20</u> Defense motion to dismiss because accused was denied access to defense counsel, lack of access to evidence, and lack of adequate facilities	<u>213</u>
<u>RE 20a</u> Defense filing (6 pages-not including attachments)	<u>213</u>
Attachment 1—International Covenant on Civil and Political Rights, Article 14 (3 pages)	<u>219</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Attachment 2—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Prosecution of Victims of international Armed Conflicts, Article 75 (3 pages)	<u>222</u>
Attachment 3—UN Human Rights Committee, “General Comment No. 13” (12 May 2004) (6 pages)	<u>225</u>
Attachment 4—Rome Statute of International Criminal Court, Article 66 (1 page)	<u>231</u>
Attachment 5—President Bush, Meeting with Afghan Interim Authority Chairman, the Whitehouse, 28 January 2002 (6 pages)	<u>232</u>
Attachment 6—Joint Press Conference with Tony Blair at the British Embassy in Washington D.C., 17 July 2003 (10 pages)	<u>238</u>
Attachment 7—CNN, “Ashcroft Defends Detainees’ Treatment,” 20 January 2002	<u>248</u>
Attachment 8—“Britain and US in Rift Over Terrorist Prisoners,” The Daily Telegraph, 21 January 2002 (3 pages)	<u>251</u>
Attachment 9—“Rumsfeld visits, thanks US troops at Camp X-ray in Cuba,” American Forces Information Service, 27 January 2002 (3 pages)	<u>254</u>
Attachment 10--DoD News Transcript, “Secretary Rumsfeld Interview with The Telegraph,” 23 February 2002 (1 page)	<u>257</u>
Attachment 11—Fox News, “Rumsfeld: Afghan Detainees at Gitmo Bay Will Not Be Granted POW Status,” 28 January 2002 (3 pages)	<u>258</u>
Attachment 12—DoD News Briefing, “ASD PA Clarke and Rear Adm. Stufflebeem, 28 January 2002 (1 page)	<u>261</u>
Attachment 13—Human Rights Committee, “Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human	<u>262</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Rights Committee: Georgia” (1997)	
Attachment 14—Commission on Human Rights, “Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers” (1998) (2 pages)	<u>267</u>
Attachment 15—International Criminal Tribunal for the Former Yugoslavia, Rules and Procedures of Evidence (5 pages)	<u>269</u>
Attachment 16—International Criminal Tribunal for Rwanda, Rules and Procedures of Evidence (4 pages)	<u>274</u>
Attachment 17—United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (4 pages)	<u>278</u>
Attachment 18—United Nations Basic Principles on the Role of Lawyers (2 pages)	<u>282</u>
Attachment 19—DoD News Transcript, “Rumsfeld Interview Interview with KSTP-ABC, St Paul, Minn” (1 page)	<u>284</u>
Attachment 20—Claude Pilloud et al, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949 (1987) (4 pages)	<u>285</u>
<u>RE 20b</u> Prosecution filing (7 pages)	<u>289</u>
<u>RE 20c</u> Defense Reply (3 pages)	<u>297</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

3RD VOLUME OF REVIEW EXHIBITS

<u>RE 21</u> Defense motion to dismiss Charge I because destruction of property of an unprivileged belligerent is not a violation of the law of war	<u>1</u>
<u>RE 21a</u> Defense filing (3 pages-not including attachments)	<u>1</u>
Attachment 1—International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49—Article 15 (2 pages)	<u>4</u>
Attachment 2—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 75 (3 pages)	<u>6</u>
<u>RE 21b</u> Prosecution filing (10 pages)	<u>9</u>
<u>RE 21c</u> Prosecution proposed findings (1 page)	<u>19</u>
<u>RE 22</u> Defense motion to dismiss because the Appointing Authority lacks authority to appoint a military commission as he is not a general court-martial convening authority	<u>20</u>
<u>RE 22a</u> Defense filing (4 pages-not including attachments)	<u>20</u>
Attachment 1—Winthrop, “Military Law and Precedent” Vol. 2, 2 ND Ed., page 835 (2 pages)	<u>24</u>
Attachment 2—Attorney General James Speed, “The Opinion of the Attorney General Affirming the Legality of Using a Military Commission to Try the Conspirators” (1865) (12 pages)	<u>26</u>
<u>RE 22b</u> Prosecution filing (6 pages)	<u>38</u>
<u>RE 23</u> Defense motion to dismiss Charge I because conspiracy is not a valid offense under the law of war or international criminal law	<u>44</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 23a</u> Defense filing (3 pages-not including attachments)	<u>44</u>
Attachment 1—Convention on the Prevention and Punishment of the Crime of Genocide, Articles 1 and 9 (2 pages)	<u>47</u>
Attachment 2—Statute of the International Tribunal for the Former Yugoslavia (1993), Article 4 (2 pages)	<u>49</u>
Attachment 3—Statute of the International Tribunal for Rwanda (1994), Article 2 (2 pages)	<u>51</u>
Attachment 4—Cassese, “International Criminal Law,” 2003, p. 191 (2 pages)	<u>53</u>
<u>RE 23b</u> Prosecution filing (12 pages)	<u>55</u>
<u>RE 23c</u> Defense Reply (5 pages)	<u>67</u>
<u>RE 23d</u> Prosecution proposed findings (1 page)	<u>72</u>
<u>RE 24</u> Defense motion to dismiss Charge II because attempted murder of Members of coalition forces does not violate the law of war and therefore is not triable by military commission	<u>76</u>
<u>RE 24a</u> Defense filing (3 pages)	<u>76</u>
<u>RE 24b</u> Prosecution filing (13 pages)	<u>79</u>
<u>RE 24c</u> Defense Reply (4 pages)	<u>92</u>
<u>RE 24d</u> Prosecution proposed findings (1 page)	<u>96</u>
<u>RE 25</u> Defense motion to dismiss Charge III because aiding the enemy is not a valid offense as the accused no allegiance to the United States or her allies	<u>97</u>
<u>RE 25a</u> Defense filing (4 pages-not including attachments)	<u>97</u>
Attachment 1—Australian Crimes Act of 1914, Section 24 (3 pages)	<u>101</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Attachment 2—Australian Defense Force Discipline Act 1982, Sections 15 and 16 (6 pages)	<u>104</u>
Attachment 3—Australian Security Legislation Amendment (Terrorism) Act 2002, Schedule 1 (4 pages)	<u>110</u>
Attachment 4—Senate Legal and Constitutional Legislation Committee, "Estimates," 16 February 2004, Canberra, Australia (3 pages)	<u>114</u>
Attachment 5—Australian Crimes (Foreign Incursions and Recruitment) Act 1978, Sections 6-7 (5 pages)	<u>117</u>
<u>RE 25b</u> Prosecution filing (11 pages)	<u>122</u>
<u>RE 25c</u> Defense Reply (2 pages)	<u>133</u>
<u>RE 25d</u> Prosecution proposed findings (2 pages)	<u>135</u>
<u>RE 26</u> Defense motion to dismiss all charges because the Appointing Authority excluding lower ranking military personnel from the panel	<u>137</u>
<u>RE 26a</u> Defense filing (3 pages-not including attachments)	<u>137</u>
Attachment 1—Memorandum from DoD General Counsel of 20 Dec 02 (2 pages)	<u>140</u>
Attachment 2—Services nominations of commission members (8 pages)	<u>142</u>
Attachment 3—Letter from the Legal Advisor of 25 Jun 04 (3 pages)	<u>150</u>
Attachment 4—Nine pages of nominated personnel (9 pages)	<u>153</u>
<u>RE 26b</u> Prosecution filing (5 pages)	<u>162</u>
<u>RE 26c</u> Defense Reply (2 pages)	<u>167</u>
<u>RE 26d</u> Prosecution power point slides used to argue the motion (7 pages)	<u>169</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 27</u> Defense motion to exclude conduct from the charges preceding start of international armed conflict in Afghanistan on 7 October 2001	<u>176</u>
<u>RE 27a</u> Defense filing (2 pages-not including attachments)	<u>176</u>
Attachment 1—Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Article 2 (1 page)	<u>178</u>
<u>RE 27b</u> Prosecution filing (11 pages)	<u>179</u>
<u>RE 27c</u> Defense Reply (5 pages)	<u>190</u>
<u>RE 28</u> Defense motion to dismiss charges because the President lacks authority under domestic or international law to conduct commissions	<u>195</u>
<u>RE 28a</u> Defense filing (5 pages-not including attachments)	<u>195</u>
Attachment 1—Neal K. Katyal and Lawrence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals (2002), page 1284 (2 pages)	<u>200</u>
Attachment 2—International Covenant on Civil and Political Rights, Article 14(1) (2 pages)	<u>202</u>
Attachment 3—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 75 (2 pages)	<u>204</u>
Attachment 4—American Declaration on the Rights and Duties of Man, Article XXVI (2 pages)	<u>206</u>
Attachment 5—Coeme and Others v. Belgium, European Court of Human Rights (2000), para. 98 (2 pages)	<u>208</u>
<u>RE 28b</u> Prosecution filing (12 pages)	<u>210</u>
<u>RE 28c</u> Defense Reply (3 pages)	<u>222</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 29</u> Defense motion to dismiss charges because the President limited jurisdiction of commissions to non-citizens, which violates equal protection of law	<u>225</u>
<u>RE 29a</u> Defense filing (8 pages-not including attachments)	<u>225</u>
Attachment 1—Geneva Convention for the Amelioration the Condition of the Wounded and the Sick in Armed Forces in the Field, Article 49 (2 pages)	<u>233</u>
Attachment 2—Jean S. Pictet (ed), Commentary - III Geneva Convention Relative to the Treatment of Prisoners of War (1960), p. 623 (2 pages)	<u>235</u>
Attachment 3—International Covenant on Civil and Political Rights, Articles 2 and 14 (3 pages)	<u>237</u>
Attachment 4—David Glazier, Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission, pages 2027 and 2030, Univ of Virginia (3 pages)	<u>240</u>
Attachment 5—Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] International Court of Justice (3 pages)	<u>243</u>
<u>RE 29b</u> Prosecution filing (9 pages)	<u>246</u>
<u>RE 29c</u> Defense Reply (3 pages)	<u>255</u>
<u>RE 30</u> Defense motion to strike the word “terrorism” from Charge I because terrorism is not an offense under the laws of war	<u>258</u>
<u>RE 30a</u> Defense filing (4 pages-not including attachments)	<u>258</u>
Attachment 1—International Covenant on Civil and Political Rights, Article 15 (2 pages)	<u>262</u>
Attachment 2—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 75 (3 pages)	<u>264</u>
Attachment 3—Daryl A. Mundis, “Prosecuting International	<u>267</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Terrorists,” Terrorism and International Law: Challenges and Responses, pp. 85-95 (2003) (11 pages)	
Attachment 4—David Stoelting, “Military Commissions and Terrorism,” 31 Denver Journal International and Policy 427 (2003) (6 pages)	<u>278</u>
Attachment 5—Rome Statute of the International Criminal Court, Article 8 -War Crimes (5 pages)	<u>284</u>
Attachment 6—U.S. State Department, “Patterns of Global Terrorism” (2000) (2 pages)	<u>289</u>
<u>RE 30b</u> Prosecution filing (10 pages)	<u>291</u>
<u>RE 30c</u> Defense Reply (4 pages)	<u>301</u>
<u>RE 30d</u> Prosecution proposed findings (1 pages)	<u>305</u>
<u>RE 31</u> Defense motion to dismiss the charges because the Presiding Officer should be more like a military judge and the rules of evidence from courts-martial should be used	<u>306</u>
<u>RE 31a</u> Defense filing (8 pages-not including attachments)	<u>306</u>
Attachment 1—United Nations Supplemental Rules of Criminal Procedure for Military Commission of the United Nations Command, Korea (1953) (7 pages)	<u>314</u>
<u>RE 31b</u> Prosecution filing (7 pages)	<u>321</u>
<u>RE 32</u> Defense objection to the structure and composition of the commission	<u>328</u>
<u>RE 32a</u> Defense filing-includes same request made to Appointing Authority, and Appointing Authority’s decision (7 pages)	<u>328</u>
<u>RE 32b</u> Prosecution filing (9 pages)	<u>335</u>
<u>RE 33</u> Defense request for a continuance until negotiations are completed with the British Government	<u>344</u>
<u>RE 33a</u> Defense filing (4 pages)	<u>344</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

<u>Description of Exhibit</u>	<u>PAGE No.</u>
<u>RE 33b</u> Prosecution filing (3 pages)	<u>348</u>
<u>RE 33c</u> Presiding Officer denies request for continuance (1 page)	<u>352</u>
<u>RE 34</u> Defense request for a continuance until Professor Schmidt is available to travel to Guantanamo (2 pages)	<u>352</u>
<u>RE 34a</u> Defense filing (2 pages-not including attachments)	<u>351</u>
Attachment 1—Appointing Authority approval of Mr. Schmitt of 19 July 2004 (1 page)	<u>354</u>
Attachment 2—Request by Col Gunn to Appointing Authority for Mr. Schmitt of 21 September 2004 (1 page)	<u>355</u>
Attachment 3—Approval by the Appointing Authority of 5 October 2004 (1 page)	<u>357</u>
Attachment 4—Email from Col Gunn to Dean of Marshall Center of 15 October 2004 and reply from Dean to Col Gunn of 20 October 2004 (2 pages)	<u>358</u>
<u>RE 34b</u> Prosecution filing (2 pages)	<u>360</u>
<u>RE 34c</u> Presiding Officer decision (1 page)	<u>362</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

4TH VOLUME OF REVIEW EXHIBITS

<u>RE 35</u> Defense request that entire commission grant production of Professor Bassiouni to provide testimony at Guantanamo Professor Bassiouni's affidavit is at RE 62	<u>1</u>
<u>RE 35a</u> Defense filing (3 pages)	<u>1</u>
<u>RE 35b</u> Prosecution filing (1 page)	<u>4</u>
Attachment 1—CV of Mr. Bassiouni (2 pages)	<u>5</u>
<u>RE 36</u> Defense request that entire commission grant production of Professor Schmidt to provide testimony at Guantanamo [RE 40 Below has details]	<u>7</u>
<u>RE 37</u> Defense request that entire commission grant production of Professor Cassese to provide testimony at Guantanamo Professor Cassese's affidavit is at RE 60	<u>8</u>
<u>RE 37a</u> Defense filing (4 pages)	<u>8</u>
Attachment 1—CV of Professor Cassese (3 pages)	<u>12</u>
<u>RE 37b</u> Presiding Officer denies production of Professor Cassese (1 page)	<u>15</u>
<u>RE 37c</u> Defense request that entire commission grant production of Professor Paust to provide testimony at Guantanamo (2 pages)	<u>16</u>
<u>RE 37d</u> Presiding Officer denies production of Professor Paust	<u>18</u>
Attachment 1—CV of Professor Paust (26 pages)	<u>19</u>
<u>RE 38</u> Defense request that entire commission grant production of Professor McCormack to provide testimony at Guantanamo RE 59 is Professor McCormack's affidavit	<u>44</u>
<u>RE 38a</u> Defense filing (3 pages)	<u>44</u>
Attachment 1—CV of Professor McCormack (14 pages)	<u>47</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 38b</u> Presiding Officer denies production of Professor McCormack (1 page)	<u>61</u>
<u>RE 39</u> Defense request that entire commission grant production of Professor Edwards to provide testimony at Guantanamo Professor Edwards' affidavit is RE 61	<u>62</u>
<u>RE 39a</u> Defense filing (4 pages)	<u>62</u>
Attachment 1—CV of Professor Edwards (16 pages)	<u>66</u>
<u>RE 39b</u> Presiding Officer denies production of Professor Edwards (1 page)	<u>82</u>
<u>RE 40</u> Defense request that entire commission grant production of Professor Schmidt to provide testimony at Guantanamo Professor Schmidt's affidavit is RE 63	<u>83</u>
<u>RE 40a</u> Defense filing (4 pages)	<u>83</u>
Attachment 1—CV of Professor Schmidt (2 pages)	<u>87</u>
<u>RE 40b</u> Government recommends denial of production of Professor Schmidt (1 page)	<u>89</u>
<u>RE 40c</u> Presiding Officer recommends denial of production of Professor Schmidt (1 page)	<u>90</u>
<u>RE 41</u> Interlocutory Question No. 1-Recommendation of Presiding Officer that closed sessions be held without accused being present—this would also permit sessions outside Guantanamo	<u>91</u>
<u>RE 41a</u> Presiding Officer request (1 page)	<u>91</u>
<u>RE 41b</u> Appointing Authority decision (1 page)	<u>92</u>
<u>RE 42</u> Defense counsel objects to Interlocutory Question No. 1 & 2-closed sessions without full commission and closed sessions not held at Guantanamo (2 pages) [same as RE 44]	<u>93</u>
<u>RE 43</u> Presiding Officer's request styled as Interlocutory Question No. 2—request to hold sessions outside Guantanamo and by conference calls (1 page)	<u>95</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
Attachment 1—CV of Professor Schmidt (1 page)	<u>96</u>
<u>RE 44</u> Defense counsel objects to Interlocutory Question No. 1 & 2-closed sessions without full commission and closed sessions not held at Guantanamo (2 pages) [same as RE 42]	<u>97</u>
<u>RE 45</u> Presiding Officer submits Interlocutory Question No. 3--Seeks clarification of the process for deciding motions and the procedure for forwarding interlocutory questions	<u>99</u>
<u>RE 45a</u> Presiding Officer request (2 pages)	<u>99</u>
<u>RE 45b</u> Appointing Authority decision (1 page)	<u>101</u>
<u>RE 46</u> Defense counsel input to Interlocutory Question No. 3--Objects to Presiding Officer’s proposal to change the process for deciding motions and the procedure for forwarding interlocutory questions (2 pages)	<u>102</u>
<u>RE 47</u> Presiding Officer submits Interlocutory Question No. 4--Seeks clarification of when the Presiding Officer should provide instruction to the commission members (4 pages)	<u>104</u>
Attachment 1—Appointing Authority decision (1 page)	<u>108</u>
<u>RE 48</u> Presiding Officer submits Interlocutory Question No. 5--Seeks clarification of when alternate member must be replaced (4 pages)	<u>109</u>
Attachment 1—Appointing Authority decision (1 page)	<u>113</u>
<u>RE 49</u> Defense counsel’s comments on Interlocutory Question No. 5-- Defense objects to Presiding Officer’s proposal—also asserts that changes to detriment of accused are impermissible ex post facto changes (1 page)	<u>114</u>
<u>RE 50</u> Appointing Authority decisions on challenges for cause of Presiding Officer and Commission members (28 pages)	<u>115</u>
<u>RE 51</u> Filings Inventory as of Nov 04 (12 pages)	<u>143</u>
<u>RE 52</u> Presiding Officer Memoranda (40 pages)	<u>155</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
1-1 Presiding Officers Memoranda	<u>156</u>
2-1 Appointment and Role of the Assistant to the Presiding Officers	<u>157</u>
3 Communications, Contact, and Problem Solving	<u>160</u>
4-2 Motions Practice	<u>162</u>
5 Spectators to Military Commissions	<u>170</u>
6-1 Requesting Conclusive Notice to be Taken	<u>173</u>
7 Access to Evidence and Notice Provisions	<u>176</u>
8 Trial Exhibits	<u>179</u>
9 Obtaining Protective Orders and Requests for Limited Disclosure	<u>185</u>
10 Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony	<u>187</u>
11 In development: Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation and Interpretation during Commission Trials	<u>190</u>
12 Filings Inventory	<u>191</u>
<u>RE 53</u> Presiding Officer letter to counsel after request for clarification of instruction to Appointing Authority was denied	<u>195</u>
<u>RE 54-A</u> Defense motion to declare the Commission improperly constituted because of absence of alternate member (4 pages)	<u>196</u>
<u>RE 55-A</u> Defense motion to dismiss the charges because the government has not respected the agreement with Australia (3 pages)	<u>200</u>
<u>RE 56</u> Exhibit Not Used	<u>203</u>
<u>RE 57</u> Chief Prosecutor details prosecutor for Hicks case (1 page)	<u>204</u>
<u>RE 58</u> The Conduct of Hostilities under the Law of International Conflict	<u>205</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
By Yoram Dinstein [cover, pages 28-30 & 233-237] (10 pages)	
<u>RE 59</u> Affidavit of Professor McCormack (6 pages); The related request is at RE 38	<u>215</u>
<u>RE 60</u> Affidavit of Professor Cassese (4 pages)—related request is at RE 37	<u>221</u>
<u>RE 61</u> Affidavit of Professor Edwards (53 pages); The related request is at RE 39	<u>225</u>
<u>RE 62</u> Affidavit of Professor Bassiouni (13 pages); The related request is at RE 62	<u>278</u>
<u>RE 63</u> Affidavit of Professor Schmidt (14 pages); The related request is at RE 40.	<u>291</u>
<u>RE 64</u> Extract from Nazi Saboteur Commission Volume I (3 pages)	<u>305</u>
<u>RE 65</u> Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2 pages)	<u>308</u>
<u>RE 66</u> Extract from Nuremburg Trial Commentary, page 225 (1 page)	<u>310</u>
<u>RE 67</u> Charter of the International Military Tribunal, Article 6 (1 page)	<u>311</u>
<u>RE 68</u> Security Council condemnation of terrorist attacks on United Functions and Powers of General Assembly	<u>312</u>
Main Committees	<u>324</u>
Frequently asked questions	<u>325</u>
<u>RE 69</u> Extract of U.N. document on war crimes (4 pages)	<u>326</u>
<u>RE 70</u> William Winthrop, “Military Law and Precedent,” Vol. 2 (1896) p. 836-37 (2 pages)	<u>331</u>
<u>RE 71</u> Defense request for trial date of 15 March 2005 (3 pages)	<u>331</u>
<u>RE 72</u> Stipulation of fact regarding accused’s Combatant Status Review (1 page)	<u>337</u>
	<u>340</u>

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit	PAGE No.
<u>RE 73</u> Presiding Officer's order on discovery (2 pages)	<u>341</u>
<u>RE 74</u> Defense proposed findings on removal of word, "terrorism" from Charges (1 page)	<u>343</u>
<u>RE 75</u> Defense proposed findings on motion to dismiss Charge III aiding the enemy (1 page)	<u>344</u>
<u>RE 76</u> Defense proposed findings on motion to dismiss Charge II because the law of war does not recognize murder by an unprivileged belligerent as an offense (1 page)	<u>345</u>
<u>RE 77</u> Defense proposed findings on motion to strike destruction of property by an unprivileged belligerent	<u>346</u>

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
DISMISS CHARGE 1 OFFENSE
OF "DESTRUCTION OF
PROPERTY BY AN
UNPRIVILEGED
BELLIGERENT"**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves to strike the words and charges of "destruction of property by an unprivileged belligerent" (as an object of the alleged conspiracy) from Charge 1, and states in support of this motion:

1. **Synopsis:** Charge 1 alleges, *inter alia*, that Mr. Hicks conspired to destroy property (that is not otherwise identified) while he did not enjoy combatant immunity. Assuming *arguendo* that Mr. Hicks engaged in such conduct, it would not constitute a violation of the law of war. Therefore, that portion of Charge 1 fails to state an offense that can be tried by military commission, and must be stricken from the charges.

2. **Facts:** Military Commission Instruction No. 2 (MCI 2), which first defined the "offense" of "destruction of property by an unprivileged belligerent" was published *after* Mr. Hicks's alleged charged conduct was performed, and even after he was taken into custody by the United States.

3. **Discussion:**

A: Destruction of Property by an Unprivileged Belligerent Is Not a War Crime

It is not a violation of the **law of war** for an unprivileged combatant to destroy property.¹ Combatants are granted "immunity" from prosecution for acts such as deliberately destroying a building or bridge, so long as the property is a legitimate military target. Unprivileged combatants, on the other hand, do not enjoy "combatant immunity," and, can be prosecuted for destruction of property. However, such prosecution may not be before a military commission. The proper forum in which to try an unprivileged combatant for destroying property is the same as that for other crimes against property which are not violations of the laws of war--the civilian criminal court of the State in which the offense occurred.

Alleged crimes occurring in the armed conflict which do not violate the law of war are subject to prosecution only in the civilian criminal courts regardless of the person's status under the law of war as a privileged combatant, unprivileged combatant, or civilian. Thus, there is not any law of war or statutory basis for the crime of "destruction of property by an unprivileged belligerent"

¹ It would be a crime under the law of war for an unprivileged combatant to destroy property that the law of war prohibits from being destroyed: attacking buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected. However such actions would be triable by a military commission *not* because of the status of the *attacker* as an unprivileged combatant, but because the *acts themselves* are violations of the law of war. Charge 1 does not allege that Mr. Hicks engaged in such conduct proscribed by the law of war; conversely, the vague and conclusory allegations Charge 1 does make with respect to the destruction of property are not found within, or chargeable or punishable under, the law of war.

RE 21-A
Page 1 of 3

war or statutory basis for the crime of “destruction of property by an unprivileged belligerent” that is contained within the conspiracy charged in Charge 1. As a result, it must be excised from the illegal objects of the conspiracy alleged in Charge 1.

B: Congress Has Not Made “Destruction of Property by an Unprivileged Belligerent” an Offense Triable by Military Commission

The only other potential source of authority for offenses eligible for charge and trial by military commission is Congress: Article 21 of the Uniform Code of Military Justice (UCMJ), establishes military commission’s jurisdiction over “...offense[s] that by statute or by the law of war may be tried by military commission . . .”² (emphasis added). It is in part from this statute that a President draws the authority to establish military commissions.³

Yet, there are only two non-law of war offenses Congress has approved for trial by military commissions—Aiding the Enemy, Article 104, UCMJ and Spies, Article 106, UCMJ – and “destruction of property by an unprivileged belligerent is not among them. Congress has never authorized a military commission to try civilians for “destruction of property by an unprivileged belligerent.” Indeed, to do so would defy logic, sense, and longstanding law of war principles, since the appropriate forum to try individuals who lack combatant immunity for deliberately destroying property already exists in the form of the civilian courts. Accordingly, “destruction of property by an unprivileged belligerent” as set forth in MCI No. 2, and repeated in Charge 1 against Mr. Hicks, is not triable by military commission, thereby depriving this military commission of jurisdiction to try Mr. Hicks for such an offense.

Further, such a charge would constitute an impermissible *ex post facto* law with respect to Mr. Hicks. No U.S. military commission has ever charged or tried an individual for an offense of “destruction of property by an unprivileged belligerent,” and MCI No. 2 is without authority to create such an offense. Moreover, even if MCO No. 2 could manufacture such an offense, the *ex post facto* application of the charge to Mr. Hicks would strip this commission jurisdiction to try and/or punish Mr. Hicks for it.

Indeed, MCI No. 2 itself directs that this military commission can try only those offenses that existed under the law of war at the time of their commission: Section 3(A) of MCI No. 2 explicitly states that “[n]o offense is cognizable in trial by a military commission if that offense did not exist prior to the conduct in question.”⁴

In this case, MCI No. 2 was published *after* Mr. Hicks allegedly performed the conduct with

² 10 U.S.C. §821.

³ See President’s Military Order of 13 November 2001, first paragraph. Note: “sections 821 and 836 of title 10, United States Code” are Article 21 and Article 36 of the Uniformed Code of Military Justice, respectively.

⁴ In addition, international law prohibits States from charging individuals with conduct which did not constitute a criminal offense at the time when it was committed. Article 15(1) of the *International Covenant on Civil and Political Rights* states that “[n] one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.” Article 75(4)(c) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* has similar language. It states that “[n]o one shall be accused or convicted of a criminal offense on account of any act or omission which did not constitute a criminal offense under the national or international law to which he was subject at the time when it was committed.”

which he is charged, but also even after he was within the custody of the United States.⁵ Thus, even under the commission's own rules as promulgated in MCI No. 2, this commission does not have jurisdiction over the alleged "destruction of property by an unprivileged belligerent," and may not try Mr. Hicks for it. Accordingly, this commission should dismiss that portion of Charge 1 pertaining to "destruction of property by an unprivileged belligerent."

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of expert witnesses.

B: Attachments

1. *International Covenant on Civil and Political Rights*, Article 15.

2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.

6. Relief Requested: The defense requests the words "destruction of property by an unprivileged belligerent" be struck from Charge 1.

7. The defense requests oral argument on this motion.

By:

for 
M.D. MORI

Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL

Joshua L. Dratel, P.C.

14 Wall Street

28th Floor

New York, New York 10005

(212) 732-0707

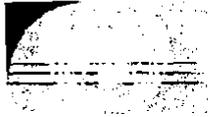
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT

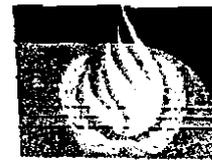
Major, U.S. Army

Detailed Defense Counsel

⁵ MCI No. 2 is not binding on this commission. It is merely the Department of Defense's position on the law. The controlling principles for this commission – with respect to what constitutes a violation of the law of war – emanate from the law of war and any statutory authority provided by Congress. Neither provides authority for charging and/or punishing Mr. Hicks for the alleged "destruction of property by an unprivileged belligerent." Consequently, any attempt to incorporate that concept into the charges against Mr. Hicks must be rejected.



**Office of the High
Commissioner for Human Rights**



International Covenant on Civil and Political Rights

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 2200A (XXI) of 16 December 1966**

entry into force 23 March 1976, in accordance with Article 49

Attachment 1 to RE ZIA
Page 1 of 2

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Attachment 1 to RE ~~21A~~ **21A**
Page 2 of 2



fulltext



**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the
Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.**

Attachment 2 to RE 21A
Page 1 of 3

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 2 to RE 214

Page 2 of 3

the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Attachment 2 to RE 214
Page 3 of 3

UNITED STATES OF AMERICA	)	PROSECUTION RESPONSE TO
	)	DEFENSE MOTION
	)	TO DISMISS CHARGE 1 OFFENSE
v.	)	OF "DESTRUCTION OF PROPERTY
	)	BY AN UNPRIVILEGED
	)	BELLIGERENT
DAVID M. HICKS	)	18 October 2004

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

2. Position on Motion. The Defense motion to dismiss that portion of Charge 1 (Conspiracy) relating to Destruction of Property by an Unprivileged Belligerent should be denied.

3. Facts

a. As the United States Supreme Court succinctly stated in *Hamdi v. Rumsfeld*¹:

On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Authorization for Use of Military Force ('the AUMF'), 115 Stat 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.²

b. Subsequent to the AUMF, the President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").³ In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and section 821 and 836 of title 10, United States Code."⁴

¹ 124 S.Ct. 2633 (2004)

² *Id.* at 2635.

³ 66 Fed. Reg. 222 (November 16, 2001)

⁴ Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

c. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁵ The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed”⁶ He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.⁷

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)⁸ and over offenses (violations of the laws of war and all other offenses triable by military commission).⁹ The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions”¹⁰

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On June 9, 2004, the Appointing Authority approved charges against the Accused, including, *inter alia*, Conspiracy to Commit the Offense of Destruction of Property by an Unprivileged Belligerent. Destruction of Property by an Unprivileged

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

⁵ *Id.*, Section 1(e)

⁶ *Id.*, Section 2(a)

⁷ *Id.*, Section 2(b)

⁸ MCO No. 1, para. 3(A)

⁹ *Id.*, paragraph 3(B)

¹⁰ *Id.*, paragraph 8(A)

Belligerent is an enumerated offense under MCI No. 2,¹¹ and Conspiracy is an enumerated form of liability/related offense.¹² On June 25, 2004, the Appointing Authority referred these charges to this Military Commission for trial.

4. Legal Authority Cited

- a. President's Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").
- b. Military Commission Order No. 1.
- c. Military Commission Instruction No. 2.
- d. Department of the Army Field Manual 27-10, July 1956.
- e. 10 U.S. Code §§ 821, 836 (Articles 21, 36, Uniform Code of Military Justice).
- f. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).
- g. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
- h. *Ex Parte Quirin et al*, 317 U.S. 1 (1942).
- i. *Talbot v. Janson*, 3 U.S. 133 (1795).
- j. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957).
- k. *Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002).
- l. *United States v Lindh*, 212 F.Supp.2d 541, 553 (E.D.V.A. 2002).
- m. Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention, 29 July 1899.
- n. Hague Convention of 1907, Convention With Respect to the Laws and Customs of War on Land (Hague IV).
- o. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- p. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 12 August 1949.

¹¹ MCI No. 2, para. 6(B)(3) and (4)

¹² *Id.*, para. 6(C)(6) and (7)

- q. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
- r. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- s. Charter of the International Military Tribunal, the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany.
- t. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- u. Statute of the International Tribunal for Rwanda, 33 I.L.M. (1994).
- v. Rome Statute of the International Criminal Court, 37 I.L.M. (1994).
- w. Adam Roberts & Richard, *Documents on the Laws of War* (3d ed. 2002).
- x. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L.F. 291 (2001).
- y. Winthrop, *Military Law and Precedents* (2d Ed. 1920).
- z. Lieber's Code, General Order No. 100 War Department, April 24, 1863.

5. Discussion

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

(1) Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution.¹³ The Congress, in passing the AUMF of 2001, expressly authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,"¹⁴ and it is the President's duty to carry out this war.

¹³ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) "The Constitution confers on the President the 'executive Power', Art II, cl. 1, and imposes on him the duty to 'take Care that the Law be faithfully executed.' Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

¹⁴ Public L. No. 107-40, 115 Stat. 224 (2001)

(2) As a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”¹⁵ Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice,¹⁶ expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

(3) As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since *Ex parte Quirin*, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.”¹⁷

(4) The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a “full and fair trial,”¹⁸ and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense.¹⁹ The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel.²⁰ It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law”²¹ and details a number of offenses that “derive from the law of armed conflict.”²²

¹⁵ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), citing *Ex parte Quirin*, 317 U.S., at 28 (emphasis added). See also, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

¹⁶ 10 U.S.C. §§ 821,836 (1994). Congress takes notice of the law of war in this manner: “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.” [emphasis added]

¹⁷ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957)

¹⁸ PMO, Section 4(c)(2).

¹⁹ *Id.*, Section 6(a).

²⁰ Pursuant to DoD MCO No. 1, Section 7. *Regulations A. Supplementary Regulations and Instructions*: The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

²¹ Para. 3(A), MCI No. 2.

²² *Id.*

This declarative instruction, which has a direct lineage to the President's authority to regulate the conduct of armed conflict, expressly lists Destruction of Property by an Unprivileged Belligerent as an offense having the following elements:

- (a) The accused destroyed property;
- (b) The property belonged to another person, and the destruction was without that person's consent;
- (c) The accused intended to destroy such property;
- (d) The accused did not enjoy combatant immunity; and
- (e) The destruction took place in the context of and was associated with armed conflict.²³

(8) Conspiracy also is enumerated as an offense having the following elements:

- (a) 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;
- (b) 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
- (c) One of the conspirators or enterprise members, during the existence of the agreement, knowing committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.²⁴

b. MCI No. 2 Accurately Declares Destruction of Property by an Unprivileged Belligerent as a Crime under the Law of Armed Conflict

(1) MCI No. 2 does not create new law; it is declarative of law that previously existed under the Law of Armed Conflict. Destruction of Property by an Unprivileged Belligerent and other acts of belligerency by an unprivileged belligerent

²³ *Id.*, para. 6(B)(4).

²⁴ *Id.*, para. 6(C)(6).

were crimes triable by military commission long before the Accused's charged activity.

(2) The Law of Armed Conflict does not create offenses that would otherwise not constitute criminal conduct. Rather, it recognizes that certain conduct that is otherwise criminal should not be excused by a state of war. As detailed further below, the Law of Armed Conflict recognizes that a lawful combatant, acting in consonance with the Law of Armed Conflict, has a legal justification for certain acts that would otherwise subject him to prosecution (e.g., willfully killing or attempting to kill certain categories of other human beings, such as other combatants, or destroying property). Conversely, the Law of Armed Conflict recognizes that a person who is *not* a lawful combatant acting in consonance with the Law of Armed Conflict does *not* enjoy this legal justification and may be prosecuted for his acts of belligerency.

(3) Destruction of Property

(a) The Defense acknowledges, and we agree, that destruction of property is an offense for which an unprivileged belligerent may be prosecuted. However, the Defense contends that this is a domestic offense, triable in a domestic court, not a violation of international law triable by military commission. This assertion is without merit.

(b) Unlawful destruction of property has long been condemned by international law. The Geneva Conventions of 1949 list as "grave breaches" "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."²⁵ Moreover, FM 27-10 states, "In addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . j. Pillage or purposeless destruction."²⁶ ICTY, ICTR, and the ICC all recognize destruction of property in one form or another as a violation of international law.²⁷

(c) Furthermore, status of the perpetrator can be just as determinative as status of the property destroyed regarding whether destruction of property constitutes a crime under international law. The Rome Statute, for instance, lists as a "serious violation" "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."²⁸

(4) Acts of Belligerency by an Unprivileged Belligerent

(a) Individuals "who take up arms and commit hostile acts without

²⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 12 August 1949* (T.I.A.S. 23362), Article 50; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949* (T.I.A.S. 3364), Article 51; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949* (T.I.A.S. 3365) ("*Geneva IV*"), Article 147.

²⁶ FM 27-10, para. 504.

²⁷ ICTY Statute, Art. 2(d), 3(d) and 3(e); ICTR Statute, Art. 4(f); Rome Statute, Art. 8(a)(iv), 8(b)(ii), 8(b)(iv), 8(b)(xiii), and 8(b)(xvi).

²⁸ Rome Statute, Art. 8(b)(xiii).

having complied with the conditions pre-scribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also, id.*, Articles 81, 82. Historically, those caught committing acts of belligerency who do not qualify as such, sometimes termed “unlawful combatants” or “unprivileged belligerents,” have been treated harshly.²⁹

(b) The recognition that unlawful combatancy violates the law of nations dates far back in our Nation’s history. In a 1795 concurring opinion, Justice Iredell noted that “hostility committed without public authority” is “not merely an offence against the nation of the individual committing the injury, **but also against the law of nations . . .**” *Talbot v. Janson*, 3 U.S. 133 (1795)(Iredell, concurring)(emphasis added).

(c) Colonel Winthrop, in his famed *Military Law and Precedents* noted:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d Ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants, typically for “Violation of the laws of war.” *Id.* at 784. Many were sentenced to death. *Id.* at 784, footnote 57.

(d) Lieber’s Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatant as well. Under Article 57, “So soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.” Article 82, on the other hand, states that those who “commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates.” *Id.*

(e) The United States Supreme Court has specifically upheld the jurisdiction of military commissions to try unlawful combatants:

By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. **Unlawful**

²⁹ In fact, summary execution of unlawful combatant was not uncommon. *See, e.g., United States v. List* (“Hostage Case”), 11 Trials of War Criminal 1223 (GPO 1950)(indictment charged Accused had illegally designated captured individuals as “partisans” and executed them. Accused acquitted on this charge because Government had failed to prove beyond a reasonable doubt that the captured individuals were, in fact, lawful combatants).

combatants are likewise subject to capture and detention, but in addition they **are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.**

Ex Parte Quirin, 317 U.S. 1 (1942)(emphasis added). A plurality of the Supreme Court recently reaffirmed this holding. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004)(“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war’”)

(f) Qualification for Lawful Belligerent Status. The standard for who qualifies as a privileged belligerent has changed through the years. Under modern international standards, to qualify as belligerents, an army, militia or volunteer corps must fulfill the following conditions:

- (i) Be commanded by a person responsible for his subordinates;
- (ii) Have a fixed distinctive emblem recognized at a distance;
- (iii) Carry arms openly; and
- (iv) Conduct their operations in accordance with the laws and customs of war.

Convention With Respect to the Laws and Customs of War on Land (Hague IV), 18 October 1907, Chapter 1, art.1, 32 Stat. 1803

(g) Furthermore, the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall also be regarded as belligerents, *but only if they carry arms openly and if they respect the laws and customs of war. Id.*

(h) Therefore, if an individual does not qualify as a belligerent, either due to his failure to abide by the first three above-enumerated requirements, or because the operations that he conducts are not in accordance with the laws and customs of war, then the laws and rights of war need not be applied to that individual under existing international law, and he may be tried by military commission for the acts which render his belligerency unlawful. *Quirin*, 317 U.S. at 31.

(i) Under the Law of Armed Conflict, only a lawful combatant enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict. *See Padilla v. Bush*, 233 F.Supp. 2d 564, 592 (S.D.N.Y. 2002). Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes. *Id.* at 592, *citing United States v. Lindh*, 212 F.Supp. 2d 541, 553 (E.D.V.A. 2002). The entire body of law stands for a simple proposition: those considered “lawful

combatants” under the law cannot be prosecuted for belligerent acts if they abide by the law of armed conflict. Conversely, those who either do not meet the definition of lawful combatant – “unlawful combatants” – or who meet the definition but do not abide by the law of armed conflict may be prosecuted by military commission. MCI No. 2 correctly states this proposition, and even provides the added protection that the Accused enjoys a presumption that he is a lawful combatant, and the Prosecution must prove beyond a reasonable doubt that he did not enjoy combatant immunity during his acts of belligerency in order to convict him of this offense.

(5) The principles and precedent of international law fully support the declaration under MCI No. 2 that Destruction of Property by an Unprivileged Belligerent states an offense and is triable by military commission. Accordingly, the Defense’s Motion to Dismiss should be denied.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense’s Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//


Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA

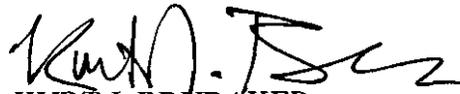
v.

DAVID M. HICKS

**PROPOSED ESSENTIAL FINDINGS
DEFENSE MOTION TO STRIKE
DESTRUCTION OF PROPERTY BY
AN UNPRIVILEGED BELLIGERENT
(D9)**

The Prosecution submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense used his properly delegated authority pursuant to section 7A of Military Commission Order No. 1 and issued Military Instruction (MCI) No. 2.
2. MCI No. 2 establishes crimes and elements that are intended for use by this Military Commission.
3. The crimes and elements listed in MCI No. 2 are derived from the law of armed conflict, which is also commonly referred to as the law of war.
4. The crime of "Destruction of Property by an Unprivileged Belligerent" is delineated in section 6C of MCI No. 2 in the section titled "Other Forms of Liability and Related Offenses."
5. Criminal liability for conduct constituting destruction of property by an unprivileged belligerent is rooted in the law of armed conflict and is triable by military commission. Based on the requirement to apply and act consistently with commission law, and finding that there is nothing in the elements of murder by an unprivileged belligerent delineated in MCI No. 2 or in Charge 2 of the charge sheet to be inconsistent with the law of armed conflict, the motion to dismiss Charge 1 is denied.



KURT J. BRUBAKER
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Ex 21-C

Page 1 of 1

Winthrop, in his treatise on "Military Law and Precedent," describes the limits on the power to appoint military commissions: "[i]n the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades. The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial."⁴

While more than fifty years have passed since the last use of military commissions, those most recent military commissions were appointed under the authority of military officials also empowered to convene general courts-martial.⁵ For instance, in 1942, President Roosevelt personally appointed the military commission to try eight Nazi Saboteurs.⁶ In 1945, two other Germans who had come ashore the United States by submarine were tried before a military commission convened by the Commanding General, Second Service Command.⁷

Likewise, military commissions used abroad during World War II were also convened by military commanders. The military commission that was the subject of review in *Johnson v. Eisenstrager*,⁸ was appointed by the United States Commanding General at Nanking, China, who was also empowered to convene general courts-martial under the then-current Articles of War. This authority was properly delegated to them by the Joint Chiefs of Staff of the United States through the Commanding General, United States Forces, China Theatre.⁹

In *In Re Yamashita*,¹⁰ the Supreme Court addressed the issue of military commission jurisdiction, and specifically noted that a military commission has jurisdiction over law of war violations only when the commission is "created by appropriate military command."¹¹ The Court explained in *Yamashita* that General Styer, Commander of the United States Armed Forces, Western Pacific, was a competent authority to appoint the commission to try General Yamashita because he was the military commander over the area where the alleged offenses occurred. Relying on the principles enunciated by Winthrop, the Supreme Court explained that "[t]he congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long-established American precedents. Such a commission may be created by

⁴ Winthrop, "Military Law and Precedent," Vol.2. 2nd Ed. (1986) page 835.

⁵ All Military tribunals set up under the power of a supreme allied commander, which exercised military jurisdiction under an occupation theory distinct from purely United States controlled military commissions, have also been ordered by a military officer authorized to convene general courts-martial. See *Hirota v. MacArthur*, 338 U.S. 197 (1948).

⁶ See *Ex parte Quirin*, 317 U.S. 1 (1942).

⁷ See *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir, 1956).

⁸ 339 U.S. 763 (1950).

⁹ *Id.* at 766.

¹⁰ 327 U.S. 1 (1946).

¹¹ *Id.* at 7.

any field commander or by any commander competent to appoint a general court-martial, as was General Styer, who had been vested with the power by order of the President."¹²

The authority to appoint a military commission flows from the military authority to command and convene general courts-martial, as well as from being the military commander of a geographical area in which a state of war or occupancy is ongoing. As Attorney General James Speed, who served in that post at the conclusion of the U.S. Civil War, explained, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war."¹³

Here, the Appointing Authority does not qualify as a legitimate delegee. Article 22, Uniform Code of Military Justice, provides who may convene general courts-martial, specifically empowering the President, Secretary of Defense, Service Secretaries and various Commanding Officers. The exercise of military jurisdiction is a military function instilled in military commissioned officers of command. The President, in his role as commander-in-chief, has the power to exercise military jurisdiction as codified by Congress in Article 22, Unified Code of Military Justice, and the law of war.

The President's Military Order of 13 November 2001 directs the Secretary of Defense to issue such orders and regulations to carry out military commissions. The President's Military Order specifically states that the Secretary of Defense will issue orders appointing one or more military commissions.¹⁴ As the Secretary of Defense is authorized to convene general courts-martial, such action is permissible. Yet, this commission has not been appointed by the Secretary of Defense. Instead, this commission has been appointed by a federal civilian employee who is neither a commanding officer nor a commissioned officer. Thus, Mr. Altenburg lacks the requisite authority under the law of war to fight battles or organize military tribunals.

Consequently, the Appointing Authority lacks the power to exercise military jurisdiction. Therefore, the military commission is improperly constituted, and the charges must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of Jordan Paust.

¹² *Id.* at 10.

¹³ Attorney General James Speed, "The Opinion of the Attorney General Affirming the Legality of Using a Military Commission to Try the Conspirators." Attorney General's Office, Washington, July 1865.

¹⁴ Section 4(b) "Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order."
(b) As a military function and in light of the findings in Section 1. including subsection (f), thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

B: Attachments

1. Winthrop, "Military Law and Precedent," Vol.2. 2nd Ed. (1986) page 835.
2. Attorney General James Speed, "The Opinion of the Attorney General Affirming the Legality of Using a Military Commission to Try the Conspirators" (1865).

6. **Relief Requested:** The defense requests that all charges be dismissed.

7. The defense requests oral argument on this motion.

By: 

M.D. MORI

for

Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL

Joshua L. Dratel, P.C.

14 Wall Street

28th Floor

New York, New York 10005

(212) 732-0707

Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT

Major, U. S. Army

Detailed Defense Counsel

William Winthrop

Vol. 2

Military Law and Precedents

A Law Classic

BeardBooks

CONSTITUTION OF THE MILITARY COMMISSION. In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades.¹⁰ The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial. Commanders of "districts" have sometimes, and legally under the general law of war and military government, convened these tribunals, though their commands have been less than a brigade; but such instances have been rare. The provisions of the Articles of war indicating by whom the court is to be constituted where the commander who would regularly order it is in fact the prosecutor or accuser, apply in terms only to general courts-martial, and are not *required* to be observed in the convening of the more summary tribunals under consideration. Where, however, an unreasonable delay will not thereby be caused, or the interests of the service or of the public otherwise prejudiced, such provisions may well, as a measure of justice or expediency, be observed.¹¹

1308 COMPOSITION. Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned officers of the army. Strictly legally they might indeed be composed otherwise should the commander will it—as, for example, in part of civilians or of enlisted men. The court-martial convened under martial law by Gov. Eyre, in Jamaica in 1865, for the trial of Geo. W. Gordon, was a mixed court of one military and two naval officers, and it was in regard to this court that D'Israeli observed in Parliament that—"in the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."¹²

The rank of the members of a military commission is legally immaterial. In a case indeed, (which must be rare,) of a trial of an officer of the army by such a tribunal, the provision of Art. 79 as to the relative rank of the members will, if practicable, properly be regarded.

In the absence of any law fixing the number of members of a military commission, the same may legally be composed of any number in the discretion of the convening authority. A commission of a single member would be as strictly legal as would be one of thirteen members. In his General Orders already cited,¹³ Gen. Scott directed that military commissions should be governed as to their composition, &c., by the provisions of the Articles of war prescribing the number of members, &c., for courts-martial: as to councils of war, it was specified that they should consist of "not less than three nor

¹⁰ As to the general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial—see G. O. 20 of 1847, (Gen. Scott:) Do. 1, 7, 33, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; 1 Bishop, C. L. § 45, 52; Dromer, 501. As to the procedure of military courts under martial law, the English writer Pratt observes, (p. 218.)—"The forms of military law should, as far as practicable, be adhered to."

¹¹ See G. C. M. O. 11, Dept. of Texas, 1866.

¹² Jones, Notes on Martial Law, 11; Finlason, History of the Jamaica Case, 111. In Queen v. Nelson & Brand, Cockburn, C. J., commented upon the composition of this court as unauthorized—as of course it was by the law governing courts-martial proper. It appears from the report the Commissioners on the Jamaica Case, (Finlason, Hist., p. 110.) that this court had been preceded, during the same exigency, by one "consisting partly of members of the legislature." In the Demerara Case, in 1823, a militia officer, (really the head of the colonial judiciary, commissioned *pro hac vice* in the militia,) was associated with officers of the army on the court-martial which tried missionary Smith, a civilian. 2 Hansard, XI, 972.

¹³ G. O. 20, 190, 287, of 1847.

Attachment 1 to RE 22A

Page 2 of 2

**Order Establishing a Military Commission to Try the Lincoln Assassination
Conspirators**

**& The Opinion of the Attorney General Affirming the Legality
of Using a Military Commission to Try the Conspirators**

Order of the President

**PROCEEDINGS OF A MILITARY COMMISSION,
Convened at Washington, D.C., by virtue of the following Orders:**

[Executive Chamber Washington City, May 1, 1865.]

WHEREAS, the Attorney-General of the United States hath given his opinion:

That the persons implicated in the murder of the late President, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, Secretary of State, and in an alleged conspiracy to assassinate other officers of the Federal Government at Washington City, and their aiders and abettors, are subject to the jurisdiction of, and lawfully triable before, a Military Commission;

It is ordered: 1st That the Assistant Adjutant-General detail nine competent military officers to serve as a Commission for the trial of said parties, and that the Judge Advocate General proceed to prefer charges against said parties for their alleged offenses, and bring them to trial before said Military Commission; that said trial or trials be conducted by the said Judge Advocate General, and as recorder thereof, in person, aided by such Assistant and Special Judge Advocates as he may designate; and that said trials be conducted with all diligence consistent with the ends of justice: the said Commission to sit without regard to hours.

2d. That Brevet Major-General Hartranft be assigned to duty as Special Provost Marshal General, for the purpose of said trial, and attendance upon said Commission, and the execution of its mandates.

3d. That the said Commission establish such order or rules of proceedings as may avoid unnecessary delay, and conduce to the ends of public justice.

[Signed]

ANDREW JOHNSON

**OPINION ON THE CONSTITUTIONAL POWER OF THE MILITARY
TO TRY AND EXECUTE THE ASSASSINS OF THE PRESIDENT.**

**BY ATTORNEY GENERAL JAMES SPEED.
ATTORNEY GENERAL'S OFFICE
Washington, July ---, 1865.**

SIR: You ask me whether the persons charged with the offense of having assassinated the

Attachment 2 to RE 22A

<http://www.law.umkc.edu/faculty/projects/frtrial/lincolnconspiracy/commiorder.htm> of 1 12 9/20/2004

President can be tried before a military tribunal, or must they be tried before a civil court. The President was assassinated at a theater in the city of Washington. At the time of the assassination a civil war as flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by Federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's House and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.

Such being the facts, the question is one of great importance— important, because it involves the constitutional guarantees thrown about the rights of the citizen, and because the security of the army and the government in time of war is involved; important, as it involves a seeming conflict between the laws of peace and of war.

Having given the question propounded the patient and earnest consideration its magnitude and importance require, I will proceed to give the reasons why I am of the opinion that the conspirators not only may but ought to be tried by a military tribunal.

A civil court of the United States is created by a law of Congress, under and according to the Constitution. To the Constitution and the law we must look to ascertain how the court is constituted, the limits of its jurisdiction, and what its mode of procedure. A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offenses as the laws of war permit: they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war. In time of peace, neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces." I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offenses committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument. But it does not follow that because such military tribunals can not be created by Congress under this clause, that they can not be created at all. Is there no other power conferred by the Constitution upon Congress or the military, under which such tribunals may be created in time of war?

That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that "Congress shall have power to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations." To define is to give the limits or precise meaning of a word or thing in being; to make, it is to call into being. Congress has the power to define, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. But very soon after the organization of the Federal Government, Mr. Randolph, then Attorney General, said: "The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the

Attachment 2 to RE 22A

Page 2 of 12
9/20/2004

existence of a nation, subject to modification on some points of indifference." The framers of the Constitution knew that a nation could not maintain an honorable place among the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but can not abrogate them, or as Mr. Randolph says, may "modify on some points of indifference."

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority. But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one that has ever glanced at the many treatises that have been published in different ages of the world by great, good and learned men, can fail to know that the laws of war constitute a part of the law of nations, and that those laws have been prescribed with tolerable accuracy.

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war among civilized nations. Under the power to define those laws, Congress can not abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people.

As war is required by the frame-work of our government to be prosecuted according to the known usages of war among the civilized nations of the earth, it is important to understand what are the obligations, duties, and responsibilities imposed by war upon the military. Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent to those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.

The power conferred by war is, of course, adequate to the end to be accomplished, and not greater than what is necessary to be accomplished. The law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great power of war, or rather the prohibitions against the use of that power, increase or diminish as the necessity of the case demands. When a city is besieged and hard pressed, the commander may exert an authority over the non-combatants which he may not when no enemy is near.

All wars against a domestic enemy or to repel invasions, are prosecuted to preserve the Government. If the invading force can be overcome by the ordinary civil police of a country, it should be done without bringing upon the country the terrible scourge of war; if a commotion or insurrection can be put down by the ordinary process of law, the military should be called out. A defensive foreign war is declared and carried on because the civil police is inadequate to repel it; a civil war is waged because the laws cannot be peacefully enforced by the ordinary tribunals of the country through civil process and by civil officers. Because of the utter inability to keep the peace and maintain order by the customary officers and agencies in time of peace, armies are organized and put into the field. They are called out and invested with the powers of war to prevent total anarchy and to preserve the Government. Peace is the normal condition of a country, and war abnormal, neither being without law, but each having laws appropriate to the condition of society. The maxim *in armis silent leges* is never wholly true. The object of war is to bring society out of its

Attachment 2 to RE 22A

Page 3 of 12

abnormal condition; and the laws of war aim to have that done with the least possible injury to persons or property.

Anciently, when two nations were at war, the conqueror had, or asserted, the right to take from enemy his life, liberty and property: if either was spared, it was as a favor or act of mercy. By the laws of nations, and of war as a part, thereof, the conqueror was deprived of this right.

When two governments, foreign to each other, are at war, or when a civil war becomes territorial, all of the people of the respective belligerents become by the law of nations the enemies of each other. As enemies they can not hold intercourse, but neither can kill or injure the other except under a commission from their respective governments. So humanizing have been, and are the laws of war, that it is a high offense against them to kill an enemy without such commission. The laws of war demand that a man shall not take human life except under a license from his government; and under the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war. Soldiers regularly in the service have the license of the government to deprive men, the active enemies of their government, of their liberty and lives; their commission so to act is as perfect and legal as that of a judge to adjudicate, but the soldier must act in obedience to the laws of war, as the judge must in obedience to the civil law. A civil judge must try criminals in the mode prescribed in the Constitution and the law; so, soldiers must kill or capture according to the laws of war. Non-combatants are not to be disturbed or interfered with by the armies of either party except in extreme cases. Armies are called out and organized to meet and overcome the active, acting public enemies.

But enemies with which an army has to deal are of two classes:

1. Open, active participants in hostilities, as soldiers who wear the uniform, move under the flag, and hold the appropriate commission from their government. Openly assuming to discharge the duties and meet the responsibilities and dangers of soldiers, they are entitled to all belligerent rights, and should receive all the courtesies due to soldiers. The true soldier is proud to acknowledge and respect those rights, and every cheerfully extends those courtesies.
2. Secret, but active participants, as spies, brigands, bushwackers, jayhawkers, war rebels and assassins. In all wars, and especially in civil wars, such secret, active enemies rise up to annoy attack and army, and must be met and put down by the army. When lawless wretches become so impudent and powerful as to not be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked. Wars never have been and never can be conducted upon the principle that an army is but a posse comitatus of a civil magistrate.

An army, like all other organized bodies, has a right, and it is its first duty, to protect its own existence and the existence of all its parts, by the means and in the mode usual among civilized nations when at war. Then the question arises, do the laws of war authorize a different mode of proceeding, and the use of different means against secret active enemies from those used against open, active enemies? As has been said, the open enemy or soldier in time of war may be met in battle and killed, wounded or taken prisoner, or so placed by the lawful strategy of war as that he is powerless. Unless the law of self-preservation absolutely demands it, the life of a wounded enemy or a prisoner must be spared. Unless pressed thereto by the extremest necessity, the laws of war condemn and punish with great

Attachment 2 to RE 22A

Page 4 of 12
10/17/2004

severity harsh or cruel treatment to a wounded enemy or prisoner.

Certain stipulations and agreements, tacit or express, betwixt the open belligerent parties, are permitted by the laws of war, and are held to be of very high and sacred character. Such is the tacit understanding, or it may be usage, of war, in regard to flags of truce. Flags of truce are resorted to as a means of saving human life, or alleviating human suffering. When not used with perfidy, the laws of war require that they should be respected. The Romans regarded ambassadors betwixt belligerents as persons to be treated with consideration, and respect. Plutarch, in his Life of Caesar, tells us that the barbarians in Gaul having sent some ambassadors to Caesar, he detained them, charging fraudulent practices, and led his army to battle, obtaining a great victory.

When the Senate decreed festivals and sacrifices for the victory, Cato declared it to be his opinion that Caesar ought to be given into the hands of the barbarians, that so the guilt which this breach of faith might otherwise bring upon the State might be expiated by transferring the curse on him who was the occasion of it.

Under the Constitution and laws of the United States, should a commander be guilty of such a flagrant breach of law as Cato charged upon Caesar, he would not be delivered to the enemy, but would be punished after a military trial. The many honorable gentlemen who hold commissions in the army of the United States, and have been deputed to conduct war according to the laws of war, would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy toward the bearers of a flag of truce.

The laws of war permit capitulations of surrender and paroles. They are agreements betwixt belligerents, and should be scrupulously observed and performed. They are contracts wholly unknown to civil tribunals. Parties to such contracts must answer any breaches thereof to the customary military tribunals in time of war. If an officer of rank, possessing the pride that becomes a soldier and a gentleman, who should capitulate to surrender the forces and property under his command and control, be charged with a fraudulent breach of the terms of surrender, the laws of war do not permit that he should be punished without a trial, or, if innocent, that he shall have no means of wiping out the foul imputation. If a paroled prisoner is charged with a breach of his parole, he may be punished if guilty, but not without a trial. He should be tried by a military tribunal, constituted and proceeding as the laws and usages of war prescribe.

The laws and usages of war contemplate that soldiers have a high sense of personal honor. The true soldier is proud to feel and know that his enemy possesses personal honor, and will conform and be obedient to the laws of war. In a spirit of justice, and with a wise appreciation of such feelings, the laws of war protect the character and honor of an open enemy. When by the fortunes of war one enemy is thrown into the hands and power of another, and is charged with dishonorable conduct and a breach of the laws of war, he must be tried according to the usages of war. Justice and fairness say that an open enemy to whom dishonorable conduct is imputed, has a right to demand a trial. If such a demand can be rightfully made, surely it can not be rightfully refused. It is to be hoped that the military authorities of this country will never refuse such a demand, because there is no act of Congress that authorizes it. In time of war the law and usage of war authorize it, and they are a part of the law of the land.

Attachment 2 to RE 22A

Page 5 of 12

One belligerent may request the other to punish for breaches of the laws of war, and, regularly, such a request should be made before retaliatory measures are taken. Whether the laws of war have been infringed or not, is of necessity a question to be decided by the laws and usages of war, and is cognizable before a military tribunal. When prisoners of war conspire to escape, or are guilty of a breach of appropriate and necessary rules of prison discipline, they may be punished, but not without trial. The commander who should order every prisoner charged with improper conduct to be shot or hung, would be guilty of a high offense against the laws of war, and should be punished therefor, after a regular military trial. If the culprit should be condemned and executed, the commander would be as free from guilt as if the man had been killed in battle.

It is manifest, from what has been said, that military tribunals exist under and according to the laws and usages of war, in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war.

Having seen that there must be military tribunals to decide questions arising in time of war betwixt belligerents who are open and active enemies, let us next see whether the laws of war do not authorize such tribunals to determine the fate of those who are active, but secret, participants in the hostilities. In Mr. Wheaton's Elements of International Law, he says: "The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State; such are the regularly commissioned naval and military forces of the national and all others called out in its defense, or spontaneously defending themselves, in case of necessity, without any express authority for that purpose. Cicero tells us in his offices, that by the Roman feudal law no person could lawfully engage in battle with the public enemy without being regularly enrolled, and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States were allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations." In speaking on the subject of banditti, Patrick Henry said in the Virginia Convention, "The honorable gentleman has given you an elaborate account of what he judges tyrannical legislation, and an ex post facto law (in the case of Josiah Phillips); he has misrepresented the facts. That man was not executed by a tyrannical stroke of power; nor was he a Socrates; he was a fugitive murderer and an outlaw; a man who commanded an infamous banditti, and at a time when the war was at the most perilous stage, he committed the most cruel and shocking barbarities; he was an enemy to the human name. Those who declare war against the human race may be struck out of existence as soon as apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws in criminal cases. The enormity of his crime did not entitle him to it. I am truly a friend to legal forms and methods, but, sir, the occasion warranted the measure. A pirate, an outlaw, or a common enemy to all mankind, may be put to death at any time. It is justified by the law of nature and nations." (3d volume Elliott's Debates on Federal Constitution, page 140.)

Attachment 2 to RE 22A

Page 6 of 12

No reader, not to say student, of the law of nations, can doubt but that Mr. Wheaton and Mr. Henry have fairly stated the laws of war. Let it be constantly borne in mind that they are talking of the law in a state of war. These banditti that spring up in time of war are respecters of no law, human or divine, of peace or of war, are hotes humani generis, and may be hunted down like wolves. Thoroughly desperate, and perfectly lawless, no man can be required to peril his life in venturing to take them prisoners— as prisoners, no trust can be reposed in them. But they are occasionally made prisoners. Being prisoners, what is to be done with them? If they are public enemies, assuming and exercising the right to kill, and are not regularly authorized to do so, they must be apprehended and dealt with by the military. No man can doubt the right and duty of the military to make prisoners of them, and being public enemies, it is the duty of the military to punish them for any infraction of the laws of war. But the military can not ascertain whether they are guilty or not without the aid of a military tribunal.

In all wars, and especially in civil wars, secret but active enemies are almost as numerous as open ones. That fact has contributed to make civil wars such scourges to the countries in which they rage. In nearly all foreign wars the contending parties speak different languages and have different habits and manners; but in most civil wars that is not the case; hence there is a security in participating secretly in hostilities that induces many to thus engage. War prosecuted according to the most civilized usage is horrible, but its horrors are greatly aggravated by the immemorial habits of plunder, rape and murder practiced by secret, but active participants. Certain laws and usages have been adopted by the civilized world in wars between nations that are not kin to one another, for the purpose and to the effect of arresting or softening many of the necessary cruel consequences of war. How strongly bound we are, then, in the midst of a great war, where brother and personal friend are fighting against brother and friend, to adopt and be governed by those laws and usages.

A public enemy must or should be dealt with in all wars by the same laws. The fact that they are public enemies, being the same, they should deal with each other according to those laws of war that are contemplated by the Constitution. Whatever rules have been adopted and practiced by the civilized nations of the world in war, to soften its harshness and severity, should be adopted and practiced by us in this war. That the laws of war authorized commanders to create and establish military commissions, courts or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. That the judgments of such tribunals may have been sometimes harsh, and sometimes even tyrannical, does not prove that they ought not to exist, nor does it prove that they are not constituted in the interest of justice and mercy. Considering the power that the laws of war give over secret participants in hostilities, such as banditti, guerrillas, spies, etc., the position of a commander would be miserable indeed if he could not call to his aid the judgments of such tribunals; he would become a mere butcher of men, without the power to ascertain justice, and there can be no mercy where there is no justice. War in its mildest form is horrible; but take away from the contending armies the ability and right to organize what is now known as a Bureau of Military Justice, they would soon become monster savages, unrestrained by any and all ideas of law and justice. Surely no lover of mankind, no one that respects law and order, no one that the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities. It would be a miracle if the records and history of this war do not show occasional cases in which those tribunals have erred; but they will show many.

Attachment 2 to RE ZLA

Page 7 of 12

very many cases in which human life would have been taken but for the interposition and judgments of those tribunals. Every student of the laws of war must acknowledge that such tribunals exert a kindly and benign influence in time of war. Impartial history will record the fact the Bureau of Military Justice, regularly organized during this war, has saved human life and prevented human suffering. The greatest suffering, patiently endured by soldiers, and the hardest battles gallantly fought during this protracted struggle, are not more creditable to the American character than the establishment of this bureau. This people have such an educated and profound respect for law and justice— such a love of mercy— that they have, in the midst of this greatest of civil wars, systematized and brought into regular order, tribunals that before this war existed under the law of war, but without general rule. To condemn the tribunals that have been established under this bureau, is to condemn and denounce the war itself, or justifying the war, to insist that it shall be prosecuted according to the harshest rules, and without the aid of the laws, usages, and customary agencies for mitigating those rules. If such tribunals had not existed before, under the laws and usages of war, the American citizen might as proudly point to their establishments as to our inimitable and inestimable constitutions. It must be constantly borne in mind that such tribunals and such a bureau can not exist except in time of war, and can not then take cognizance of offenders and offenses against the laws of war.

But it is insisted by some, and doubtless with honesty, and with a zeal commensurate with their honesty, that such military tribunals can have no constitutional existence. The argument against their constitutionality may be shortly, and I think fairly, stated thus: Congress alone can establish military or civil judicial tribunals. As Congress has not established military tribunals, except such as have been created under the articles of war, and which articles are made in pursuance of that clause in the Constitution which gives to Congress the power to make rules for the government of the army and navy, and any other tribunal is and must be plainly unconstitutional, and all its acts void.

This objection thus stated, or stated in any other way, begs the question. It assumes that Congress alone can establish military judicial tribunals. Is that assumption true? We have seen that when war comes, the laws and usages of war come also, and that during the war they are a part of the laws of the land. Under the Constitution, Congress may define and punish offenses against those laws, but in default of Congress defining those laws and prescribing a punishment for their infraction, and the mode of proceeding to ascertain whether an offense has been committed, and what punishment is to be inflicted, the army must be governed by the laws and usages of war as understood and practiced by the civilized nations of the world. It has been abundantly shown that these tribunals are constituted by the army in the interest of justice and mercy, and for the purpose and to the effect of mitigating the horrors of war.

But it may be insisted that though the laws of war, being a part of the law of nations, constitute a part of the laws of the land, that those laws must be regarded as modified so far, and whenever they come in direct conflict with plain constitutional provisions. The following clauses of the Constitution are principally relied upon to show the conflict betwixt the laws of war and the Constitution:

"The trial of all crimes, except in cases of impeachment, shall be by the jury: and such trial shall be held in the State where the said crime shall have been committed: but when not committed within any State, the trial shall be at such or places as the Congress may by law have directed." (Art. III, of the original Constitution, sec. 2.)

Attachment 2 to RE ZZA

Page 8 of 12

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled, in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law: nor shall private property be taken for public use without just compensation."

(Amendments to the Constitution, Art. V.)

"In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation: to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor: and to have the assistance of counsel for his defense." (Art. VI of the amendments to the Constitution.)

These provisions of the Constitution are intended to fling around the life, liberty and property of a citizen all the guarantees of a jury trial. These constitutional guarantees can not be estimated too highly, or protected too sacredly. The reader of history knows that for many weary ages the people suffered for the want of them; it would not only be stupidity, but madness in us not to preserve them. No man has a deeper conviction of their value, or a more sincere desire to preserve and perpetuate them than I have.

Nevertheless, these exalted and sacred provisions of the Constitution must be read alone and by themselves, but must be read and taken in connexion with other provisions. The Constitution was framed by great men-- men of learning and large experience, and it is a wonderful monument of their wisdom. Well versed in the history of the world, they knew that the nation for which they were forming a government would, unless all history is false, have wars, foreign and domestic. Hence the government framed by them is clothed with the power to make and carry on war. As has been shown, when war comes, the laws of war come with it. Infractions of the laws of nations are not denominated crimes, but offenses. Hence the expression in the Constitution that "Congress shall have power to define and punish offenses against the law of nations." Many of the offenses against the law of nations for which a man may lose his life, his liberty or his property are not crimes. It is an offense against the law of nations to break a lawful blockade, and for which a forfeiture of the property is the penalty, and yet the running of a blockade has never been regarded a crime; to hold communication or intercourse with the enemy is a high offense against the laws of war, and for which those laws prescribe punishment, and yet it is not a crime; to act as a spy is an offense against the laws of war, and the punishment for which in all ages has been death, and yet it is not a crime; to violate a flag of truce is an offense against the laws of war, and yet not a crime of which a civil court can take cognizance; to unite with banditti, jayhawkers, guerrillas or any other unauthorized marauders is a high offense against the laws of war; the offense is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offense, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war. Some of the offenses against the laws of war are crimes, and some not. Because they are crimes they do not cease to be offenses against those laws; nor because they are not crimes or misdemeanors do they fail to be offenses against the laws of war. Murder is a crime, and the murderer, as such, must be proceeded against in the form and manner prescribed in the

Attachment 2 to RE 22A
Page 9 of 12

Constitution; in committing the murder an offense may also have been committed against the laws of war; for that offense he must answer to the laws of war, and the tribunals legalized by that law.

There is, then, an apparent but no real conflict in the constitutional provisions. Offenses against the law must be dealt with and punished under the Constitution, as the laws of war, they being part of the law of nations; crimes must be dealt with and punished as the Constitution and laws made in pursuance thereof, may direct.

Congress has not undertaken to define the code of war nor to punish offenses against it. In the case of a spy, Congress has undertaken to say who shall be deemed a spy, and how he shall be punished. But every lawyer knows that a spy was a well-known offender under the laws of war, and that under and according to those laws he could have been tried and punished without an act of Congress. This is admitted by the act of Congress, when it says that he shall suffer death "according to the law and usages of war." The act is simply declaratory of the law.

That portion of the Constitution which declares that "no person shall be deprived of his life, liberty or property without due process of law," has such direct reference to, and connection with, trials for crime or criminal prosecutions, that comment upon it would seem to be unnecessary. Trials for offenses against the laws of war are not embraced or intended to be embraced in those provisions. If this is not so, then every man that kills another in battle is a murderer, for he deprived a "person of life without that due process of law" contemplated by this provision; every man that holds another as a prisoner of war is liable for false imprisonment, as he does so without that same due process. The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it can not be the true construction— it can not be what was intended by the framers of the instrument. One of the prime motives for the Union and a Federal Government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a *felo de se*. If a man should sue out his writ of habeas corpus, and the return shows that he belonged to the army or navy, and was held to be tried for some offense against the rules and articles of war, the writ should be dismissed, and the party remanded to answer to the charges. So, in time of war, if a man should sue out a writ of habeas corpus, and it is made to appear that he is in the hands of the military as a prisoner of war, the writ should be dismissed and the prisoner remanded to be disposed of as the laws and usages of war require. If the prisoner be a regular unoffending soldier of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war, he should have such trial and be punished as the laws of war require. A spy, though a prisoner of war, may be tried, condemned and executed by a military tribunal without a breach of the Constitution. A bushwacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned and executed as offenders against the laws of war. The soldier that would fail to try or spy or bandit after his capture, would be as derelict in duty as if he were to fail to capture; he is as much bound to try and to execute, if guilty, as he is to arrest; the same law that makes it his duty to pursue and kill or capture, makes it his duty to try according to the usages of war. The judge of a civil court is not more strongly bound under the Constitution and the law to try a criminal than is the

Attachment 2 to RE 22A

Page 10 of 12

military to try an offender against the laws of war.

The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, or bandit or other offender against the law of war, may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.

The laws of war authorized human life to be taken without legal process, or that legal process contemplated by those provisions in the Constitution that are relied upon to show that military judicial tribunals are unconstitutional. Wars should be prosecuted justly as well as bravely. One enemy in the power of another, whether he be an open or a secret one, should not be punished or executed without trial. If the question be once concerning the laws of war, he should be tried by those engaged in the war; they and they only are his peers. The military must decide whether he is or not an active participant in the hostilities. If he is an active participant in the hostilities, it is the duty of the military to take him a prisoner without warrant or other judicial process, and dispose of him as the laws of war direct.

It is curious to see one and the same mind justify the killing of thousands in battle because it is done according to the laws of war, and yet condemning that same law when, out of regard for justice and with the hope of saving life, it orders a military trial before the enemy are killed. The love of law, of justice and the wish to save life and suffering, should impel all good men in time of war to uphold and sustain the existence and action of such tribunals. The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offenses against the laws of war, that is their effect. They prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion.

The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, etc., are offenders against the laws of nature and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land.

Obedience to the Constitution and the law, then, requires that the military should do their whole duty; they must not only meet and fight the enemies of the country in open battle, but they must kill or take the secret enemies of the country, and try and execute them according to the laws of war. The civil tribunals of the country can not rightfully interfere with the military in the performance of their high, arduous and perilous, but lawful duties. That Booth and his associates were secret active public enemies, no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box on to the stage, after he had fired the fatal shot, *sic semper tyrannis*, and his dying message, "Say to my mother that I died for my country," show that he was not an assassin from private malice, but that he acted as a public foe. Such a deed is expressly laid down by Vattel, in his work on the law of nations, as an offense against the laws of war, and a great crime. "I give, then, the name of assassination to treacherous murder, whether the perpetrators of the deed be the subjects of the party whom we cause to be assassinated or of our sovereign, or that it be executed by any other emissary introducing himself as a suppliant, a refugee, or a

Attachment 2 to RE 22A

Page 11 of 12
9/20/2004

deserter, or, in fine, as a stranger." (Vattel, 339.)

Neither the civil nor the military department of the Government should regard itself as wiser and better than the Constitution and the laws that exist under or are made in pursuance thereof. Each department should, in peace and in war, confine itself to its own proper sphere of action, diligently and fearlessly perform its legitimate functions, and in the mode prescribed by the Constitution and the law. Such obedience to and observance of law will maintain peace when it exists, and will soonest relieve the country from the abnormal state of war.

My conclusion, therefore, is, that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong of the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.

I am, sir, most respectfully, your obedient servant,

JAMES SPEED.
Attorney General.
To the President

Lincoln Assassination
Conspiracy Trial Home

Attachment 2 to RE ZZA

Page 12 of 12

UNITED STATES OF AMERICA)	
	)	PROSECUTION RESPONSE TO
	)	DEFENSE MOTION TO DISMISS:
v.	)	APPOINTING AUTHORITY LACKS
	)	POWER TO APPOINT MILITARY
	)	COMMISSION
DAVID M. HICKS	)	18 October 2004

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

2. Position on Motion. The Defense motion to dismiss on the grounds that the Appointing Authority lacks the power to appoint the Military Commission is without merit and should be denied.

3. Facts.

a. The President’s Military Order (PMO) of 13 November 2001, concerning the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,”¹ authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals “for any and all offenses triable by military commission.”² The Order does not establish the structure of commissions or qualifications of commission members, but delegates authority on such matters to the Secretary of Defense.³

b. In Military Commission Order No. 1 (MCO 1), and subsequent orders and instructions issued under his authority, the Secretary of Defense established procedures for the appointment of military commissions and set forth various rules governing the structure, composition, jurisdiction, and procedures for military commissions appointed under the PMO.⁴ MCO 1 provides that the Secretary of Defense or a designee may appoint military commissions pursuant to the PMO and defines the basic responsibilities of the Appointing Authority (AA).⁵

c. The office of “Appointing Authority for Military Commissions” was established and defined in DoD Directive 5105.70, dated Feb 10, 2004. The Directive states: “The Appointing Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense.”⁶ The AA is appointed under the authority of the U.S. Constitution, Article II,

¹ President’s Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(*hereinafter* PMO).
² PMO §4(a).
³ PMO §6(a).
⁴ Military Commission Order No. 1 (Mar 21, 2002)(*hereinafter* MCO 1).
⁵ MCO 1, ¶2.
⁶ DoD Dir. 5105.70, §3.1.

Section 2, Clause 2 (Commander in Chief) and 10 U.S.C. §§113(d) and 131(b)(8).⁷ The AA reports directly to the Secretary of Defense.⁸

d. On 15 March 2004, the Secretary of Defense designated Mr. John D. Altenburg, Jr., as the Appointing Authority pursuant to the PMO, MCO 1 and DoD Dir. 5105.70.⁹

e. The Accused in this case was designated by the President for trial by military commission and charges against the Accused were referred to a Commission appointed in accordance with commission orders and instructions by Mr. Altenburg.

4. Legal Authority.

- a. President's Military Order of November 13, 2001.
- b. Manual for Courts-Martial (2002).
- c. Military Commission Order No. 1.
- d. DoD Dir. 5105.70.
- e. *In re Yamashita*, 327 U.S. 1 (1946).
- f. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- g. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- h. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
- i. 10 U.S.C. §§113(d) and 131(b).

5. Discussion

The Defense contends that the "power to appoint military commissions is derived from the power to exercise military jurisdiction, specifically, the power to convene a general court-martial." Because the Appointing Authority is not authorized to convene a general court-martial under 10 U.S.C. §822, the Defense argues that he is not authorized to appoint a military commission or to exercise "military jurisdiction" of any kind. These propositions are manifestly misguided, and the Defense fails to cite any authority to support its position on this motion.

a. The Appointing Authority Has the Power to Appoint Military Commissions.

The President's Military Order of 13 November 2001, authorizes the Secretary of Defense "as a military function" to issue "orders for the appointment of one or more military commissions" and to "issue orders and regulations" to govern the military commission process.¹⁰ The PMO also anticipates that the Secretary of Defense would delegate authority to conduct commissions to appropriate officials.¹¹ The Secretary thereafter issued a series of orders and directives, as outlined in the facts above, to implement the PMO and establish a process for the conduct of military commissions. These orders and directives are firmly rooted in the President's clear constitutional and

⁷ Id. §4.1.

⁸ Id. §5.1.1.

⁹ Military Commission Order No. 5 (Mar. 15, 2004).

¹⁰ PMO §4(b).

¹¹ PMO §6(b).

statutory authority to establish military commissions.¹² These orders and directives empower the AA to appoint military commissions in accordance with Commission Law. In performing this function, the AA reports directly to the Secretary of Defense and acts “under the authority, direction and control” of the Secretary.

The Defense does not challenge the power of the President or the Secretary of Defense to appoint military commissions. Rather, they deny that the Secretary may delegate the authority to appoint commissions to anyone except an officer authorized to convene general courts-martial under 10 U.S.C. §822. However, in creating the office of AA, the Secretary does not rely on §822, but on the PMO and his general authority to delegate his functions, duties and powers under 10 U.S.C. §§113(d) and 131(b)(8). Under §113, Congress has empowered the Secretary to delegate his duties as he sees fit: “Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.” This is precisely what the Secretary has done in delegating his duties under the PMO to the AA. The Defense is unable to identify any law that specifically prohibits this delegation of authority.

Under the PMO, the President retains the power personally to designate individuals for trial by military commission. The President directs the Secretary of Defense to issue implementing orders and appoint officials to administer the military commissions process. The Secretary, acting pursuant to the President’s order and his own statutory authority, has delegated AA duties to Mr. Altenburg. The law gives the secretary the flexibility to structure the process in this way. It is eminently reasonable that he should do so, given the breadth and complexity of responsibilities that the Secretary must discharge on behalf of the Nation in time of war. Congress recognized these realities and conferred on the Secretary broad discretion to delegate functions as he sees fit. His determination to exercise his power to delegate is entitled to the deference of this Commission.

b. The Power to Appoint Military Commissions Is Not Derived from or Dependent Upon the Power to Convene General Courts-Martial.

The Defense claims that the military commission is improperly constituted because it must be constituted under 10 U.S.C. § 822, by a person with the authority to convene a general court-martial, and the Appointing Authority lacks such authority. This claim is meritless.

The rules set out in the UCMJ, including 10 U.S.C. § 822 (entitled “Who may convene a general courts-martial”¹³) apply to courts-martial, not military commissions. Pursuant to the Military Order, the President designated Hicks as eligible for trial before

¹² See “Prosecution Response to Defense Motion to Dismiss (Lack of Jurisdiction: President’s Military Order Is Invalid Under U.S. and Int’l Law)” dated 18 October 2004.

¹³ Section 822 provides that general courts-martial may be convened by the President, the Secretary of Defense, a service Secretary, and certain commanding officers. 10 U.S.C. §822 (USCS 2004).

a military commission. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war, *see* 10 U.S.C. § 821 (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions”), it does not purport to subject such commissions to its comprehensive set of provisions governing courts-martial, including § 822. Indeed, the Supreme Court has recognized that while Congress has prescribed in detailed fashion the jurisdiction and procedures governing courts-martial, it has taken a hands-off approach with respect to wartime military commissions, by recognizing and approving their use, but not regulating their procedures.

In *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court rejected any suggestion that the procedures found in the Articles of War would apply to the trial by military commission of a person who was subject to both military commission and court-martial jurisdiction for the same offense. In *Madsen*, the civilian spouse of an Air Force officer was tried for murdering her husband by a military commission in occupied Germany. *Id.* at 343-44. At the time, the Articles of War provided that she could have been tried by court-martial for the offense. *Id.* at 345. The issue before the Supreme Court was whether Madsen could also be tried by a military commission for the same offense. *Id.* at 342.

Before reaching its ultimate conclusion that Madsen could be tried by a military commission, *id.* at 355, the *Madsen* Court characterized the unique nature and purpose of military commissions:

Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute.* It has been adapted in each instance to the need that called it forth.

Id. at 346-348 (footnotes omitted) (emphasis added). The Court went on to hold that, “[i]n the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.” *Id.* at 348. The Court explained that, in contrast to Congress’ active regulation of “the jurisdiction and procedure of United States courts-martial,” *id.* at 349, Congress had shown “evident restraint” with respect to making rules for military commissions. *Id.* The Court further explained that Article 15 of the Articles of War (now Article 21, UCMJ, 10 U.S.C. § 821) reflected Congress’ intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. *Id.* at 353.

When the President established military commissions to try unlawful combatants in the ongoing armed conflict with al Qaida and the Taliban and set out the procedures that will govern them, he exercised the very discretion that the *Madsen* Court held was

implicit in his powers as Commander in Chief and was left unrestricted by Congress. Because, as *Madsen* explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law military commissions, those provisions are inapplicable to the military commission trying the Accused in this case. Thus, there is no requirement that a military commission be constituted as a general court-martial under § 822.

In *Yamashita v. Styer*, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Article of War (now Article 21, UCMJ), Congress “recognized military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles,” and “gave sanction . . . to any use of the military commission contemplated by the common law of war.” *Id.* at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of the courts-martial by the Article of War, the Court also based its holding on the fact that “the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war.” *Id.* (emphasis added).

Contrary to the Defense assertion, *Yamishita* did not hold that *only* military commanders could appoint military commissions. The Court was required to answer whether General Styer, as Commander of the United States Forces, Western Pacific, had legal authority to create the military commission that tried General Yamashita. *Id.* at 9. The Court held that General Styer had such authority, based upon “long-established American precedents” and the President’s general proclamation of 2 July 1942 authorizing military commissions. *Id.* at 10. The Court was not called upon to consider and did not decide whether the Secretary of Defense could lawfully delegate such authority to a civilian official directly under his control, as he has done here. In other words, the Court affirmed the historic practice of permitting field commanders to appoint military commissions, but did not rule that the Secretary or the President could never delegate such power to a duly appointed civilian official. That issue has never been addressed by the Supreme Court.

Similarly, the Defense reliance on Winthrop’s 19th Century treatise on military law¹⁴ is of little use in resolving this question. First, the observations of Colonel Winthrop are a valuable guide to past practice, but cannot seriously be offered as restrictions on the powers of the Secretary of Defense under modern statutes. His scholarship reflects past custom and precedent; it of course cannot describe the scope of the Secretary’s powers under current law. Past customary practice cannot limit the Secretary’s powers explicitly conferred by Congress. Secondly, Winthrop merely suggested that “in the absence of any statute,” commanders could be guided by past practice. As demonstrated above, the Secretary acted upon sound statutory and Constitutional authority in delegating authority to the AA.

¹⁴ William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920).

The Secretary of Defense has determined that it is necessary to delegate his duties under the PMO to an Appointing Authority. That determination is entitled to the deference of the Commission. Congress's longstanding decision both to recognize and approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require giving the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress's decision to legislate detailed rules for the military's use of courts-martial in the UCMJ. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") In these circumstances, the President's action is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
DISMISS CHARGE 1 FOR
FAILURE TO STATE AN
OFFENSE TRIABLE BY
MILITARY COMMISSION**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of Charge 1 because it fails to state an offense triable by military commission, and offers in support of this motion:

1. **Synopsis:** Charge 1, "conspiracy," is not a not an offense within the jurisdiction of this military commission. In fact, "conspiracy" is not a valid offense under the law of war or international criminal law.
2. **Facts:** The question posed is a pure question of law under the law of war.
3. **Discussion:**

Charge 1 is based on the charge of "conspiracy" contained within Military Commission Instruction No. 2 (MCI No. 2) para. 6C, entitled "Other Forms of Liability and Related Offenses." Yet, the crime of conspiracy contained in MCI No. 2 does not exist in the law of war or international law.

There is no crime of "conspiracy" under the law of war. The government acknowledges this fact by not including "Conspiracy" in the list of offenses in MCI No. 2 para. 6A, entitled "Substantive Offenses—War Crimes." Moreover, under international law, there is no crime of conspiracy at all except in the context of genocide.¹

The offense of conspiracy is a "common law," crime, and is used primarily in "common law" countries, which include the U.S. and Great Britain. In common law countries, it is a crime--a "conspiracy"--for a person to enter into an agreement with another person to carry out a criminal act.² Countries that do not follow the common law tradition do not accept "conspiracy"

¹ In all of the international criminal law conventions of the last half century, the sole reference to conspiracy appears in connection to the international crime of genocide. The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III (b), renders "conspiracy to commit genocide" punishable. Following the pattern of this convention, the other international instruments addressing conspiracy in the context of armed conflict do so only with regard to genocide. The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3) both criminalize conspiracy to commit genocide, using precisely the same language as the Genocide Convention. Indeed, the ICTR has issued numerous judgments related to the offense. It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy.

² Conspiracy is an "inchoate" or "preliminary" crime. In these types of crimes, the actual substantive offense does not have to be completed for the perpetrator to be convicted. For example, the crime of conspiracy is committed if two persons enter into an agreement to kill a person next week even if it turns out that they cannot or do not

RE 23-A
Page 1 of 3

as an offense. In fact, domestic law in most nations criminalizes only complicity or participation in a crime that is actually committed or attempted.³ International law, including the law of war, following the practice of most countries in the world, does not include common law conspiracy as a viable, cognizable theory of criminal liability.⁴

This commission may try Mr. Hicks only for violations of the law of war and other offenses Congress has authorized for trial by military commission. The only such offenses are Aiding the Enemy under UCMJ Art. 104, and Spies under UCMJ Art. 106. The offense of "conspiracy" as stated in MCI No. 2 para. 6C, is neither a law of war crime or other offense triable by military commission. Accordingly, Charge 1 fails to state an offense over which this commission has jurisdiction. As a result, Charge 1 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of expert witnesses.

B: Attachments

1. *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III (b).
2. Statute of the International Tribunal for the Former Yugoslavia (1993), Article 4.3.
3. Statute of the International Tribunal for Rwanda (1994), Article 2.3.
4. Cassese, "International Criminal Law," 2003, p. 191.

6. **Relief Requested:** The defense requests Charge 1 be dismissed.

accomplish the murder. It is the agreement to commit the murder, coupled with some overt act in furtherance of that illegal objective, that constitutes the criminal offense. Of course, if the conspirators completed the murder, they would be guilty of both murder and conspiracy to commit murder.

³ In most countries it would not be a crime for two parties to enter into an agreement to kill another person. However, if person 1 gives person 2 a gun, knowing that person 2 is going to use that gun to kill person 3, and then person 2 actually uses the gun to kill person 3, person 1 would be guilty would be guilty of murder for helping person 2 commit the murder.

⁴ Cassese, "International Criminal Law," Oxford UP, 2003, p. 191. Shabas, "An Introduction to the International Criminal Court," 2nd ed., Cambridge UP, p. 103.

7. The defense requests oral argument on this motion.

By:



M.D. MORI

Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL

Joshua L. Dratel, P.C.

14 Wall Street

28th Floor

New York, New York 10005

(212) 732-0707

Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT

Major, U.S. Army

Detailed Defense Counsel

**Office of the High
Commissioner for Human Rights**

Convention on the Prevention and Punishment of the Crime of Genocide

**Approved and proposed for signature and ratification or accession by
General Assembly resolution 260 A (III) of 9 December 1948**

entry into force 12 January 1951, in accordance with article XIII

status of ratifications, reservations and declarations

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Attachment 1 to RE 23A

Page 1 of 2

Article 3

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 4

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article 6

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or

Attachment 1 to RE 23A
Page 2 of 2

**STATUTE OF THE INTERNATIONAL TRIBUNAL
(ADOPTED 25 MAY 1993)**

CONTENTS

<u>Article 1</u>	Competence of the International Tribunal	<u>Article 18</u>	Investigation and preparation of indictment
<u>Article 2</u>	Grave breaches of the Geneva Conventions of 1949	<u>Article 19</u>	Review of the indictment
<u>Article 3</u>	Violations of the laws or customs of war	<u>Article 20</u>	Commencement and conduct of trial proceedings
<u>Article 4</u>	Genocide	<u>Article 21</u>	Rights of the accused
<u>Article 5</u>	Crimes against humanity	<u>Article 22</u>	Protection of victims and witnesses
<u>Article 6</u>	Personal jurisdiction	<u>Article 23</u>	Judgement
<u>Article 7</u>	Individual criminal responsibility	<u>Article 24</u>	Penalties
<u>Article 8</u>	Territorial and temporal jurisdiction	<u>Article 25</u>	Appellate proceedings
<u>Article 9</u>	Concurrent jurisdiction	<u>Article 26</u>	Review proceedings
<u>Article 10</u>	<i>Non-bis-in-idem</i>	<u>Article 27</u>	Enforcement of sentences
<u>Article 11</u>	Organization of the International Tribunal	<u>Article 28</u>	Pardon or commutation of sentences
<u>Article 12</u>	Composition of the Chambers	<u>Article 29</u>	Cooperation and judicial assistance
<u>Article 13</u>	Qualifications and election of judges	<u>Article 30</u>	The status, privileges and immunities of the International Tribunal
<u>Article 14</u>	Officers and members of the Chambers	<u>Article 31</u>	Seat of the International Tribunal
<u>Article 15</u>	Rules of procedure and evidence	<u>Article 32</u>	Expenses of the International Tribunal
<u>Article 16</u>	The Prosecutor	<u>Article 33</u>	Working languages
<u>Article 17</u>	The Registry	<u>Article 34</u>	Annual report

Attachment 2 to RE 23A
Page 1 of 2

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Attachment 2 to RE 23A
Page 2 of 2

UNITED NATIONS



NATIONS UNIES

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

- Article 1: Competence of the International Tribunal for Rwanda
- Article 2: Genocide
- Article 3: Crimes against Humanity
- Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
- Article 5: Personal Jurisdiction
- Article 6: Individual Criminal Responsibility
- Article 7: Territorial and Temporal Jurisdiction
- Article 8: Concurrent Jurisdiction
- Article 9: Non Bis in Idem
- Article 10: Organization of the International Tribunal for Rwanda
- Article 11: Composition of the Chambers
- Article 12: Qualification and Election of Judges
- Article 12 bis: Election of Permanent Judges
- Article 12 ter: Election and Appointment of *Ad Litem* Judges
- Article 12 quater: Status of *Ad Litem* Judges
- Article 13: Officers and Members of the Chambers
- Article 14: Rules of Procedure and Evidence
- Article 15: The Prosecutor
- Article 16: The Registry
- Article 17: Investigation and Preparation of the Indictment
- Article 18: Review of the Indictment
- Article 19: Commencement and Conduct of Trial Proceedings

Attachment 3 to 23A
 Page 1 of 2

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.

Attachment 3 to RE 23A
Page 2 of 2

OXFORD

INTERNATIONAL CRIMINAL LAW



Antonio Cassese

perpetration follows, it is no longer punishable *per se*, as it is 'absorbed' into the actual crime (although it may be taken into account as an aggravating circumstance). This subcategory includes planning and ordering.

2. Criminal conduct that is preparatory to a crime, but which by definition cannot be followed by the intended crime. This subcategory encompasses attempt, where, by definition, the subsequent offence is not consummated (because subjective or external circumstances prevent consummation).

3. Criminal conduct that is punished *per se*, whether or not it is followed by the consummation of a crime; where a crime does follow, this conduct, as well as the consummated crime is punished. This subcategory includes incitement to commit genocide and conspiracy to genocide.

In many national legal systems (particularly in common law countries) three categories of such crimes are envisaged: attempt, conspiracy, and incitement. In international law, while attempt is regarded as admissible as a *general class* of inchoate crimes, conspiracy and incitement are only prohibited as 'preliminary' (not consummated) offences when connected to the most serious crime, genocide. The very limited acceptance of conspiracy is probably due to the fact that this class of criminal offence is not accepted in most civil law countries; hence it has been considered admissible at the international level only with regard to the most heinous and dangerous crime. Indeed, genocide is a crime that by definition attacks individuals qua members of a group and with a view to destroying the group as such.

As for incitement, as we have seen above, in international criminal law it is prohibited only if it leads to the actual perpetration of the crime, that is, as a form of participation in a crime, probably because States and courts have felt that prohibiting incitement *per se* in connection with *any* international crime including war crimes and crimes against humanity would excessively broaden the range of criminal conduct, the more so because of the difficulty of clearly delineating the notion of incitement. Incitement as such has been exceptionally prohibited, subject however to some stringent conditions, in connection, again, with the most harmful and serious international crime, genocide.

As for planning and ordering, the rationale behind the tendency of international law to punish them as inchoate crimes lies primarily in this: the most serious and large-scale international crimes result from careful preparation and concerted action by many agents, or are the result of instructions and directives issued by military or political leaders. In consequence, international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it penally punishable.

Attachment 4 to P

Page 2 of 2

23A

vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code.”¹

c. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.” *Id.* at Section 1(e). The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed” *Id.* at Section 2(a). He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order. *Id.*

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority) and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id.*, at para 3(A), 3(B). The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions” *Id.*, at para 8(A).

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On 9 June 2004, the Appointing Authority approved charges against the Accused, including Charge 1: Conspiracy to attack civilians; to attack civilian objects; to commit murder by an unprivileged belligerent; to commit the offense of destruction of property by an unprivileged belligerent; and to commit the offense of terrorism. In MCI No. 2, conspiracy is an

¹ Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

enumerated form of liability.² On June 25, 2004, the Appointing Authority referred the charges to the Military Commission for trial.

5. Legal Authorities Cited:

- a. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion)
- b. President's Military Order of November 13, 2001 ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism")
- c. Military Commission Order No. 1
- d. Military Commission Instruction No. 2
- e. Ex parte Quirin, 317 U.S. 1
- f. Johnson v. Eisentrager, 339 U.S. 763 (1950)
- g. Colepaugh v. Looney, 235 F.2d 429 (10th Cir 1956)
- h. Iannelli v. United States, 420 U.S. 770 (1975)
- i. Direct Sales Co. v. United States, 319 U.S. 703 (1943)
- j. Manual for Courts-Martial
- k. United States v. Recio, 537 U.S. 270 (2003)
- l. Callahan v. United States, 364 U.S. 587 (1961)
- m. Pinkerton v. United States, 328 U.S. 640 (1946)
- n. United States v. Rivera-Santiago, 872 F.2d 1073 (1st Cir. 1989)
- o. Carlson v. United States, 187 F.2d 366, 370 (10th Cir. 1951)
- p. United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002)
- q. WAYNE R. LAFAVE, CRIMINAL LAW (4TH ED. West Group 2000)
- r. Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996)
- s. U.S Army's Field Manual 27-10, The Law of Land Warfare, (18 July 1956)
- t. Prosecutor v. Tadic, Case no. IT-94-1-A (Appeals Chamber, July 15, 1999)
- u. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279
- v. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 (2003)
- w. International Military Tribunal for the Far East, Apr. 26, 1946
- x. Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et. al for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001)
- y. Statute of the International Tribunal for Yugoslavia
- z. Statute for the International Tribunal of Rwanda
- aa. Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948
- bb. Prosecutor v. Musema, Case no. ICTR-96-13-T, January 27, 2000
- cc. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003)

² MCI No.2. at para. 6(C)(6) and (7).

- dd. Prosecutor v. Mulinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
- ee. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000
- ff. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

6. Discussion.

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction.

Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution. Ex Parte Quirin, 317 U.S. 1, 26 (1942). “The Constitution confers on the President the ‘executive Power’, Art II, cl. 1, and imposes on him the duty to ‘take Care that the Law be faithfully executed.’ Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

The Congress, in passing the AUMF of 2001, expressly authorized the President to use “all necessary and appropriate force” against “nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,” and it is the President’s duty to carry out this war. Public L. No. 107-40, 115 Stat. 224 (2001).

As a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added). See also, Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice, expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since Ex parte Quirin. . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.” Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957).

The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a

“full and fair trial” and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense. PMO, Section 4(c)(2). The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel. Pursuant to DoD MCO No. 1, Section 7, The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships. It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law” Para. 3(A), MCI No. 2. and details a number of offenses that “derive from the law of armed conflict.” Id.

One of the charges before this Commission is conspiracy or joining an enterprise of persons who shared a criminal purpose to commit several of the offenses delineated in MCI No. 2. The elements of this offense are delineated in Section 6(C)(6) of MCI No. 2 and as discussed, such elements are declarative of existing law.

The elements of this offense are as follows:

- (1) Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share 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) That the Accused knew of the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully; 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.

b. The Basics of Conspiracy Law and the “Agreement”

Conspiracy is an inchoate offense, the essence of which is the agreement to commit an unlawful act. Jannelli v. United States, 420 U.S. 770, 777 (1975). The agreement need not be explicit and can be inferred from the facts and circumstances of the case. Direct Sales Co. v. United States, 319 U.S. 703, 711-713 (1943). “The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.” MCI No. 2 Section (6)(C)(6)(b)(1); Manual for Courts-Martial (MCM), United States (2002 Edition), Section 5(c)(2) (sufficient if minds of parties arrive at a common understanding and this may be shown by conduct of the parties). The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. MCM, Section

5(c)(2). A conspiracy conviction will be upheld even if the substantive offense that the conspirators agreed to commit is never completed or attempted. United States v. Recio, 537 U.S. 270-275 (2003) (agreeing to commit crime is sufficient evil warranting punishment whether or not substantive crime ever ensues); Iannelli 420 U.S. at 778. It is well established that when groups or partnerships are formed to commit criminal acts, the dangers are far greater.

[C]ollective criminal agreement – partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Callahan v. United States, 364 U.S. 587, 593-94 (1961).

Thus, paragraph 6(C) of MCI No. 2 is consistent with United States' domestic jurisprudence when it states "regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy." Furthermore, the Comment in para. C(6)(b)(8) of MCI No. 2 is firmly established in the law when it states that "conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy." See Pinkerton v. United States, 328 U.S. 640 (1946).

Relationship with Co-Conspirators.

While a conspiracy does require two or more persons to enter into an agreement, the Prosecution is not required to establish that the Accused knew the identity of his co-conspirators and their particular connection with the criminal purpose. MCI No. 2 para 6(C)(6)(b)(1); MCM, Section 5(c)(1).

A conspiracy is a continuum. Once a participant knowingly helps initiate the agreement and set it in motion, he assumes conspirator's responsibility for the foreseeable actions of his confederates within the scope of the conspiratorial agreement, whether or not he is aware of precisely what steps they plan to take to accomplish the agreed goals." United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989). Absent some type of withdrawal defense by the accused, all of the overt acts taken by the accused or another co-conspirator, regardless of the date they were undertaken, and regardless of exactly when it may be that jurisdiction attached for the President to *charge* this conspiracy as a crime under the Laws of War, are relevant to show the accused's participation in the conspiracy. After all, "the overt acts merely manifest that the conspiracy is at work." Carlson v United States 187 F.2d 366, 370 (10th Cir. 1951).

Overt Acts.

There are several overt acts alleged on the Accused's charge sheet. While not required, all of these alleged overt acts are arguably tied to the actions of the Accused. See MCI No. 2, Section 6(C)(6)(b)(3) (overt act must be done by one or more of the conspirators, but not necessarily the accused); MCM, Section 5(c)(4)(a) (overt act must be done by one or more of the conspirators, but not necessarily the accused). See also United States v. Hersh, 297 F.3d 1233, 1244-46 (11th Cir. 2002) (requiring only a showing that **one** overt act occurred after the effective date of the criminal statute).

While not required for the resolution of this issue, it is the Prosecution's position that the crux of a conspiracy offense is the agreement. After the agreement, the offense is complete once an overt act is committed that will "effectuate the object of the conspiracy or in furtherance of the common criminal enterprise." MCI No. 2 para 6(C)(6)(b)(3). It is not essential that any substantive offense be committed. Id. at para 6(C)(6)(b)(4). Therefore it is irrelevant whether the ultimate crime is committed or whether a state of armed conflict existed at the time of the overt act. The purpose behind criminalizing conspiracies is to prevent crimes before they occur, while attacking against the dangers of group criminality. See WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. West Group 2000) at 620.

c. U.S. Military Commissions have Previously Convicted of Conspiracy in Relation to Law of War Violations.

For example, in Ex parte Quirin, several Nazi saboteurs were charged and tried before a military commission created by President Roosevelt in his capacity as President and Commander in Chief. Included in these charges was **conspiracy to commit the offenses of violation of the law of war**, violation of Article 81 of the Articles of War (giving intelligence to the enemy) and Article 82 of the Articles of War (spying). 317 U.S. 1 (1942). The exact wording of the conspiracy specification was:

Specification: In that, during the year 1942, the prisoners, Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications."

Quirin Trial Transcript at 43, 44.

Similarly, in Colepaugh v. Looney, the accused was tried before a military commission and convicted of conspiracy to commit law of war violations. 235 F.2d 429 (10th Cir. 1956). Relying on the Quirin decision, the court stated that there can be no doubt that the President, as Commander in Chief of the armed forces can invoke the law of war by appropriate proclamation

and can define the various offenses against the law of war. *Id.* at 431-432. It is noteworthy that this opinion was issued in 1956 and there was no mention that the enactment of the UCMJ in 1950 would in any way curtail the President's powers in this regard.

While Quirin is one of the most well known military commission cases, war crime conspiracy convictions at military commissions did not commence with the Quirin decision. See Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001) (military commission had jurisdiction to try conspirator in the assassination of President Lincoln); Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996) (providing historical context for military commissions and identifying other commission war crime conspiracy convictions from 1865 and 1942).

The Department of the Army formally recognized the offense of conspiracy to commit war crimes in 1956. U.S. Army's Field Manual 27-10, The Law of Land Warfare, Chapter 8, para. 500 (18 July 1956). It clearly and succinctly states that "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." *Id.* Based on this language alone, the *ex post facto* argument alluded to at times by the Defense is nullified.

The Defense, in its motion, attempts to advance an argument that conspiracy law is not a "viable, cognizable theory of criminal liability," in international law. Defense Motion at pg. 2. Their source for this proclamation is the book International Criminal Law by Professor Cassese. See Defense Motion, footnote 4. This source simply does not support this argument. Professor Cassese notes that Nuremburg had a restrictive view of conspiracy, but he does not assert that prosecutors have never charged anyone with conspiracy to commit an inchoate offense against the law of war. *Id.* at 197. In fact, this page in the textbook is part of a section discussing conspiracy to commit genocide. *Id.* In this realm, Cassese acknowledges that the ICTR Trial Chamber has concluded that this prohibition applies to inchoate offenses and that in the Musema case, a conspiracy conviction was determined valid regardless of whether the ultimate substantive offense was ever committed. *Id.* at 198.

d. The Accused can be Tried for Any Act that Constitutes a Crime Under the Law of War or that by Statute can be Tried Before a Military Commission.

Article 21 of the Uniform Code of Military Justice (UCMJ) states that military commissions have jurisdiction to try "offenses that by statute or by the law of war may be tried by military commissions." A literal reading of this statute defeats the Defense argument that Commissions can only try the offenses of spying (UCMJ Article 106) and aiding the enemy (UCMJ Article 104). The word "or" clearly shows that this statute permits the prosecution of violations of the law of war **in addition** to the offenses that can be tried based upon offenses defined by statutes elsewhere. Therefore neither of these crimes specifically defined under the UCMJ nor the crimes defined in 18 U.S.C. § 2411 preclude the prosecution of other violations of the law of war.

The UCMJ was enacted in 1950 and replaced its predecessor, the Articles of War. The Modern Article 21, UCMJ was not altered in any way from its predecessor, Article 15 of the

Articles of War. In fact, this statutory language was left unchanged because this language had already been construed and interpreted favorably in Quirin. H.R. Rep No. 81-491 (specifically stating it was left unchanged because of Quirin); S. Rep. No. 81-486 (also confirming left intact because of Quirin). Clearly, Congress did not intend to limit the prosecution of war crimes that were the subject of prosecution in Quirin.

e. Conspiracy under International Law.

The crime of conspiracy was clearly established in the Nuremburg Charter. It defined crimes against peace to include “the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participations in a **common plan or conspiracy** for the accomplishment of the foregoing” (emphasis added). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547; Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 56 (2003) (citing Nuremburg and Tokyo trials as examples where conspiracy to commit crimes against peace were recognized in the charters as separate crimes). The Nuremburg Tribunal stated that Hitler had to have the cooperation of others in carrying out his plan. When these others, with knowledge of his [Hitler’s] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. See Nazi Conspiracy and Aggression, Opinion and Judgment Vol. 1, Office of the United States Chief of Counsel for Prosecution of Axis Criminality at 45.

Conspiracy law was solidified in Articles 5(a) and 5(b) of the International Military Tribunal for the Far East, Apr 26, 1946, 2, 4 Bevan 20, 28, which punished “the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international law, treaties or agreements or assurances, or participation in a **common plan or conspiracy** for the accomplishment of any of the foregoing” and also directly assigned criminal responsibility to conspirators “for all acts performed by any person in the execution of such plan.”

At Nuremburg, seven individuals were in fact convicted of conspiracy offenses. The Nuremburg International Tribunal is reflective of customary international law. See also, Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n. 53 (examining International Tribunal at Nuremburg holding that person can be convicted of war crimes and crimes against humanity they are “connected with” even if not involved in or part of a prearrangement with the person who actually commits the crime).

Military tribunals in France and Great Britain continued to broaden conspiracy law as they conducted several military commissions where conspiracy or joint enterprise to commit war crimes was prosecuted. See Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999) (discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries). Admittedly, many of these cases discussed in Tadic rested their convictions on a joint enterprise theory of liability for the ultimate substantive offense. Based on the arguments presented, it is clear that the theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under MCI No. 2. Tadic at paras. 206-213 citing The Essen

Lynching Case *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947) and drawing the inference that “all concerned in the killing” were guilty, citing the United States military court case of Kurt Goebel et al. placing great emphasis on the “common purpose” argument of the prosecutor who stated all the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it.”

Conspiracy law continued to develop and expand in International Law. Its existence is most prevalent in the Genocide Convention of 1948. In addition to establishing the crime of conspiring to commit genocide, it also mandated that members of the United Nations would ensure that conspiracy to commit genocide was a punishable offense in their domestic criminal codes. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(b), 78 U.N.T.S. 277, 280. The conspiracy crime is proscribed in various other international conventions. See Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c) (as amended) (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffic drugs); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 29 I.L.M. 493; International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Gaor, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who “commit, participate in, directly incite or conspire in the commission of the acts [of apartheid]”); Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n.126 (2003) (extensive discussion of conspiracy recognized in various international conventions). Based upon this established history of conspiracy law in the international arena, *ex post facto* concerns are alleviated and do not stand as an obstacle to prosecution under international criminal law. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 60-61 (2003); Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001) (identifying examples where *ex post facto* problems avoided because crimes already recognized under customary international law).

Conspiracy law has been recognized in the International Tribunals of Yugoslavia (ICTY) and Rwanda (ICTR). See Statute of the International Tribunal for Yugoslavia, art. 4(3)(b) (declaring that conspiracy to commit genocide is a punishable act); Statue for the International Tribunal for Rwanda, art. 2(3)(b); Amnesty International, *The International Criminal Court: Making the Right Choices*, pt. 1, VI(D) (1997) (stating that concept of “conspiracy” is recognized in the ICTY and ICTR statutes).

In Prosecutor v. Alfred Musema, the ICTR defined the crime of conspiracy to commit genocide established in the ICTR statute. Case No. ICTR-96-13-T, Trial Chamber, January 27, 2000 at para 185-198. Choosing a common law approach over a civil law approach, the Trial Chamber held that conspiracy is “an agreement between two or more persons.” Id. This is consistent with the language of MCI No. 2. Most importantly, the Trial Chamber recognized conspiracy as a crime in and of itself and not just a theory of liability. Id.

In Presbyterian Church of Sudan v. Talisman Energy, there is a comprehensive discussion of the sources of customary international law and whether conspiracy to commit a war crime is an offense under these laws. 244 F. Supp. 2d 289 (S.D.N.Y. 2003). This case arose under the Alien Tort Claims Act (ATCA) where the Talisman Corporation was sued for conspiring to commit war crimes and other offenses. *Id.* at 296. Based on the wording of the ATCA statute, the court had to analyze the validity of the allegations by applying customary international law. *Id.* at 304. The court held that “an examination of international law reveals that the concepts of **conspiracy** and aiding and abetting are commonplace with respect to the types of allegations contained in the Amended Complaint, such as genocide and **war crimes**” (emphasis added). *Id.* at 321. In making this determination, the court examined the precedent from the various international criminal tribunals. *Id.* at 322-324.

MCI No. 2 establishes criminal liability through either entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or *otherwise joining an enterprise of persons who share a common criminal purpose*. MCI No. 2 para 6(C)(6). This liability based upon “joining an enterprise” was established solidly in an in-depth opinion in the seminal case of Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). Tadic was convicted of murdering five people because he “took part in the common criminal purpose to rid [the Prijedor region] of the non-Serb population, by committing inhumane acts,” and because the killing of non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware. Prosecutor v. Tadic, Case No. IT-94-1-T, paras 371-73 (ICTY Trial Chamber II, May 7, 1997), *aff’d*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). There is a distinction between the Tadic decision and Section 6(C)(6) of MCI No. 2. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise. *Id.* MCI No. 2 permits conviction of the enterprise offense in and of itself.

From a practical perspective this is a matter of little import. It appears that MCI No. 2 merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to (as well as others in common law jurisdictions). Even under a traditional court-martial approach, a conspirator can be convicted of the underlying substantive offense solely because of his role in the analogous conspiracy. There is no prejudice to the Accused. See MCM, Section 5(c)(8); Pinkerton, 328 U.S. at 646.

The impact of the distinction is even more remote in the prosecution of this Accused as factually, the ultimate substantive offenses were carried out to completion. Prosecutor v. Multinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 23, 21 May 2003 (identifying difference in that conspiracy only requires an agreement whereas joint criminal enterprise requires some criminal act in furtherance of the agreement). While there may be some differences, the underlying goal that is common to these offenses is the punishment of criminal thoughts when coupled with some action that advances the thought.

The Tadic Appeals Chamber delineated three categories of joint activity that could result in criminal liability for a person who joins a criminal enterprise. They are:

(1) where all co-defendants, acting pursuant to a common design possess the same criminal intention;

(2) where members of a unit act pursuant to a concerted plan, each with the requisite mental element deriving from “knowledge of the nature of the system . . . and intent to further the common design” (based on World War II concentration camp prosecutions of administrative and support staff);

(3) where the accused possesses “the intention to take part in a joint criminal enterprise and to further . . . the criminal purposes of that enterprise” and the offenses committed by members of the group are foreseeable.

Tadic, Appeals Chamber, July 15, 1999, paras. 196-220.

The ICTY continued to expand the enterprise liability case law established in Tadic in Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000. The Furundzija Appeals Chamber stated that a preexisting plan or purpose is not required for criminal liability to attach. *Id.* at para. 119. The “common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.” *Id.*

Some have suggested that the ICTY’s required proof of a “common plan” for criminal enterprise convictions is strikingly similar to the proof required for the “agreement” element in establishing a conspiracy. Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

While not specifically mentioning the word “conspiracy” in the newly established International Criminal Court (ICC), a person can be held criminally responsible if they contribute to the “commission or attempted commission of . . . a crime by a group of persons acting with a common criminal purpose.” Section 3(d) of Article 25 Rome Statute of the International Criminal Court, July 17, 1998. For liability to attach, such contribution must be intentional and shall either: (1) Be made with the aim of furthering the criminal activity or criminal purpose of the group . . .; or (2) Be made in the **knowledge of the intention of the group** to commit the crime (emphasis added).

7. Attachments. None.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

//Original Signed//


Lieutenant Colonel, U.S. Marine Corps
Prosecutor

inappropriate here – demonstrates the obvious: that conspiracy is *not* recognized as a valid offense under the law of war or by other international tribunals beyond the genocide context. Simply put, international courts have refused to expand the use of conspiracy in any other situation besides genocide, and the conspiracy offense listed in MCI No. 2 is likewise invalid.

Common Criminal Purpose is only a Theory of Liability

The prosecution devotes several pages to the theory of “common criminal purpose” used in the ICTY. Yet the prosecution fails to confront the fact that MCI No.2 does not incorporate this theory of liability as enunciated in international criminal law in the context of prosecution of violations of the laws of war. The ICC statute, in Article 25, incorporates a common criminal purpose doctrine as a form of individual criminal responsibility, but not as a basis for an inchoate offense.³ The ICTY has used “joint criminal enterprise” only as a theory of individual criminal responsibility.⁴ Conversely, and critically, joint criminal enterprise (common criminal purpose) has never been charged as an inchoate offense. Similarly, the ICTR has used the common criminal purpose doctrine to find liability, but it does not comprise a separate inchoate offense.⁵ Thus, MCI No. 2's attempt to do so is without any support in the international arena.

Thus, even if “common criminal purpose” as used in the international criminal tribunals is a valid form of individual criminal liability in a particular case, it is nevertheless a theory distinct from conspiracy, and one that cannot be merged therewith somehow to provide a basis for an inchoate offense. Consequently, MCI No. 2's attempt to transform “common criminal purpose” into an inchoate offense – contrary to all authority, including all holdings by the ICTY and ICTR – must be rejected.

The U.S. Offense of Conspiracy is not Internationally Accepted

The common law crime of conspiracy does not exist under international criminal law generally, except in the case of genocide, the most aggravated of international crimes. This is because most civil law countries (in contrast to common law jurisdictions such as the United States and United Kingdom) do not recognize the crime of conspiracy in their domestic criminal law systems.⁶ Instead, they focus on complicity, or participation, in an actual crime or attempt.⁷

judgments related to the offense. It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy of any kind.

³ Article 25, 3. (d), In any way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.

⁴ See, *Prosecutor v. Kvočka et al., Judgement*, Case No. IT-98-30/1, T.Ch. I, 2 Nov 2001

⁵ *Kayishema and Ruzindana*, ICTR-95-01-0534 (Trial Chamber), May 21, 1999, para. 203-205.

⁶ Cassese, “International Criminal Law,” Oxford UP, 2003, p. 191.

Review Exhibit

23C

Page

2

of

5

World War II Trials

The prosecution's reliance on the trials held after the Second World War is similarly misplaced. Application of conspiracy to international crimes occurred most prominently in the war crimes trials following World War II. The inclusion of the notion of conspiracy in the charters of the various tribunals was the result of U.S. influence during the drafting processes, but even then conspiracy was recognized in only very limited fashion (and not to the extent that would sustain Charge 1 herein).⁸ Article 6 of the Nuremberg Charter (1945) sets forth the three crimes within the jurisdiction of the International Military Tribunal: crimes against peace, crimes against humanity, and war crimes. The term "conspiracy" appeared only in the definition of the first: "...planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or *conspiracy* for the accomplishment of the foregoing." (Emphasis added).

A non-specific reference was also contained in the final sentence of article 6: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all the acts performed by any persons in execution of such plan." (Emphasis added).

In the IMT, the prosecution, in count one, attempted to charge the defendants with conspiracy to commit war crimes and crimes against humanity as well as the crime of waging aggressive war. In the Tribunal's judgement, it found that "the [IMT] charter **does not define as a separate crime any conspiracy** except the one to commit acts of aggressive war."⁹ The tribunal **disregarded "the offences of conspiracy to commit war crimes** and crimes against humanity and will consider only the common plan to prepare, initiate, and wage aggressive war."¹⁰ The principles set out in the Nuremberg Charter were confirmed as principles of international law by the UN General Assembly on December 11, 1946.¹¹

Although the IMT captured the greater attention, most of the war crimes trials held following the war were conducted by the individual allies pursuant to Allied Control Council Law No. 10 (1945). That instrument, in Article II (d), mentioned conspiracy *per se* only with regard to crimes against peace.

The Charter of the International Military Tribunal for the Far East (1946), in Article 5, followed the Nuremberg precedent in citing conspiracy vis-à-vis crimes against peace (Article

⁷ Shabas, "An Introduction to the International Criminal Court," 2nd ed., Cambridge UP, p. 103.

⁸ Bassiouni, "Introduction to International Criminal Law," Transnational Publishers, 2003, p. 8.

⁹ IMT-Nuremberg transcript, first volume, p. 226.

¹⁰ *Id.* at 226.

¹¹ Resolution Affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/236 (1946).

Review Exhibit 230

Page 3 Of 5

5a), and also included it in the definition of the offense of crimes against humanity (Article 5c).¹² Tellingly, the Charter did not contain any offense of conspiring to commit war crimes.

Conspiracy is not followed in International Criminal Law

Despite the references to conspiracy in the three aforementioned instruments, subsequent international criminal law conventions have not included conspiracy to commit such offenses. Instead, the sole references to conspiracy appear in connection to genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article III (b), proscribes only “conspiracy to commit genocide” punishable. Following the pattern of this convention, the other international instruments addressing conspiracy in the context of armed conflict do so only with regard to genocide.

The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3) both criminalize conspiracy to commit genocide, using precisely the same language as the Genocide Convention. Indeed, the ICTR has issued numerous judgments with respect to the offense.¹³ It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy of any kind.

Conclusion: As demonstrated, the offense of conspiracy is clearly restricted in modern international criminal law practice to the offense of genocide, the most egregious international crime. The offense of conspiracy as set forth in MCI No.2 is not found in the statutes of the International Criminal Tribunal of Yugoslavia, International Criminal Tribunal for Rwanda or the International Criminal Court. MCI No. 2’s infusion of common criminal purpose into the common law notion of conspiracy is unavailing as well as a purported basis for an inchoate offense under the law of war.

4. Evidence: The testimony of expert witnesses.

5. Relief Requested: The defense requests Charge 1 be dismissed, and any and all references to “co-conspirator” be stricken from Charge 2.

6. The defense requests oral argument on this motion.

¹² Crimes against peace: “Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

Crimes against humanity: “Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

¹³ See, e.g., *Musema*, (Trial Chamber), January 27, 2000; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003; *Niyitegeka*, (Trial Chamber), May 16, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003.

Review Exhibit

23C

Page

4

of

5

By:

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

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 23C
Page 5 of 5

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**PROPOSED ESSENTIAL FINDINGS
DEFENSE MOTION TO DISMISS
CHARGE 1
(D11)**

The Prosecution submits the following proposed essential findings in relation to the above referenced motion:

1. The General Counsel of the Department of Defense used his properly delegated authority pursuant to section 7A of Military Commission Order No. 1 and issued Military Commission Instruction (MCI) No. 2.
2. MCI No. 2 establishes crimes and elements that are intended for use by this Military Commission.
3. The crimes and elements listed in MCI No. 2 are derived from the law of armed conflict, which is also commonly referred to as the law of war.
4. The crime of "conspiracy" is delineated in section 6C of MCI No. 2 in the section titled "Other Forms of Liability and Related Offenses"
5. Under MCI No. 2, a person can be found guilty of conspiracy based upon two different theories of liability.
6. One theory of conspiracy liability under MCI No. 2 is based upon entering into an agreement with one or more persons to commit one or more substantive offenses triable by military commissions while knowing the unlawful purpose of the agreement. (Hereinafter "agreement" liability)
7. A second theory of conspiracy liability under MCI No. 2 is based upon joining an enterprise of persons who share a common criminal purpose that involved, at least in part, the commission or intended commission of one or more offenses triable by military commission and such that the person joined the criminal enterprise willfully, that is with the intent to further the unlawful purpose. (Hereinafter "common criminal enterprise" liability)
8. Under MCI No. 2, both agreement conspiracy liability and common criminal enterprise conspiracy liability require an overt act.
9. Charge 1 against the Accused charges the offense of conspiracy delineating liability based on either agreement liability or common criminal enterprise liability.

Review Exhibit 123-0

Page 1 Of 4

10. Charge 1 has delineated specific overt acts and the Prosecution will be required to prove at least one of these alleged overt acts beyond a reasonable doubt to convict the Accused of Charge 1.
11. Military Commission jurisdiction is based on, among other things, Article 21 of the Uniform Code of Military Justice that was enacted in 1950.
12. For purposes of this motion, Article 21 of the Uniform Code of Military Justice is the same as its precursor, Article 15 of the Articles of War.
13. Article 15 of the Articles of War was in effect when the U.S. Military Commission case of Ex parte Quirin, 317 U.S. 1 (1942) was tried.
14. Article 15 of the Articles of War was in effect when the U.S. Military Commission case later the subject of litigation in Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), was tried.
15. In both the Quirin and Colepaugh cases, the Accused were charged with the offense of conspiracy to commit a law of war violation.
16. In both the Quirin and Colepaugh cases, defense counsel brought challenges advocating that conspiracy to commit a law of war violation was not an offense.
17. Despite the defense challenges, the Accused in both the Quirin and Colepaugh cases were convicted of conspiring to commit law of war violations.
18. The above-mentioned conspiracy convictions have never been overturned.
19. The Department of the Army formally recognized conspiracy to commit war crimes as an offense in 1956 when it issued the U.S. Army's Field Manual 27-10, The Law of Land Warfare.
20. "Agreement" type conspiracy has been recognized in various facets of international law. These include:
 - a. Nuremburg – conspiracy to commit aggressive war
 - b. International Tribunal for the Far East
 - c. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide
 - d. Convention for the Suppression of Illicit Traffic in Dangerous Drugs (1936)
 - e. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

Review Exhibit 23-D
Page 2 Of 4

f. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

21. MCI No. 2 creates a more difficult standard for conviction of agreement type conspiracy than customary international law, as it requires the commission of an overt act.
22. Both the International Criminal Tribunal of the Former Yugoslavia (ICTY) as well as the International Criminal Tribunal for Rwanda (ICTR) have sustained "Agreement" conspiracy convictions.
23. Common criminal enterprise liability was solidified in the ICTY Appeals Chamber Decision in Prosecutor v. Tadic, Case No. IT-94-1-A (Appeals Chamber, July 15, 1999).
24. The decision in Tadic was based upon finding this theory of liability implicitly contained in Article 7 of the governing statute for the ICTY.
25. Common criminal enterprise liability used in the ICTY and ICTR is a basis for finding someone guilty of the ultimate substantive offense and not necessarily of an inchoate crime such as conspiracy.
26. Based on the elements listed in MCI No. 2 for common criminal enterprise conspiracy liability, there is little or no distinction between the elements used by the ICTY and ICTR and MCI. No. 2.
27. While the ICTY and ICTR require the completion of the substantive offense, this difference is minimized by the requirement that the Prosecution prove at least one overt act beyond a reasonable doubt.
28. Like Nuremburg, the ICTY and the ICTR, the starting point for this commission is to look at its own statute or commission law.
29. It is common for there to be slight differences in applying the law of war because of differences in countries with civil law versus common law systems.
30. Based on the initial requirement to apply and act consistently with commission law, and finding that there is nothing in the conspiracy elements

Review Exhibit 23-0
Page 3 Of 4

delineated in MCI No. 2 or in Charge 1 of the charge sheet to be inconsistent with the law of war, the motion to dismiss Charge 1 is denied.



KURT J. BRUBAKER
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 23-0

Page 4 Of 4

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
DISMISS CHARGE 2 FOR
FAILURE TO STATE AN
OFFENSE TRIABLE BY
MILITARY COMMISSION**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves this military commission to dismiss Charge 2 against Mr. Hicks because it fails to state an offense under the law of war, and is not an offense triable by military commission. The defense states in support of this motion:

1. **Synopsis:** In Charge 2, the Government alleges that Mr. Hicks attempted to murder divers members of coalition forces (the identities of these persons are not stated) while he did not enjoy combatant immunity. This conduct is not a violation of the law of war, and, therefore, fails to state an offense that can be tried before this military commission. Further, this military commission is without jurisdiction to try Mr. Hicks for this supposed offense because it is not "triable by military commission." Accordingly, the commission must dismiss Charge 2.

2. **Facts:** See Charge Sheet.

3. **Discussion:** It is not a violation of the law of war for an unprivileged combatant to engage in combat against enemy combatants.¹ Combatants are granted "immunity" from prosecution for acts like deliberately killing (murder) or injuring (battery) another human being that, if committed outside the context of combat, would ordinarily be criminal. Unprivileged combatants, on the other hand, do not enjoy "combatant immunity," and, can be prosecuted for killing or injuring a combatant. However, such prosecution may not be before a military commission. The proper forum in which to try an unprivileged combatant for killing or injuring a combatant is the same as that for other crimes against persons which are not violations of the laws of war--the domestic civilian criminal court of the State where the offense occurred.

An unprivileged combatant who engages in war-like acts (*i.e.*, engaging in combat operations) can be targeted by combatants. However, nothing in the law of war or any statute allows unprivileged combatants to be tried by military commission for the war-like acts they commit unless those acts violate the law of war. The law of war simply does not prohibit war-like acts committed against combatants.

Alleged crimes occurring in the armed conflict that do not violate the law of war are subject to prosecution only in the domestic civilian criminal courts of the sovereign in whose

¹ It would be a crime under the law of war for an unprivileged combatant to cause death or injury to a combatant if the (i) the person attacked was a combatant who had surrendered or was wounded, or (ii) the attacker used prohibited methods or means of warfare when he or she attacked the combatant. However such actions would be triable by a military commission not because of the status of the attacker as an unprivileged combatant, but because the acts themselves are violations of the law of war. Because Charge 2 does not contain allegations that Mr. Hicks engaged in such conduct, it will not be discussed further in this motion.

RE 24A
Page 1 of 3

territory the offense conduct was performed, regardless of the person's status under the law of war as a privileged combatant, unprivileged combatant, or civilian.

Thus, the crime of "Murder by an Unprivileged Belligerent" does not exist under the law of war, notwithstanding its inclusion in Military Commission Instruction No. 2 (MCI No. 2). The offense lacks any basis in the law of war or any enabling statute. The offense of "Murder by an Unprivileged Belligerent" is, as styled in MCI No. 2, a solely domestic offense that must be tried in a domestic civilian criminal court that possesses geographic jurisdiction. Consequently, it must be rejected in this instance.

Article 21 of the Uniform Code of Military Justice (UCMJ) establishes a military commission's jurisdiction over "...offense[s] **that by statute or by the law of war may be tried by military commission...**"² (emphasis added). It is from this congressionally enacted Article that the President, in part, draws his authority to establish military commissions.³

However, there are only two non-law of war offenses Congress has approved for trial by military commission—Aiding the Enemy, Article 104, UCMJ and Spies, Article 106, UCMJ. Congress has never authorized a military commission to try civilians for "Murder by an Unprivileged Belligerent." Indeed, to do so would be completely contrary to logic, sense, and tradition, because the forum to try individuals who lack combatant immunity for deliberately killing or injuring combatants already exists in the form of the domestic civilian courts of the sovereign possessing jurisdiction. Accordingly, "Murder by an Unprivileged Belligerent," as set forth in MCI No. 2, is not triable by military commission, and this military commission lacks jurisdiction to try Mr. Hicks for such an offense. Therefore, Charge 2 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence:** 1. The testimony of expert witnesses.

6. **Relief Requested:** The defense requests Charge 2 be dismissed.

² 10 U.S.C. §821.

³ See President's Military Order of 13 November 2001, first paragraph. Note: "sections 821 and 836 of title 10, United States Code" are Article 21 and Article 36 of the Uniformed Code of Military Justice, respectively.

7. The defense requests oral argument on this motion.

By: 
for M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

c. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”² The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed” *Id.*, Section 2(a). He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order. *Id.*, Section 2(b)

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority), MCO No. 1, para. 3(A), and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id.*, paragraph 3(B). The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions” *Id.*, paragraph 8(A)

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On June 9, 2004, the Appointing Authority approved charges against the Accused, including, *inter alia*, Attempted Murder by an Unprivileged Belligerent. Murder by an Unprivileged Belligerent is an enumerated charge in MCI No. 2,³ and Attempt is an enumerated form of liability/related offenses.⁴ On June 25, 2004, the Appointing Authority referred these charges to this Military Commission for trial.

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

² *Id.*, Section 1(e)

³ MCI No. 2, para. 6(B)(3) and (4)

⁴ *Id.*, para. 6(C)(6) and (7)

4. Legal Authority Cited

- a. President's Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").
- b. Military Commission Order No. 1.
- c. Military Commission Instruction No. 2.
- d. Department of the Army Field Manual 27-10, July 1956.
- e. 10 U.S. Code §§ 821, 836 (Articles 21, 36, Uniform Code of Military Justice).
- f. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).
- g. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
- h. *Ex Parte Quirin et al.*, 317 U.S. 1 (1942).
- i. *Talbot v. Janson*, 3 U.S. 133 (1795).
- j. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957).
- k. *Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y. 2002).
- l. *United States v Lindh* 212 F.Supp.2d 541, 553 (E.D.V.A. 2002).
- m. Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention, 29 July 1899.
- n. Hague Convention of 1907, Convention With Respect to the Laws and Customs of War on Land (Hague IV).
- o. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- p. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 12 August 1949.
- q. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949

- r. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- s. Charter of the International Military Tribunal, the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany.
- t. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- u. Statute of the International Tribunal for Rwanda, 33 I.L.M. (1994).
- v. Rome Statute of the International Criminal Court, 37 I.L.M. (1994).
- w. Adam Roberts & Richard, *Documents on the Laws of War* (3d ed. 2002).
- x. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L.F. 291 (2001).
- y. Winthrop, *Military Law and Precedents* (2d Ed. 1920).
- z. Lieber's Code, General Order No. 100 War Department, April 24, 1863.
- aa. Black's Law Dictionary (6th ed. 1990).

5. Discussion

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

(1) Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution.⁵ The Congress, in passing the AUMF of 2001, expressly authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,"⁶ and it is the President's duty to carry out this war.

⁵ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) "The Constitution confers on the President the 'executive Power', Art II, cl. 1, and imposes on him the duty to 'take Care that the Law be faithfully executed.' Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

⁶ Public L. No. 107-40, 115 Stat. 224 (2001)

(2) As a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial of* unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”⁷ Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice,⁸ expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

(3) As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since *Ex parte Quirin*, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.”⁹

(4) The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a “full and fair trial,”¹⁰ and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense.¹¹ The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel.¹² It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law”¹³ and details a number of offenses that “derive from the law of armed conflict.”¹⁴

(5) This declarative instruction, which has a direct lineage to the President’s authority to regulate the conduct of armed conflict, expressly lists “Murder by

⁷ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), citing *Ex parte Quirin*, 317 U.S., at 28 (emphasis added). See also, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

⁸ 10 U.S.C. §§ 821,836 (1994). Congress takes notice of the law of war in this manner: “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.” [emphasis added]

⁹ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957)

¹⁰ PMO, Section 4(c)(2).

¹¹ *Id.*, Section 6(a).

¹² Pursuant to DoD MCO No. 1, Section 7. *Regulations A. Supplementary Regulations and Instructions*: The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

¹³ Para. 3(A), MCI No. 2.

¹⁴ *Id.*

an Unprivileged Belligerent” as an offense requiring proof beyond a reasonable doubt of the following elements:

- (a) The Accused killed one or more persons;
- (b) The Accused either:
 - (i) intended to kill or inflict great bodily harm on such person or persons; or
 - (ii) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
- (c) The accused did not enjoy combatant immunity; and
- (d) The killing took place in the context of and was associated with armed conflict.¹⁵

(6) The instruction also enumerates Attempt among “Other Forms of Liability and Related Offenses,”¹⁶ having the following elements:

- (a) The accused committed an act;
- (b) The accused intended to commit one or more substantive offenses triable by military commission;
- (c) The act amounted to more than mere preparation; and
- (d) The act apparently tended to effect the commission of the intended offense.¹⁷

b. MCI No. 2 Accurately Declares Murder by an Unprivileged Belligerent as a Crime under the Law of Armed Conflict

(1) MCI No. 2 does not create new law; it is declarative of law that previously existed under the Law of Armed Conflict. Murder and other acts of belligerency by an unprivileged belligerent was a crime triable by military commission long before the Accused’s charged activity.

(2) The Law of Armed Conflict does not create offenses that would otherwise not constitute criminal conduct. Rather, it recognizes that certain conduct that is otherwise criminal should not be excused by a state of war. As detailed further below,

¹⁵ MCI No. 2, para. 6(B).

¹⁶ *Id.*, para. 6(C)(7).

¹⁷ *Id.*

the Law of Armed Conflict recognizes that a lawful combatant, acting in consonance with the Law of Armed Conflict, has a legal justification for certain acts that would otherwise subject him to prosecution (e.g., willfully killing or attempting to kill certain categories of other human beings, such as other combatants, or destroying property). Conversely, the Law of Armed Conflict recognizes that a person who is *not* a lawful combatant acting in consonance with the Law of Armed Conflict does *not* enjoy this legal justification and may be prosecuted for his acts of belligerency.

(3) Unlawful Killing

(a) As a starting point, unlawful killing is universally recognized and punished as a crime. "Murder," according to Black's Law Dictionary, is "the unlawful killing of a human being by another with malice aforethought."¹⁸ "Malice aforethought," in turn, is a "predetermination to commit an act without legal justification or excuse."¹⁹ The Defense acknowledges that murder is a criminal act, and that an unprivileged belligerent (*i.e.*, one who does not enjoy combatant immunity) can be prosecuted for willfully killing a combatant. The Prosecution concurs with the Defense on this point. However, the Defense contends that this is a domestic offense, triable in a domestic court, not a violation of international law, triable by military commission. This assertion is without merit.

(b) Murder has long been condemned not only under domestic laws, but under international law. As early as 1899,²⁰ at the Hague Convention, the international community recognized that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."²¹ Among other limitations, Section II, Chapter I of Article 23 of the Hague Convention of 1899 prohibited "kill[ing] or wound[ing] treacherously individuals belonging to a hostile nation *or army*."²² This language was reiterated in the 1907 Hague Convention.

(c) As noted in FM 27-10, the Geneva Conventions of 1949 define willful killing of protected persons as a "grave breach."²³ Department of the Army Field Manual 27-10, July 1956, para 502. Addressing armed conflicts not of an international character, Geneva IV prohibits "violence to life and person, *in particular murder of all kinds*" of persons taking no active part in hostilities (emphasis added). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August*

¹⁸ Black's Law Dictionary, page 1019 (6th ed. 1990).

¹⁹ *Id.* at 957.

²⁰ The Hague Convention of 1899 was later substituted by the Hague Convention of 1907, §2 Art.22, which reiterated the same edict. The convention of 1899 is still cited, however, to show the first point in time that means of injuring the enemy were formally limited in international law.

²¹ *Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention*, 29 July 1899, art. 22, 32 Stat. 1803.

²² *Id.* at art. 23.

²³ See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 12 August 1949 (T.I.A.S. 23362), Article 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (T.I.A.S. 3364), Article 51; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (T.I.A.S. 3364), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (T.I.A.S. 3365) ("Geneva IV"), Article 147.*

(d) The Nuremberg Charter recognized criminal liability for murder by its declaration that the Tribunal “shall have the power to try and punish persons who, . . . whether as individuals or as members of organizations, committed any of the following crimes:²⁴

(a) Crimes against Peace: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: Namely violations of the laws or customs of war. Such violations shall include, but not be limited to, *murder* [emphasis added], ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely *murder* [emphasis added], extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all such acts performed by any persons in execution of such plan.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547.²⁵

(e) Present-day international tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for

²⁴ The Nuremberg Tribunal, and the doctrines developed thereunder, have become to be known as the “Nuremberg Principles,” which were unanimously adopted by United Nations Resolution 95(I), which affirmed the principles of international law recognized by the charter of the Nuremberg Tribunal and then judgment of the tribunal. See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, vol. XXII, IMT Secretariat, Nuremberg, 1948, pp. 413-414 and 497 (As reprinted in *Documents on the Laws of War, Third Edition*).

²⁵ See also International Military Tribunal for the Far East, Apr. 26, 1946, 2, art. 5(a)-(b), 4 *Bevans* 20, 28 (using the same or substantially similar language). The Allied Powers also used the same provisions to describe crimes against peace and similarly assigned criminal responsibility for lower level military tribunals in Allied occupied Germany. See Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette Control Council for Germany 50, 50-51 (1946). See also Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* 555 (1954) and Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 *Mil. L. Rev.* 275, 281 (1995).

Rwanda (ICTR) and the International Criminal Court (ICC)²⁶ – all have codified murder in some form as an offense under the customary law of armed conflict.

i. Pursuant to Article 2 of the ICTY Statute, the Tribunal has the power to prosecute persons committing or ordering the commission of grave breaches of the Geneva Conventions of 12 August 1949, including *willful killing* of protected persons.²⁷ Article 5, *Crimes Against Humanity*, states that the Tribunal shall have the power to prosecute any persons responsible for murder when committed in armed conflict, whether international or internal in character, and directed against any civilian population.²⁸

ii. The ICTR Statute contains almost identical provisions.²⁹ Under Article 3, *Crimes Against Humanity*, the Rwandan tribunal has the power to prosecute persons responsible for murder when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.³⁰ Under Article 4, *Violations of Article 3 Common to the Geneva Conventions*, the Rwandan tribunal has the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 including murder.

iii. The Rome Statute of the ICC specifies a number of punishable offenses that include some type of willful killing as an element both as an allegation of crimes against humanity and an allegation of war crimes.³¹ These offenses include: genocide by killing,³² the crime against humanity of murder,³³ and the war crime

²⁶ The U.S. delegation to the ICC appealed to United States federal law during negotiations over the ICC statute. See Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 *Crim. L.F.* 291, 294 n.13, 316, 317 n.86 (2001) (observing that the United States delegation was guided by federal law and U.S. military materials).

²⁷ Statute of the International Tribunal art. 7 32 *I.L.M.* 1192-94, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 *I.L.M.* 1203 [hereinafter ICTY Statute], available at <http://www.un.org/icty/badic/statut/stat2000.htm>.

²⁸ ICTY Statute, Art 5.

²⁹ Statute of the International Tribunal for Rwanda adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg. at 2, U.N. Doc. S/RES/955 (1994), 33 *I.L.M.* (1994) [hereinafter ICTR Statute], available at <http://www.ict.rw/ENGLISH/basicdocs/statute.html>

³⁰ ICTR Statute, Art 3.

³¹ July 17, 1998, art. 28(b)(i), U.N. Doc. A/CONF. 183/9 (1998), 37 *I.L.M.* 999 [hereinafter Rome Statute] available at <http://www.un.org/law/icc/statute/rome.htm>.

³² Rome Statute, Article 6 (a) Genocide by killing

1. The perpetrator killed 2 one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

³³ Article 7 (1) (a) Crime against humanity of murder

of willful killing of protected persons,³⁴ killing or wounding a person *hors de combat*,³⁵ and treacherously killing or wounding individuals belonging to the hostile nation or army.³⁶

(f) Unlawful killing clearly is a charge contemplated by international law. Furthermore, the status or means used by the perpetrator, as well as the status of the victim, can be determinative of whether a killing is unlawful.

(4) Acts of Belligerency by an Unprivileged Belligerent

(a) Individuals “who take up arms and commit hostile acts without having complied with the conditions pre-scribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also, id.*, Articles 81, 82. Historically, those caught committing acts of belligerency who do not qualify as such, sometimes termed “unlawful combatants” or “unprivileged belligerents,” have been treated harshly.³⁷

(b) The recognition that unlawful combatancy violates the law of nations dates far back in our Nation’s history. In a 1795 concurring opinion, Justice Iredell noted that “hostility committed without public authority” is “not merely an offence against the nation of the individual committing the injury, **but also against the**

-
1. The perpetrator killed 7 one or more persons.
 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

³⁴ Rome Statute, Article 8 (2) (a) (i) War crime of wilful killing

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁵ Rome Statute, Article 8 (2) (b) (vi) War crime of killing or wounding a person *hors de combat*

1. The perpetrator killed or injured one or more persons.
2. Such person or persons were *hors de combat*.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁶ Rome Statute, Article 8(2)(b)(xi).

³⁷ In fact, summary execution of unlawful combatant was not uncommon. *See, e.g., United States v. List* (“Hostage Case”), 11 Trials of War Criminal 1223 (GPO 1950)(indictment charged Accused had illegally designated captured individuals as “partisans” and executed them. Accused acquitted on this charge because Government had failed to prove beyond a reasonable doubt that the captured individuals were, in fact, lawful combatants).

law of nations” *Talbot v. Janson*, 3 U.S. 133 (1795)(Iredell, concurring)(emphasis added).

(c) Colonel Winthrop, in his famed *Military Law and Precedents* noted:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d Ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants, typically for “Violation of the laws of war.” *Id.* at 784. Many were sentenced to death. *Id.* at 784, footnote 57.

(d) Lieber’s Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatant as well. Under Article 57, “So soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.” Article 82, on the other hand, states that those who “commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates.” *Id.*

(e) The United States Supreme Court has specifically upheld the jurisdiction of military commissions to try unlawful combatants:

By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. **Unlawful combatants** are likewise subject to capture and detention, but in addition they are **subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.**

Ex Parte Quirin, 317 U.S. 1 (1942)(emphasis added). A plurality of the Supreme Court recently reaffirmed this holding. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004)(“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war’”).

(f) Qualification for Lawful Belligerent Status. The standard for who qualifies as a privileged belligerent has changed through the years. Under modern international standards, to qualify as belligerents, an army, militia or volunteer corps must fulfill the following conditions:

(i) Be commanded by a person responsible for his subordinates;

(ii) Have a fixed distinctive emblem recognized at a distance;

(iii) Carry arms openly; and

(iv) Conduct their operations in accordance with the laws and customs of war.

Convention With Respect to the Laws and Customs of War on Land (Hague IV), 18 October 1907, Chapter 1, art.1, 32 Stat. 1803

(g) Furthermore, the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall also be regarded as belligerents, *but only if they carry arms openly and if they respect the laws and customs of war. Id.*

(h) Therefore, if an individual does not qualify as a belligerent, either due to his failure to abide by the first three above-enumerated requirements, or because the operations that he conducts are not in accordance with the laws and customs of war, then the laws and rights of war need not be applied to that individual under existing international law, and he may be tried by military commission for the acts which render his belligerency unlawful. *Quirin*, 317 U.S. at 31.

(i) Thus, under the Law of Armed Conflict, only a lawful combatant enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict. *See Padilla v. Bush*, 233 F.Supp. 2d 564, 592 (S.D.N.Y. 2002). Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes. *Id.* at 592, *citing United States v. Lindh*, 212 F.Supp. 2d 541, 553 (E.D.V.A. 2002). The entire body of law stands for a simple proposition: those considered “lawful combatants” under the law cannot be prosecuted for belligerent acts if they abide by the law of armed conflict. Conversely, those who either do not meet the definition of lawful combatant – “unlawful combatants” – or who meet the definition but do not abide by the law of armed conflict may be prosecuted by military commission. MCI No. 2 correctly states this proposition, and even provides the added protection that the Accused enjoys a presumption that he is a lawful combatant, and the Prosecution must prove beyond a reasonable doubt that he did not enjoy combatant immunity during his acts of belligerency in order to convict him of this offense.

(5) The principles and precedent of international law fully support the declaration under MCI No. 2 that Murder by an Unprivileged Belligerent states an offense and is triable by military commission. Accordingly, the Defense’s Motion to Dismiss should be denied.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA)	
)	
	)	DEFENSE REPLY REGARDING
	)	MOTION TO DISMISS
v.	)	CHARGE 2 FOR FAILURE TO
	)	STATE AN OFFENSE TRIABLE
	)	BY MILITARY COMMISSION
DAVID M. HICKS)	
)	
	)	26 October 2004

The Defense in the case of the *United States v. David M. Hicks* moves to dismiss Charge 2 on the ground that it fails to state an offense under the laws of armed conflict (LOAC), and states in support of this reply:

- Synopsis:** The prosecution’s response fails to establish that LOAC protects combatants in the ordinary course of armed conflict. The killing of a combatant does not violate LOAC unless the killing involves unlawful means or methods.
- Facts:** Mr. Hicks never fired a weapon or assisted in firing a weapon at U.S. or any other force during the international armed conflict in Afghanistan.
- Discussion:** The issue at the heart of this motion is whether the killing of a soldier by an individual who does not possess combatant immunity violates the LOAC. The answer is no.

The prosecution’s position is patently circular, since it attempts to validate the offense in Charge 2, listed in MCI No. 2, by citing MCI No. 2 itself as “declarative of existing law.” But MCI No. 2 is not declarative of existing law regarding this particular offense. Instead, with respect to Charge 2, MCI No. 2 invents a new offense in its entirety. In fact, MCI No. 2 was issued after the alleged offenses occurred as a means of justifying prosecutions by this commission. MCI No.2 is not a duplicate of any of the International Criminal Courts statutes, does not reflect the existing state of the law of war, and is not the product of independent or recognized scholarship on the LOAC or international law. Indeed, absent itself, MCI No. 2, and Charge 2 in particular, is without any foundation at all.

For this commission to have jurisdiction, the alleged criminal conduct must violate LOAC. The prosecution cites numerous examples in which the words “murder” or “killing” are used. Yet all of these examples involve the murder or killing of individuals protected under LOAC (“willful killing of protected person,”¹ “person taking no active part in hostilities,”² “acts committed against any civilian population,”³ “willful killing of protected persons,”⁴ and “attack

¹ Prosecution Response, page 7, paragraph (3)(c).

² Prosecution Response, page 7, paragraph (3)(c).

³ Prosecution Response, page 8, paragraph (3)(d)(c).

⁴ Prosecution Response, page 9, paragraph (3)(e)(i).

Review Exhibit 24C
Page 1 of 4

against any civilian population”⁵). In each of the instances cited by the prosecution, it is the *protected* status of the individual killed or attacked which renders such action a violation of the LOAC.

In contrast, in the circumstances pertinent here, military members are not within the LOAC’s protection unless *hors de combat*. The LOAC does not serve as a complete criminal code governing all potential crimes that may occur within an international armed conflict. Rather, LOAC co-exists with domestic penal laws, and is selective in who, when and what it protects.

The prosecution reaches back to the Hague convention for the proposition that killing “**treacherously** individuals belonging to a hostile nation or army”⁶ as support for this new charge. Yet, the prosecution fails to mention that the treacherous killing verbiage is designed to prohibit using poisons or acts of perfidy,⁷ both of which are violations of LOAC.

Similarly, the prosecution’s reliance on the international criminal tribunals of the ICTY, ICTR and ICC is misplaced. All the sections cited by the prosecution address killing of “protected persons” such as civilians or soldiers *hors de combat*. Thus, those sections do not support Charge 2 herein.

Further, the prosecution seeks support for Charge 2 in the definitions of “crimes against humanity.” Again, that reliance is unavailing, since “crimes against humanity” are not triable in a military commission. Article 21 of the UCMJ extends jurisdiction over only violations of the law of war and specific statutes. (Article 104 and Article 106 of the UCMJ).

Being an Unprivileged Belligerent is not an offense under LOAC

The prosecutions also unsuccessfully seeks refuge in MCI No. 2. The reference to “unprivileged belligerent”⁸ in Charge 2 and in the comment in MCI No. 2, which states, “[e]ven an attack on a soldier would be a crime if the attacker did not enjoy ‘belligerent privilege’” or “‘combatant immunity[,]’” is an attempt to make any participation in an armed conflict by a person who does not enjoy combatant status a violation of the law of war. Such a position is incorrect.

There is but one LOAC consequence of direct participation in an armed conflict. Civilians who “take a direct part in hostilities” lose the protection from attack they would

⁵ Prosecution Response, page 9, paragraph (3)(e)(ii).

⁶ Prosecution response, page 7, paragraph (3)(b).

⁷ Perfidy is the misuse of protected status to accomplish a killing. (e.g. dressing as a member of the Red Cross to gain entry to an enemy’s base and then attacking would be perfidy).

⁸ The government uses the term “unprivileged belligerent” to represent an individual who is not entitled to combatant immunity. The test to determine a person’s ability to receive combatant immunity is the same as determining the entitlement to POW status under the applicable principles of the Third Geneva Convention of 1949.

Review Exhibit 24C

Page 2 Of 4

otherwise enjoy pursuant to the law of war.⁹ Thus, it is not a violation of the law of war for combatants to use force against a civilian who takes a direct part in hostilities during the time they engage in hostile action: “[w]ith unlawful combatants, [LOAC] refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, . . .”¹⁰

However, because the unprivileged belligerent does not have combatant status (he remains a civilian), he does not enjoy immunity from prosecution for murder that a combatant, protected by the law of war, has when killing an enemy combatant or civilian directly participating in the hostilities. This immunity from prosecution (together with entitlement to treatment as a prisoner of war) constitutes the fundamental benefit of lawful combatant status.

Absent such immunity, the unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of those States that possess both subject matter jurisdiction over the offense, and personal jurisdiction over the accused. Because murder is not a crime under the LOAC, the applicable domestic law offers the sole basis for prosecution. Although the distinction between the war criminal and the unprivileged belligerent (who may also be a war criminal if his conduct violates LOAC) has at times been misconstrued,¹¹ such a distinction is well-established in the law of war, and is essential to a fair and impartial – and *lawful* – prosecution by this commission.¹²

4. Evidence: The testimony of expert witnesses.
5. Relief Requested: The defense requests that Charge 2 be dismissed.
6. The defense request oral argument on this motion.

By:

M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

⁹ PI, art 51.3.

¹⁰ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, P.31 (2004).

¹¹ See, e.g., *Ex parte Quirin*, 317 US at 32. The Quirin decision has been criticized for its deviation from law of war principles by several top scholars and practitioners in the field. For instance, W. Hays Parks, the Law of War Chair, Office of the General Counsel, Department of Defense, has noted that “*Quirin* is lacking with respect to some of its law of war scholarship.” *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493 (2003), at fn. 31.

¹² YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT’L L. 323, reprinted in MIL. L. REV. (Bicentennial Issue) 487 (1975). See also, Derek Jinks, *The Declining Status of Pow Status*, 45 HARV. INT’L L.J. 367, 436-439, who takes an even more permissive view of the issue.

Review Exhibit 24C

Page 3 of 4

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 240

Page 4 of 4

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

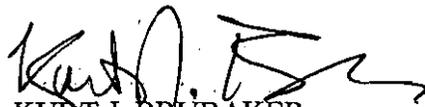
**PROPOSED ESSENTIAL FINDINGS
DEFENSE MOTION TO DISMISS
CHARGE 2**

(D12)

1 November 2004

The Prosecution submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense used his properly delegated authority pursuant to section 7A of Military Commission Order No. 1 and issued Military Commission Instruction (MCI) No. 2.
2. MCI No. 2 establishes crimes and elements that are intended for use by this Military Commission.
3. The crimes and elements listed in MCI No. 2 are derived from the law of armed conflict, which is also commonly referred to as the law of war.
4. The crime of "Murder by an Unprivileged Belligerent" is delineated in section 6B of MCI No. 2 in the section titled "Substantive Offenses – Other Offenses Triable by Military Commission."
5. Criminal liability for conduct constituting murder by an unprivileged belligerent is rooted in the law of armed conflict and is triable by military commission. Based on the requirement to apply and act consistently with commission law, and finding that there is nothing in the elements of murder by an unprivileged belligerent delineated in MCI No. 2 or in Charge 2 of the charge sheet to be inconsistent with the law of armed conflict, the motion to dismiss Charge 2 is denied.



KURT J. BRUBAKER
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 24-D

Page 1 Of 1

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
DISMISS CHARGE 3 FOR
FAILURE TO STATE AN
OFFENSE**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of Charge 3 against Mr. Hicks, and states in support of this motion:

1. **Synopsis:** Charge 3 alleges that Mr. Hicks aided the enemy. However, the charge fails to state an offense by Mr. Hicks because Mr. Hicks owed no duty of allegiance to the United States or any other nation that would make him criminally liable for his actions while in Afghanistan.

2. **Facts:**
- A. Mr. Hicks is an Australian citizen.
 - B. Mr. Hicks has never been a member of the United States Armed Forces, and the site of the alleged misconduct by Mr. Hicks is not within the territory under the control of the United States or United States Armed Forces.
 - C. Mr. Hicks' conduct in Afghanistan did not violate Australian law.

3. **Discussion:**

A. Allegiance to the United States

The critical element of the offense of aiding the enemy is breach of the duty of allegiance to the United States.¹ Absent any duty of allegiance to the United States, it is not a criminal act for a person to perform acts that would constitute aiding the enemy if committed by a United States citizen (e.g., providing advantage to an enemy of the United States). Allegiance to the United States is established either by U.S. citizenship at the time of the alleged conduct,² by membership in the United States Armed Forces,³ or by presence within the territorial limits of

¹ The American offense of "aiding the enemy" has its origins in Articles 27 and 28 of the Articles of War of 1775, predating the American crime of treason. These offenses of "aiding the enemy" and "treason" were enacted by the first Congress of the United States on 30 April 1790. This Act, 1 Stat. 112, provided that "if any person or person, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, ... such person or persons shall be adjudged guilty of treason ..." See *Chandler v. U.S.*, 171 F.2d 921, 931 (1st Cir. 1948). The requirement that there be a breach of allegiance to the United States for the offense of "aiding the enemy" was carried over into the Articles of War and, ultimately the Uniform Code of Military Justice. See *United States v. Olsen*, 7 U.S.C.M.A. (1957).

² *Gillars v. U.S.*, 87 U.S. App. DC. 16, 45, (1950).

³ As of March 2003, "Immigrants make up nearly 5 percent of all enlisted personnel on active duty in the U.S. Armed Forces." See The American Immigration Law Foundation, "U.S. Soldiers from Around the World:

RE 25A
Page 1 of 4

the United States⁴ (a “citizen in enemy country owes temporary allegiance to the alien government, must obey its laws and may not plot or act against it”).⁵

Charge 3 fails to allege these essential elements of the offense of “aiding the enemy,” and therefore fails to state an offense. Nor could the offense be properly alleged against Mr. Hicks, since neither precedent nor authority exist for alleging “aiding the enemy” with respect to any allegiance owed an ally or “coalition partner.”

B. Mr. Hicks Did Not Owe Any Allegiance to the United States

At the time of the alleged conduct, Mr. Hicks did not owe any duty of allegiance to the United States. He is an Australian citizen, and not a United States citizen. Nor is he a member of the U.S. Armed Forces. He had never set foot within the territorial jurisdiction of the United States. None of the alleged conduct occurred in the United States or its territories; all conduct allegedly occurred in foreign countries.⁶ There is absolutely no connection between Mr. Hicks and the United States that would give rise to a duty of allegiance to the United States. Consequently, since Mr. Hicks had no duty of allegiance to the U.S., it cannot constitute “aiding and abetting” for him to act in such a way that might provide aid to an enemy of the United States.

C. Mr. Hicks’ Conduct Did Not Violate Australian Law

At the time of the alleged conduct, Mr. Hicks was residing in Afghanistan. The only governments to which he owed a duty of allegiance to were the government of Afghanistan (*i.e.*, the Taliban) because he was within the territory of Afghanistan, and the government of Australia, by virtue of his Australian citizenship. The government of Australia has stated that it does not consider any of Mr. Hicks’s activities in Afghanistan to have violated Australian law, including the Australian domestic offense of “aiding the enemy.”⁷ At the Australian Senate Estimate

Immigrants Fight for an Adopted Homeland.” Available at
<http://www.aifl.org/ipc/policy_reports_2003_pr001_soldier.asp>.

⁴ *Ex parte Quirin*, 317 U.S. 1 (1942). The requirement that the accused owe a duty of allegiance to the United States is so central to the offense of “aiding the enemy” that it should be stated in the charges. For example, in the military commission trials that resulted in the case of *Ex parte Quirin*, the charges contained an allegation that the defendants had a duty of allegiance to the United States because they had entered United States territory.

⁵ *Gillars v. U.S.*, 87 U.S. App. D.C. 16, 41-42 (1950).

⁶ There is no reported case in which a non-United States citizen has been tried in either a court-martial or military commission for committing the offense of “aiding the enemy” outside the territorial jurisdiction of the United States or outside the geographical limits of an area occupied by United States forces. Military case law involving violations of Article 104, Uniform Code of Military Justice, primarily involves United States service members held as prisoners of war and their interactions with their captors. See *U.S. v. Olson*, 7 U.S.C.M.A. 460 (1957); *U.S. v. Batchelor*, 7 U.S.C.M.A. 354 (1956); and *U.S. v. Garwood*, 20 M.J. 148 (1985).

⁷ The Australian equivalent of our “aiding the enemy” is embodied in its treason law, Section 24 of the Australian *Crimes Act 1914* (the treason law), and Sections 15 and 16 of the *Defence Force Discipline Act 1982* (Australian “aiding the enemy” law). None of these Sections applied to Mr. Hicks at the time of the charged offenses. The treason law criminalized only those acts by a person intended to assist a country at war (declared or undeclared) with Australia, which the Australian Government had proclaimed to be an enemy of Australia. At the time of the alleged

Hearing of 16 February 2004, the Assistant Secretary, Security Law and Justice Branch of the Australian Attorney Generals' Department explained, "[t]he government has consistently said that, on the basis of the evidence available to prosecuting authorities, there are no grounds to prosecute Mr. Hicks ... under any laws in Australia that were current at the time of [his] activities."⁸ It is therefore inappropriate for the United States to claim that a person with no allegiance to the United States is guilty of the crime of "aiding the enemy" when that person's own country does not believe his actions were illegal.

D: Conclusion

Since Mr. Hicks is not, and has not ever been, a United States citizen, and/or has not had some other connection with the United States that would give rise to a duty of allegiance to the U.S., there cannot be grounds for a charge of "aiding the enemy" against him. The offense conduct alleged is without basis in the Uniform Code of Military Justice or any other United States law. Moreover, its application in this case would *ex post facto*, and/or constitute a Bill of Attainder. As a result, Charge 3 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of expert witnesses to be requested.

B: Attachments

1. Australian *Crimes Act 1914*, Section 24.
2. Australian *Defence Force Discipline Act 1982*, Sections 15 and 16.
3. Australian *Security Legislation Amendment (Terrorism) Act 2002*, Schedule 1.
4. See Senate Legal and Constitutional Legislation Committee, "Estimates," 16 February 2004, Canberra, Australia.
5. Australian *Crimes (Foreign Incursions and Recruitment) Act 1978*, Sections 6-7.

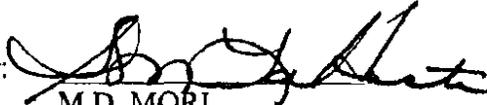
6. **Relief Requested:** The defense requests that Charge 3 be dismissed.

offenses here, the Australian Government had not declared that any nation or entity with which Australia was at war or in conflict was an enemy. Accordingly, there was no "enemy" of Australia for Mr. Hicks to "aid." Also, the Australian "aiding the enemy" law applies only to members of the Australian Defence Force and Defence civilian employees who agree in writing to be subject to that law (*see* Section 3). Since Mr. Hicks was not a member or employee of the Australian Defence Force, the "aiding the enemy" law did not apply to him. On 5 July 2002, Australia modified its treason law, broadening it to encompass acts by persons in support of a country or organization that is engaged in armed hostilities against the Australian Defence Force. *See Australian Security Legislation Amendment (Terrorism) Act 2002*.

⁸ See Senate Legal and Constitutional Legislation Committee, "Estimates," 16 February 2004, Canberra, Australia. Ironically, had Mr. Hicks assisted the Northern Alliance forces in their bid to overthrow the established government of Afghanistan, namely the Taliban, he would have potentially violated Australian law. *See Australian Crimes (Foreign Incursions and Recruitment) Act 1978*, Sections 6 and 7.

7. The defense requests oral argument on this motion.

By:


M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel



Crimes Act 1914

Act No. 12 of 1914 as amended

Volume 2

Part 1D—Forensic procedures

Crimes14Vo02.doc 15/11/2002 2:00 pm

Attachment 1 to RE 25A
Page 1 of 3

Part II—Offences against the Government

24AA Treachery

- (1) A person shall not:
 - (a) do any act or thing with intent:
 - (i) to overthrow the Constitution of the Commonwealth by revolution or sabotage; or
 - (ii) to overthrow by force or violence the established government of the Commonwealth, of a State or of a proclaimed country; or
 - (b) within the Commonwealth or a Territory not forming part of the Commonwealth:
 - (i) levy war, or do any act preparatory to levying war, against a proclaimed country;
 - (ii) assist by any means whatever, with intent to assist, a proclaimed enemy of a proclaimed country; or
 - (iii) instigate a person to make an armed invasion of a proclaimed country.
- (2) Where a part of the Defence Force is on, or is proceeding to, service outside the Commonwealth and the Territories not forming part of the Commonwealth, a person shall not assist by any means whatever, with intent to assist, any persons:
 - (a) against whom that part of the Defence Force, or a force that includes that part of the Defence Force is or is likely to be opposed; and
 - (b) who are specified, or included in a class of persons specified, by proclamation to be persons in respect of whom, or a class of persons in respect of which, this subsection applies.
- (3) A person who contravenes a provision of this section shall be guilty of an indictable offence, called treachery.

Penalty: Imprisonment for life.

- (4) In this section:

Section 24AB

proclaimed country means a country specified by proclamation made for the purpose of this definition to be a proclaimed country, and includes any colony, overseas territory or protectorate of that country, or any territory for the international relations of which that country is responsible, which is a colony, overseas territory, protectorate or territory to which the proclamation is expressed to extend.

proclaimed enemy, in relation to a proclaimed country, means an enemy:

- (a) of and at war with a proclaimed country, whether or not the existence of a state of war has been declared; and
 - (b) specified by proclamation made for the purpose of this definition to be an enemy of and at war with that country.
- (5) A proclamation shall not be made for the purpose of the definition of *proclaimed country*, or for the purpose of the definition of *proclaimed enemy*, in subsection (4) except in pursuance of a resolution of each House of the Parliament passed within the preceding period of 21 days.

Attachment 1 to RE 25A
Page 3 of 3



Defence Force Discipline Act 1982

Act No. 152 of 1982 as amended

This compilation was prepared on 31 July 2002
taking into account amendments up to Act No. 63 of 2002

The text of any of those amendments not in force
on that date is appended in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Attachment 2 to RE 25A
Page 1 of 6

Part III—Offences

Division 1—Offences relating to operations against the enemy

15 Abandoning or surrendering a post etc.

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person has a duty to defend or destroy a place, post, service ship, service aircraft or service armoured vehicle; and
 - (b) the person knows of that duty; and
 - (c) the person abandons or surrenders to the enemy the place or thing mentioned in paragraph (a).

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15A Causing the capture or destruction of a service ship, aircraft or vehicle

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person engages in conduct; and
 - (b) the conduct causes the capture or destruction by the enemy of a service ship, service aircraft or service armoured vehicle; and
 - (c) by engaging in the conduct, the person intends to bring about that result.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Section 15B

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15B Aiding the enemy while captured

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person is captured by the enemy; and
 - (b) the person serves with the enemy, aids the enemy in prosecuting hostilities or measures likely to influence morale or aids the enemy in any other manner that is not authorised by international law.

Maximum punishment: Imprisonment for life.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15C Providing the enemy with material assistance

- (1) A person who is a defence member or a defence civilian is guilty of an offence if the person provides the enemy with, or permits or enables the enemy to have access to, arms, ammunition, vehicles, supplies of any description or any other thing likely to assist the enemy.

Maximum punishment: Imprisonment for life.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15D Harbouring enemies

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person harbours or protects another person; and
 - (b) that other person is an enemy person; and
 - (c) that other person is not a prisoner of war; and

Section 15E

- (d) the first-mentioned person knows that the other person is an enemy person.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15E Offences relating to signals and messages

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person is engaged on service in connection with operations against the enemy; and
(b) the person:
(i) gives a signal, message or other communication that the person knows to be false; or
(ii) alters or interferes with a signal, message or other communication; or
(iii) alters or interferes with apparatus for giving or receiving a signal, message or other communication.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15F Failing to carry out orders

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person:
(i) is ordered by his or her superior officer to prepare for, or to carry out, operations against the enemy; or
(ii) is otherwise under orders to prepare for, or to carry out, operations against the enemy; and

Section 15G

(b) the person does not use his or her utmost exertions to carry those orders into effect.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

15G Imperilling the success of operations

(1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person engages in any conduct; and
- (b) the conduct imperils the success of operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

16 Communicating with the enemy

(1) A person who is a defence member or a defence civilian is guilty of an offence if the person communicates with, or gives intelligence to, the enemy.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

16A Failing to report information received from the enemy

(1) A person who is a defence member or a defence civilian is guilty of an offence if:

Section 16B

- (a) the person receives information from the enemy; and
- (b) the person does not make the information known to proper authority; and
- (c) the information is likely to be directly or indirectly useful in operations against the enemy; and
- (d) the person knows or could reasonably be expected to know that the information is likely to be directly or indirectly useful in operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.

16B Offence committed with intent to assist the enemy

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
 - (a) the person engages in conduct that constitutes an offence against any of sections 15 to 16A (other than section 15B or 15C); and
 - (b) the person engages in that conduct with intent to assist the enemy.

Maximum punishment: Imprisonment for life.

- (2) In paragraph (1)(a), strict liability applies to the physical element of circumstance, that the conduct constitutes an offence against the section concerned.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Attachment 2 to RE 25A
Page 6 of 6



Security Legislation Amendment (Terrorism) Act 2002

No. 65, 2002

**An Act to enhance the Commonwealth's ability to
combat terrorism and treason, and for related
purposes**

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Attachment 3 to RE 25A
Page 1 of 4

Schedule 1—Amendments relating to treason and terrorism

Criminal Code Act 1995

1 The Schedule (after Chapter 4 of the *Criminal Code*)

Insert:

Chapter 5—The security of the Commonwealth

Note: If either the *Criminal Code Amendment (Espionage and Related Offences) Act 2002* or the *Suppression of the Financing of Terrorism Act 2002* receives the Royal Assent on or before the day on which this Act receives the Royal Assent, this item does not commence at all. See subsection 2(3) of this Act.

2 The Schedule (Chapter 5 of the *Criminal Code*)

Insert in the appropriate numerical position:

Part 5.1—Treason

Division 80—Treason

80.1 Treason

- (1) A person commits an offence, called treason, if the person:
- (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
 - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
 - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
 - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or

- (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
- (f) engages in conduct that assists by any means whatever, with intent to assist:
 - (i) another country; or
 - (ii) an organisation;
that is engaged in armed hostilities against the Australian Defence Force; or
- (g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- (h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.

Penalty: Imprisonment for life.

- (1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).

- (1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:
- (a) is referred to in paragraph (1)(e) or (f); and
 - (b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).

- (2) A person commits an offence if the person:
- (a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or apprehension;
or

- (b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.

Penalty: Imprisonment for life.

- (3) Proceedings for an offence against this section must not be commenced without the Attorney-General's written consent.
- (4) Despite subsection (3):
- (a) a person may be arrested for an offence against this section; or
 - (b) a warrant for the arrest of a person for such an offence may be issued and executed;
- and the person may be charged, and may be remanded in custody or on bail, but:
- (c) no further proceedings may be taken until that consent has been obtained; and
 - (d) the person must be discharged if proceedings are not continued within a reasonable time.
- (5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.
- (6) Section 24F of the *Crimes Act 1914* applies to this section in the same way it would if this section were a provision of Part II of that Act.
- (7) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

- (8) In this section:

constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

organisation means:

- (a) a body corporate; or
- (b) an unincorporated body;

whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.

Attachment 3 to RE 25A
Page 4 of 4



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ESTIMATES

(Additional Estimates)

MONDAY, 16 FEBRUARY 2004

CANBERRA

BY AUTHORITY OF THE SENATE

Attachment 4 to RE 25A
Page 1 of 3

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Monday, 16 February 2004

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

Senators in attendance: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Bishop, Greig, Kirk, Ludwig, O'Brien and Scullion

Committee met at 9.04 a.m.

ATTORNEY-GENERAL'S PORTFOLIO

In Attendance

Senator Ellison, Minister for Justice and Customs
Mr Robert Cornall, Secretary
Mr Ian Carnell, Deputy Secretary, Criminal Justice & Security
Mr Ian Govey, Deputy Secretary, Civil Justice & Legal Services
Mr Richard Oliver, General Manager, Corporate Services
Mr Trevor Kennedy, Chief Finance Officer
Mr Graham Fry, Acting General Manager, Information and Knowledge Services
Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division
Mr Iain Anderson, First Assistant Secretary, Legal Services and Native Title Division
Mr James Faulkner, Assistant Secretary, Constitutional Policy Unit
Ms Karen Moore, Acting Assistant Secretary, Office of Legal Services Coordination
Ms Kathryn Shugg, Assistant Secretary, Native Title Unit
Mr Steven Marshall, Assistant Secretary, Native Title Unit
Ms Philippa Lynch, First Assistant Secretary, Family Law and Legal Assistance
Ms Sue Pidgeon, Assistant Secretary, Family Pathways
Mr Kym Duggan, Assistant Secretary, Family Law Branch
Mr Paul Griffiths, Assistant Secretary, Legal Assistance Branch
Ms Renée Leon, First Assistant Secretary, Office of International Law
Ms Youda Younan, Senior Legal Officer, Office of International Law
Mr James Graham, Principal Legislative Counsel
Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division
Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch
Ms Robyn Warner, Assistant Secretary, International Crime Branch
Dr Dianne Heriot, Assistant Secretary, Crime Prevention Branch
Ms Robyn Frost, Director, International Crime Branch
Mr Peter Ford, First Assistant Secretary, Information and Security Law Division
Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch
Mr David Templeman, Director General, Emergency Management Australia
Mr Ed Tyrie, Executive Director, Protective Security Coordination Centre
Ms Helaine Hallahan, Director, Counter-Terrorism Policy Section
Australian Federal Police
Mr Mick Keelty, Commissioner

LEGAL AND CONSTITUTIONAL

Attachment 4 to RE 25A
Page 2 of 3

Senator BOLKUS—So we have come to our own independent conclusion that there is no charge which can be made against Hicks here but, in coming to that conclusion, we are of a view that the evidence is sufficient for him to be charged in Guantanamo Bay on US offences?

Mr Holland—Putting it another way—

Senator BOLKUS—I actually put it that way for a reason, Mr Holland.

Mr Holland—I know, but I have to answer it in the most helpful way I can. The government has consistently said that, on the basis of the evidence available to prosecuting authorities, there are no grounds to prosecute Mr Hicks or Mr Habib under any laws in Australia that were current at the time of their activities. If, however, the evidence was there to support any charges the United States authorities had, then the United States could go ahead and do that. It is not saying that the charges that the United States might have had are exactly the same as ours. Certainly, if the terrorism laws that came into effect last year were in place at the time that these activities were engaged in, it is possible that a different outcome would have been reached.

Senator BOLKUS—Taking you two steps back, are we of a view that there is sufficient evidence for Hicks to be charged with an offence under US law?

Mr Holland—That is not a decision for me or the Australian government to make. To be perfectly honest, at this stage, charges have not yet been laid. Without knowing what those charges are, it is not possible to say whether or not the evidence would support those charges.

Senator BOLKUS—There is only one thing wrong with that: he is an Australian national and he has been held for over a couple of years. We take an interest in Australian nationals who may be held unfairly overseas and we raise complaints about such incarceration world wide. I would have thought that, in these circumstances, it would have been a requirement to look at the evidence about and to make an assessment with a view to—for instance, if you thought that there was insufficient evidence—raising consular requests on his behalf. You are telling me that you have not made that assessment?

Mr Holland—I certainly have not, no.

Senator BOLKUS—Don't you think someone should? You have the evidence before you. In order to work out whether we should be acting more strenuously with respect to Hicks, shouldn't we make an assessment as to whether we think he has been held fairly or unfairly?

Mr Cornall—We do not have the evidence before us. We have had access to Mr Hicks and Mr Habib through the AFP and through ASIO, and they have conducted extensive inquiries in relation to any possible offences in Australia.

Senator BOLKUS—But to have come to that conclusion, Mr Cornall, you must have had some evidence before you.

CHAIR—Senator Bolkus, perhaps we could let Mr Cornall conclude.

Mr Cornall—Yes, we had. We had all of the evidence that the AFP was able to generate in its investigation and in its interviews. But, in terms of the evidence that the Americans have, we have not been party to their interviews, we have not seen the transcripts of their interviews

LEGAL AND CONSTITUTIONAL

Attachment 4 to RE 25A
Page 3 of 3



Crimes (Foreign Incursions and Recruitment) Act 1978

Act No. 13 of 1978 as amended

This compilation was prepared on 6 July 2004
taking into account amendments up to Act No. 104 of 2004

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

CrimesForIncursRecr1978.doc 06/07/2004 1:28 pm

Attachment 5 to RE 25A
Page 1 of 5

Section 3A

3A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

4 Extension of Act to Territories

This Act extends to every Territory.

5 Act not to apply to acts done for defence of Australia

Nothing in this Act applies to any act done by a person acting in the course of the person's duty to the Commonwealth in relation to the defence of Australia.

6 Incursions into foreign States with intention of engaging in hostile activities

(1) A person shall not:

- (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
- (b) engage in a hostile activity in a foreign State.

Penalty: Imprisonment for 20 years.

(2) A person shall not be taken to have committed an offence against this section unless:

- (a) at the time of the doing of the act that is alleged to constitute the offence, the person:
 - (i) was an Australian citizen; or
 - (ii) not being an Australian citizen, was ordinarily resident in Australia; or
- (b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

(3) For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of

achieving any one or more of the following objectives (whether or not such an objective is achieved):

- (a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
 - (aa) engaging in armed hostilities in the foreign State;
 - (b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
 - (c) causing the death of, or bodily injury to, a person who:
 - (i) is the head of state of the foreign State; or
 - (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
 - (d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.
- (4) Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with:
- (a) the armed forces of the government of a foreign State; or
 - (b) any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force.
- (5) Paragraph (4)(a) does not apply if:
- (a) a person enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and
 - (b) the organisation is a prescribed organisation at the time of entry.
- (6) Paragraph (4)(a) does not apply if:
- (a) a person engages in a hostile activity in a foreign State while in or with an organisation; and
 - (b) the organisation is a prescribed organisation at the time when the person engages in that hostile activity.
- (7) For the purposes of subsections (5) and (6), *prescribed organisation* means:
- (a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or

Section 7

- (b) an organisation referred to in paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in subsection 102.1(1) of the *Criminal Code*.
- (8) Before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:
 - (a) a serious violation of human rights; or
 - (b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or
 - (c) a terrorist act (as defined in section 100.1 of the *Criminal Code*); or
 - (d) an act prejudicial to the security, defence or international relations of the Commonwealth.

7 Preparations for incursions into foreign States for purpose of engaging in hostile activities

- (1) A person shall not, whether within or outside Australia:
 - (a) do any act preparatory to the commission of an offence against section 6, whether by that person or by another person;
 - (b) accumulate, stockpile or otherwise keep arms, explosives, munitions, poisons or weapons with the intention of committing an offence against section 6, whether by that person or by another person;
 - (c) train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of preparing that other person to commit an offence against section 6;
 - (d) allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises,

movements or evolutions, with the intention of committing an offence against section 6;

- (e) give money or goods to, or perform services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6;
- (f) receive or solicit money or goods, or the performance of services, with the intention of supporting or promoting the commission of an offence against section 6;
- (g) being the owner, lessee, occupier, agent or superintendent of any building, room, premises or place, intentionally permit a meeting or assembly of persons to be held in the building, room, premises or place with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f); or
- (h) being the owner, charterer, lessee, operator, agent or master of a vessel or the owner, charterer, lessee, operator or pilot in charge of an aircraft, intentionally permit the vessel or aircraft to be used with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f).

(1A) A reference in subsection (1) to the commission of an offence against section 6 is a reference to the doing of an act that would constitute, or would but for subsection 6(2) constitute, an offence against section 6.

(1B) A person shall not be taken to have committed an offence against this section merely because of doing an act by way of, or for the purposes of, the provision of aid of a humanitarian nature.

(2) A person shall not be taken to have committed an offence against this section in respect of the doing of an act outside Australia unless:

- (a) at the time of the doing of that act, the person:
 - (i) was an Australian citizen; or
 - (ii) not being an Australian citizen, was ordinarily resident in Australia; or
- (b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

Penalty: Imprisonment for 10 years.

Attachment 5 to RE _____
Page 5 of 5

1951 (known as the “ANZUS Treaty”).³ On September 14, 2001, the White House announced:

The Governments of Australia and the United States have concluded that Article IV of their mutual defense treaty applies to the terrorist attacks on the United States.

The United States welcomes Australia’s decision to join us in applying the ANZUS Treaty, which serves to reinforce the strong bonds of friendship and shared values that unite the American and Australian people. The tragic events of September 11, 2001 took place just one day after President Bush and Prime Minister Howard stood together in Washington, D.C. to commemorate the 50th anniversary of the U.S.-Australia alliance. Although our alliance with Australia was crafted under very different circumstances than exist now, the events of September 11, 2001 are a powerful reminder that the alliance and our shared commitments are no less valid today.

Australia shares our assessment of the gravity of the situation and is resolute in its commitment to work with the United States and all freedom loving people to combat international terrorism.

In the days and weeks to come, we will consult closely with our Australian allies regarding an effective response to these attacks.

White House Press Release of September 14, 2001.⁴

c. The international community immediately recognized the attacks of September 11, 2001 as an act of war, and invoked provisions of international treaties applicable to international armed conflict. *See, e.g.*, UN Security Council Resolution 1368 of 12 September 2001; NATO Press Release, 12 September 2001; White House Press Release, September 14, 2001.

d. War planning against the perpetrators of September 11, 2001 – al Qaida – began immediately following those attacks. On September 20, 2001, President Bush, in an address to the Joint Session of Congress and the American people,⁵ noted that the September 11th attacks constituted “an act of war against our country.”⁶ He also condemned the Taliban regime and put it on notice that it must either assist in bringing the terrorists to justice or “share in their fate.”⁷ Warning the American public to expect

³ 3 U.S.T. 3420

⁴ Available at www.whitehouse.gov/news/releases/2001/09/20010914-12.html

⁵ Address to a Joint Session of Congress and the American People of September 20, 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html

⁶ *Id.*

⁷ *Id.*

“a lengthy campaign, unlike any other we have ever seen,”⁸ the President delivered a message to the United States military: “Be ready. I’ve called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.”⁹

e. Indeed, the September 11th attacks on the United States were an act of war, sparking the commencement of major combat operations in Afghanistan against the al Qaida network and the Taliban regime, known as Operation Enduring Freedom. But the war did not leap into existence on September 11, 2001. This war – declared and waged by al Qaida against the United States – has existed since the early 1990s.¹⁰ As a federal court has said, “Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings – the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania – are sufficient to confirm the President’s assertion that a state of war exists between the United States and [al Qaida].” El-Shifa Pharmaceutical Industry Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

f. On October 7, 2001, the President announced that on his orders, the U.S. military had “begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”¹¹ Great Britain joined in this military action, and Australia, along with other allies, pledged forces “as the operation unfolds.”¹² By November 2001, the Australian Government had contributed troops and equipment to the Coalition.¹³ Operations in Afghanistan continue,¹⁴ as do worldwide operations against al Qaida.¹⁵

f. On November 13, 2001, the President issued a Military Order: “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”¹⁶ In doing so, the President expressly relied on “the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and section 821 and 836 of title 10, United States Code.”¹⁷

⁸ *Id.*

⁹ *Id.*

¹⁰ Final Report of the National Commission on Terrorist Attacks Upon the United States, Authorized Edition (2004), at 46, 48, 59.

¹¹ Presidential Address to the Nation of October 7, 2001, available at www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

¹² *Id.*

¹³ CNN.com article, “Australian forces in key mop-up role,” September 4, 2002.

¹⁴ *See, e.g.,*

¹⁵ *See, e.g.,* Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, October 4, 2004 (the war against al Qaida “will likely go on for years”).

¹⁶ 66 Fed. Reg. 222 (November 16, 2001)

¹⁷ Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

g. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”¹⁸ The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed”¹⁹ He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.²⁰

h. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)²¹ and over offenses (violations of the laws of war and all other offenses triable by military commission).²² The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions”²³

i. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

j. On June 9, 2004, the Appointing Authority approved charges against the Accused, including, *inter alia*, Charge 3: Aiding the Enemy, which is an enumerated

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

¹⁸ *Id.*, Section 1(e)

¹⁹ *Id.*, Section 2(a)

²⁰ *Id.*, Section 2(b)

²¹ MCO No. 1, para. 3(A)

²² *Id.*, paragraph 3(B)

²³ *Id.*, paragraph 8(A)

charge under MCI No. 2.²⁴ On June 25, 2004, the Appointing Authority referred this and the remaining charges to this Military Commission for trial.

k. The Prosecution concurs with the Defense that the Accused is an Australian citizen. He has never been a member of either the U.S. or Australian Armed Forces. The Prosecution concedes that the site of the Accused's alleged misconduct, Afghanistan, is not within territorial limits of the United States.

5. Legal Authority Cited

- a. President's Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").
- b. Military Commission Order No. 1.
- c. Military Commission Instruction No. 2.
- d. Department of the Army Field Manual 27-10, July 1956.
- e. 10 U.S. Code §§ 821, 836 (Articles 21, 36, Uniform Code of Military Justice).
- f. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).
- g. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
- h. *Ex Parte Quirin et al*, 317 U.S. 1, 31 (1942).
- i. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957).
- j. *Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002).
- k. *United States v Lindh* 212 F.Supp.2d 541, 553 (E.D.V.A. 2002).
- l. Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention, 29 July 1899.
- m. Hague Convention of 1907, Convention With Respect to the Laws and Customs of War on Land (Hague IV).
- n. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

²⁴ MCI No. 2, para. 6(B)(3) and (4)

- o. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 12 August 1949.
- p. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
- q. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- r. Charter of the International Military Tribunal, the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany.
- s. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- t. Statute of the International Tribunal for Rwanda, 33 I.L.M. (1994).
- u. Rome Statute of the International Criminal Court, 37 I.L.M. (1994).
- v. Adam Roberts & Richard, *Documents on the Laws of War* (3d ed. 2002).
- w. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L.F. 291 (2001).
- x. Black's Law Dictionary (6th ed. 1990).

6. Discussion

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

(1) Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution.²⁵ The Congress, in passing the AUMF of 2001, expressly authorized the President to use “all necessary and appropriate force” against “nations, organizations, or persons he

²⁵ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) “The Constitution confers on the President the ‘executive Power’, Art II, cl. 1, and imposes on him the duty to ‘take Care that the Law be faithfully executed.’ Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,²⁶ and it is the President's duty to carry out this war.

(2) As a plurality of the Supreme Court just months ago held, "The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"²⁷ Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice,²⁸ expressly recognized the President's authority to use and to prescribe rules regarding military commissions. Thus, the President's Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

(3) As commissions are recognized to be the Executive Branch's prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. "[S]urely since *Ex parte Quirin*, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations."²⁹

(4) The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a "full and fair trial,"³⁰ and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense.³¹ The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel.³² It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is "declarative of existing law"³³ and details a number of offenses that "derive from the law of armed conflict."³⁴

²⁶ Public L. No. 107-40, 115 Stat. 224 (2001)

²⁷ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), citing *Ex parte Quirin*, 317 U.S., at 28 (emphasis added). See also, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

²⁸ 10 U.S.C. §§ 821, 836 (1994). Congress takes notice of the law of war in this manner: "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." [emphasis added]

²⁹ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957)

³⁰ PMO, Section 4(c)(2).

³¹ *Id.*, Section 6(a).

³² Pursuant to DoD MCO No. 1, Section 7. *Regulations A. Supplementary Regulations and Instructions*: The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

³³ MCI No. 2, para. 3(A).

³⁴ *Id.*

(5) This declarative instruction, which has a direct lineage to the President's authority to regulate the conduct of armed conflict, expressly lists "Aiding the Enemy" as an offense requiring proof beyond a reasonable doubt of the following elements:

(a) The accused aided the enemy;

(b) The accused intended to aid the enemy;

(c) The conduct took place in the context of and was associated with armed conflict.³⁵

(6) In the Comments section to Aiding the Enemy, MCI No. 2 states:

The requirement that conduct be wrongful for this crime *may* necessitate that, *in the case of a lawful belligerent*, the accused owe allegiance or some duty to the United States of American *or to an ally or coalition partner.*"

Id., para. 6(B)(5)(b)(3)(emphasis added).

b. Allegiance to the United States is not an Element to Aiding the Enemy

(1) Hence, the Defense assertion that allegiance to the United States is an element of this offense is rebutted by MCI No. 2. Furthermore, in the case of an *unlawful* belligerent, as the Accused is alleged to be, allegiance is not even relevant. Acts of belligerency by an unprivileged belligerent are *per se* wrongful (*see* Prosecution Response to Defense Motion to Dismiss Charge 2). Thus, the Prosecution need not show any allegiance to the United States or to an ally or coalition partner to prove this offense. Furthermore, even were allegiance relevant, the facts are clear that the Accused did owe allegiance to Australia, an important ally and Coalition partner.

(2) As with other offenses listed in MCI No. 2, Aiding the Enemy existed as an offense long before the publication of MCI No. 2 or before the Accused's alleged acts. In fact, Aiding the Enemy is an offense explicitly recognized by Congress and triable by military commission. Article 104 of the Uniform Code of Military Justice states:

Any person who –

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or hold any intercourse with the enemy, either directly or indirectly; shall suffer death or such punishment as a court-martial **or military commission** may direct.

³⁵ *Id.*, para. 6(B)(5)(a).

10 U.S. Code § 904.

(3) Hence, Aiding the Enemy is statutorily triable by military commission under the Uniform Code of Military Justice. Review of Manual for Courts-Martial (MCM) provisions pertaining to this offense is instructive. The elements of applicable subdivisions of Aiding the Enemy, as defined by the MCM, are as follows:

- (1) Aiding the Enemy.
 - (a) That the accused aided the enemy; and
 - (b) That the accused did so with certain arms, ammunition, supplies, money, or other things.
-
- (3) Harboring or protecting the enemy.
 - (a) That the accused, without proper authority, harbored or protected a person;
 - (b) That the person so harbored or protected was the enemy; and
 - (c) That the accused knew that the person so harbored or protected was an enemy.
- (4) Giving intelligence to the enemy.
 - (a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and
 - (b) That the intelligence information was true, or implied the truth, at least in part.
- (5) Communicating with the enemy.
 - (a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy; and
 - (b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

MCM, 2000 ed., Part IV, para. 28(b).

(4) MCM Explanations provide the following:

(a) “This article denounces offenses by **all persons whether or not otherwise subject to military law**. Offenders may be tried by court-martial or by **military commission**.” *Id.*, para. 28(c)(1).

(b) “‘Enemy’ includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. ‘Enemy’ is not restricted to the enemy government or its armed forces.” *Id.*, para. 28(c)(2), 23(c)(1)(b).

(c) “A prisoner of war may violate this article” *Id.*, para. 28(c)(6)(a).

(d) “Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.” *Id.*, para. 28(c)(6)(c).

(4) As noted by the Defense, the origins of the offense of Aiding the Enemy date back as far as 1775. See Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U.Balt.L.Rev. 49. Field Manual (FM) 27-10, which provides “authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land,” notes the offense of Aiding the Enemy, tracking the exact language of modern-day Article 104. FM 27-10, *The Law of Land Warfare*, 18 July 1956.

(5) Despite this element not appearing in either MCI No. 2 or Article 104 of the UCMJ, or any of its precursors, the Defense asserts, “The critical element of the offense of aiding the enemy is the breach of the duty of allegiance to the United States.” This assertion is wholly unsupported; in fact, it crumbles if one examines the authorities cited in the Defense’s footnotes purportedly in support of this notion. The offense of aiding the enemy did not “predate[] the American crime of treason.” It has continuously existed in the Articles of War entirely separate from it. The Defense then cites the treason statute of 1790 and a federal case regarding treason, both wholly inapposite to this case.

(6) The case of *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1950), nowhere holds or implies that there was a requirement that there be a breach of allegiance to the United States for the offense of aiding the enemy. The Court in *Olson* only mentions the crime of treason to note, “We are well aware of the fact that some Federal courts, in an analogous line of cases involving the crime of treason, have expressed views which might lead to a different conclusion” regarding whether communication of an idea can constitute an overt act. *Id.* at 256 – 257. This highlights the fact that treason is an “analogous line of cases” distinguishable from the crime of aiding the enemy. Furthermore, not only does the *Olson* court not state that allegiance to the United States is an element, but they speak to the sweeping nature of the offense: “Article of War 81 provides that ‘Whosoever relieves or attempts to relieve the enemy’ commits an offense under the Article, and the Code is just as sweeping, for it punishes ‘any person’ who aids the enemy.” *Id.* at 255.

(7) As noted by the Defense, in one of the most famous Commission cases, *Ex Parte Quirin*, 317 U.S. 1 (1942), the Accused were charged with and convicted of aiding the enemy. The United States Supreme Court, prior to announcing their full opinion, expressly held in a *per curiam* decision that aiding the enemy, along with the other charges, stated offenses “which the President is authorized to order tried before a military commission.” *Id.* Contrary to the Defense assertion, *Quirin* does not support the notion that allegiance to the United States is required for the offense. The Specification in question read as follows:

Charge II: Violation of the 81st Article of War

Specification: In that, during the month of June, 1942, the prisoners, Ernst Peter Burger . . . Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the

German Reich, a belligerent enemy nation, and without being in the uniform of the armed forces of that nation, relieved or attempted to relieve enemies of the United States with arms, ammunition, supplies, money, and other things, and knowingly harbored, protected and held correspondence with and gave intelligence to enemies of the United States by entering the territorial limits of the United States, in the company of other enemies of the United States, with explosives, money and other supplies with which they relieved each other and relieved the German Reich, for the purpose of destroying and sabotaging war industries, transportation facilities or war materials of the United States, and by harboring, communicating with, and giving intelligence to each other and to other enemies of the United States in the course of such activities.

Transcript of Proceedings before the Military Commission to Try Persons Charged with offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942 (transcribed by University of Minnesota students, Minneapolis, Minnesota, 2004, Joel Samaha, Sam Root, Paul Sexton, eds).³⁶

(8) It can hardly be gleaned from the above that “allegiance to the United States” was either alleged or a “central element” as claimed by the Defense. In fact, *Quirin* makes clear that an unlawful enemy combatant, neither a citizen nor owing any duty of allegiance to the United States, can be guilty of the offense of Aiding the Enemy.

(9) Allegiance to the United States is not an element of this offense. Accordingly, the Defense Motion should be denied.

7. Attached Files. None.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. As the Defense’s motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

³⁶ Available at www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm

UNITED STATES OF AMERICA)	
)	
)	
v.	)	DEFENSE REPLY ON MOTION
	)	TO DISMISS CHARGE 3 FOR
	)	FAILURE TO STATE AN
	)	OFFENSE
DAVID M. HICKS)	
	)	26 October 2004

The defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss Charge 3 against Mr. Hicks, and states in support of this reply:

1. **Synopsis:** Charge 3 alleges that Mr. Hicks aided the enemy. However, the charge fails to state an offense by Mr. Hicks because Mr. Hicks owed no duty of allegiance to the United States or any other nation that would make him criminally liable for his actions while in Afghanistan.

2. **Facts:**
- A. Mr. Hicks is an Australian citizen.
 - B. Mr. Hicks has never been a member of the United States Armed Forces, and the site of the alleged misconduct by Mr. Hicks is not within the territory under the control of the United States or United States Armed Forces.
 - C. Mr. Hicks' conduct in Afghanistan did not violate Australian law.

3. **Discussion:**

In defending Charge 3, the prosecution relies exclusively on MCI No. 2 and its attendant commentary. Yet MCI No. 2 and that commentary were issued *after* the alleged commission of the alleged conduct that forms the basis for Charge 3. At the time of the conduct, neither Australian, U.S., or international law prohibited Mr. Hicks from the "aiding the enemy" as alleged in Charge 3.

The prosecution's reliance on the explanation section to the Manual for Courts-martial that addresses the offense of aiding the enemy is entirely misplaced. Indeed, that section of the Manual directly supports the defense's position, since it states plainly that "[c]itizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy."¹ Once an individual is located within a territory where U.S. forces military forces are in control, Article 104 controls. The decision in *Gillars v. U.S.*, states the same rationale: a "citizen in enemy country owes temporary allegiance to the alien government, must obey its laws and may not plot or act against it").²

¹ MCM, para. 28(c)(6)(c).

² *Gillars v. U.S.*, 87 U.S. App. D.C. 16, 41-42 (1950).

Review Exhibit 250

Page 1 of 2

The prosecution's reliance on *Ex Parte Quirin*³ is also misplaced. The prosecution asserts that the Nazi saboteurs owed no duty to the United States. This is an incorrect statement on the law as described above in *Gillars*. When the saboteurs "enter[ed] the territorial limits of the United States, . . ." ⁴ Article 104 governed their conduct. Thus, in order to violate Article 104, an individual must be present in territory controlled by the U.S. military forces (or U.S. territory itself), a circumstance glaringly absent in this case with respect to Charge 3 against Mr. Hicks. In fact, Mr. Hicks was never within any territory controlled by U.S. forces,⁵ the jurisdictional predicate for the operation of Article 104.

The prosecution fails to cite a single case in which a non-U.S. citizen who had never set foot in the U.S., or in an area under the control of the U.S. armed forces, has been tried for aiding the enemy. The reason for that void is obvious: because it is not authorized under law, and, as a result, has been attempted (under any of the legitimately constituted legal military or international law systems). Moreover, the prosecution's attempt to do so in this case flies in the face of common sense. An individual without allegiance to the U.S. (and alleged to be the enemy) cannot be prosecuted for aiding the enemy for conduct occurring outside territory controlled by the United States or its armed forces.

4. Evidence:

A: The testimony of expert witnesses to be requested.

5. Relief Requested: The defense requests that Charge 3 be dismissed.

6. The defense requests oral argument on this motion.

By:

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

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 25C
Page 2 Of 2

³ 317 U.S. 1 (1942).

⁴ Prosecution Response, page.11, citing *Quirin* transcript.

⁵ It is noteworthy that the prosecution does not take objection to the facts in the defense motion.

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**PROPOSED ESSENTIAL FINDINGS
DEFENSE MOTION TO DISMISS**

CHARGE 3

(D13)

1 November 2004

The Prosecution submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense used his properly delegated authority pursuant to section 7A of Military Commission Order No. 1 and issued Military Commission Instruction (MCI) No. 2.
2. MCI No. 2 establishes crimes and elements that are intended for use by this Military Commission.
3. The crimes and elements listed in MCI No. 2 are derived from the law of armed conflict, which is also commonly referred to as the law of war.
4. The crime of Aiding the Enemy is delineated in section 6B of MCI No. 2 in the section titled "Substantive Offenses – Other Offenses Triable by Military Commission."
5. Aiding the Enemy has been expressly recognized by Congress as an offense triable by military commission since prior to the 1951 enactment of the Uniform Code of Military Justice. The present-day statutory offense of Aiding the Enemy is contained in Article 104.
6. Allegiance to the United States is not an element under Article 104, Aiding the Enemy.
7. Military Commission jurisdiction is based on, among other things, Article 21 of the Uniform Code of Military Justice that was enacted in 1950.
8. For purposes of this motion, Article 21 of the Uniform Code of Military Justice is the same as its precursor, Article 15 of the Articles of War.
9. Article 15 of the Articles of War was in effect when the U.S. Military Commission case of Ex parte Quirin, 317 U.S. 1 (1942) was tried.
10. In Quirin, the Accused were charged with the offense of Aiding the Enemy. Despite defense challenges, the Accused was convicted of Aiding the Enemy.

Review Exhibit

25-D

Page

1

Of

2

The U.S. Supreme Court expressly determined that Aiding the Enemy stated an offense triable by military commission. This conviction or the holding of Quirin have never been overturned.

11. Allegiance to the United States is not an element of the offense of Aiding the Enemy triable by this Military Commission.
12. Based on the requirement to apply and to act consistently with commission law, and finding that there is nothing in the Aiding the Enemy elements delineated in MCI No. 2 or in Charge 3 of the charge sheet to be inconsistent with the law of armed conflict, the motion to dismiss Charge 3 is denied.



KURT J. BRUBAKER
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 25-D
Page 2 Of 2

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

MOTION TO DISMISS:

**IMPROPER PANEL
SELECTION PROCEDURES**

4 October 2004

The Defense in the case of the *United States v. David M. Hicks* moves for dismissal of the charges against Mr. Hicks, and states in support of this motion:

1. **Synopsis:** The selection of members for the military commission in this case was conducted in a manner that explicitly and systemically excluded members based on rank. Systematic exclusion of certain ranks from sitting on military criminal tribunals is unlawful. Accordingly, the commission lacks jurisdiction to try Mr. Hicks, and the charges against him should be dismissed.

2. Facts:

a. Military Commission Order No. 1 (MCO1), establishes that the only qualification to serve as a commission member is that the individuals selected be commissioned officers in the United States armed forces, including reservists on active duty, National Guard personnel on active duty, or retired personnel on active duty.

b. MCO 1 requires the presiding officer be a judge advocate as well.

c. On 20 December 2002, the General Counsel to the Department of Defense issued a memorandum to the Secretaries of the Military Departments requesting candidates for commission members and presiding officers. In this memorandum, the General Counsel instructed the Military Departments to nominate officers in the pay grade of only O-4 and above. (See Exhibit 1).

d. The U.S. Marine Corps, Navy, U.S. Army and U.S. Air Force submitted candidates for commission members and presiding officers meeting the mandatory criteria of grade O-4 and above only. (See Exhibit 2).

e. On 25 June 2004, the Legal Advisor to the Appointing Authority (hereinafter "LEAA") provided the written guidance to the Appointing Authority on the selection of commission members and presiding officers. The LEAA indicated that the General Counsel's criteria were more restrictive than the criteria contained in MCO No. 1, and informed the Appointing Authority that he was not bound to select only from the names provided. The guidance from the LEAA also cautioned that rank could not be "used for the deliberate or systematic exclusion of otherwise qualified persons from commission membership." (See Exhibit 3).

f. Enclosed with the LEAA's guidance was a spreadsheet listing the services' nominations, which failed to contain the name of any officer below pay grade O-4. No other

RE 26A
Page 1 of 3

names or lists of names of potential candidates were provided to the Appointing Authority. (See Exhibit 4).

g. The appointing Authority selected officers in the pay grade of 0-5 and above to serve as commission members and presiding officer(s). The Appointing Authority selected only those officers included on the nomination list provided to him. *Id.*

3. Discussion:

Mr. Hicks has the right to a "full and fair" trial, which requires that the members of the commission be fair and impartial. This right is the same for military members during proceedings at a court-martial. The fairness of the selection process in this case should be determined by reference to the standards, practices, and case law used in military justice practice, as well as concurrent constitutional and other rights under U.S. and international law.

In *United States v. Kirkland*¹, the Court of Appeals for the Armed Forces (hereinafter "CAAF") held that the systematic exclusion of qualified personnel based on rank constituted reversible error. In *Kirkland*, nominees for court-martial members were solicited from subordinate commands and provided to the general court-martial convening authority -- excluding pay grades E-6 and below, however. Also,, even though the general court-martial convening authority knew he could select personnel not listed on the recommendation sheets submitted to him, the CAAF still found error and overturned the sentence in the case.

Analyzed pursuant to those standards, the instruction here was clearly contrary to the criteria set forth in MCO No. 1. The General Counsel's instructions deliberately excluded all officers in the pay grade of 0-3 and below. The effect of the instructions was to exclude from consideration for service on this military commission the **majority** of all commissioned officers serving in the U.S Armed Forces. This deliberate exclusion was further reflected in the ultimate choices made by the Appointing Authority.

Analyzed pursuant to those standards, the instruction here was clearly contrary to the criteria set forth in MCO No. 1. The General Counsel's instructions deliberately excluded all officers in the pay grade of 0-3 and below. The effect of the instructions was to exclude from consideration for service on this military commission the **majority** of all commissioned officers serving in the U.S Armed Forces. This deliberate exclusion was further reflected in the ultimate choices made by the Appointing Authority.

Moreover, even though the LEAA recognized the impropriety of the exclusion, the error was not corrected. While he LEAA advised the Appointing Authority that the latter could choose names not submitted among the nominations, he did not provide either a list of other available officers, or any other information that would facilitate compliance with MCO No. 1. Nor could the Appointing Authority be expected to possess such information independently. Although the Appointing Authority had formerly served on active duty as a general officer in the U.S. Army, he could not reasonably be perceived to know of qualified non-recommended commissioned officers in the rank of 0-3 and below from all four uniformed services.

¹ 53 M.J. 22 (CAAF 200)

Exclusion of otherwise qualified officers based on rank, or the appearance of such categorical exclusion, strikes at the heart of the "essential fairness and integrity" of any system of justice. The deliberate, explicit, and systematic exclusion of a majority of the eligible officers in armed forces from consideration for service on a military commission constitutes *per se* unlawful command influence. Such unlawful command influence robs this commission system of both its legitimacy and jurisdiction. Analogously, a civilian court jury that purposefully excluded from the venire otherwise qualified persons who earned less than a specified amount of money, or possessed less than a set number of assets, would be unconscionable and intolerable, and would represent the worst type of jury-rigging imaginable in a system in which all accused are entitled to equal treatment before the law, and a jury chosen from an applicable cross-section designed to ensure impartiality and fairness. Accordingly, these commission proceedings are fatally tainted, and must be dismissed.

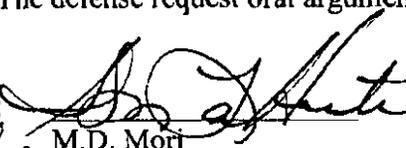
4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence:** Exhibit 1: Memo from DOD General Counsel of 20 Dec 02
Exhibit 2: Services nominations of commission members
Exhibit 3: Letter from the Legal Advisor of 25 Jun 04
Exhibit 4: 9 pages of nominated personnel.

6. **Relief Requested:** The defense requests the charges be withdrawn from this commission.

7. The defense request oral argument on this request.

By:


for M.D. Mori
Major, U.S. Marine Corps
Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

SecNav



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

DEC 20 2002

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Identifying Personnel to Serve as Members and Presiding Officers for Military Commissions

- References:
- (a) President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"
 - (b) Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002

The Department of Defense must develop a "pool" of candidates to serve as commission members and presiding officers in the event that military commissions are convened pursuant to the above orders. This pool, comprised of candidates submitted by you as follows, will serve as the principal source from which the Appointing Authority may draw to empanel commissions. The pool should be replenished continually, so that there is always a list of appropriate officers from which to choose.

As set forth in section 4(A) of reference (b), each commission shall consist of at least three but no more than seven members, one of whom shall be designated as the presiding officer of the proceedings of that commission. There shall also be one or two alternate members. The members and alternate members shall be commissioned officers of the United States armed forces, including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. Consistent with the preceding guidance, I request that you provide from each of your services a list of 25 officers who meet the following criteria:

- Mandatory Criteria
 - Grade of O-4 or above
 - Reputation for integrity and good judgment
 - Top Secret security clearance
- Preferred Criteria
 - Combat or operational experience
 - Command experience

At least five of those 25 officers should also meet the following eligibility criteria for designation as presiding officers:

- Grade of O-5 or above
- Article 26(b) and (c), UCMJ, certified (or previously certified)
- Substantial litigation experience involving major cases
- Law of armed conflict training or experience

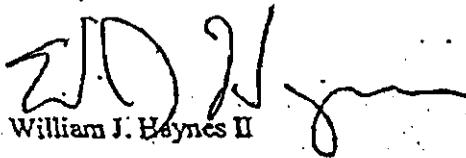
Attach 1 to Review Exhibit 26A

Page 1 Of 2 001859

With your list of candidates, please submit a completed copy of the attached Military Commission Member Data Sheet for each officer nominated, signed by the candidate officer.

Candidates must be available for short-notice temporary duty for up to 90 days. Please be sure to maintain a full list of 25 qualified candidates for each of your services, at least five of whom are also qualified for designation as presiding officers, by immediately nominating a replacement for any candidate who becomes unavailable.

Please respond by January 10, 2003. Candidates should be available as of the date of your response. You should not interpret this requirement, however, as signaling an intention to appoint a commission at any particular time. My point of contact for this matter is Ms. Lisa Simon, who can be reached at (703) 695-3392.


William J. Haynes II

Attachment:
Military Commission Member Data Sheet

cc: Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
Under Secretary of Defense for Personnel and Readiness

Attach 1 to Review Exhibit 26A

Page 2 Of 2 001860

REVIEW EXHIBIT 26

ATTACHMENT 2

This document constitutes a releasable summary of Attachment 2 of Review Exhibit (RE) 26. Attachment 2 of RE 26 is not included in order to protect the privacy and security of the individuals nominated by the military services to be the Presiding Officer and Commission members. Attachment 2 of RE 26 consists of five pages of lists of military personnel nominated to be the Presiding Officer and Commission members. The following pages were removed from the record:

- (1) pages 1 and 2--a list of names and grades of personnel nominated by the Marine Corps and Navy
- (2) pages 5 and 6--a list of names and grades of personnel nominated by the Army; and,
- (3) page 8--a list of names and grades of personnel nominated by the Air Force.

The status of the officers as active, reserve or retired for the Army Presiding Officer nominees was also included.

Marine Corps. Page 1 lists Marine Corps officers who were nominated in the following numbers and grades for the position indicated:

- **Presiding Officer.** 5 personnel in the grade of Colonel (O-6)
- **Commission Members.** 20 personnel were nominated in the following grades: 4 Colonels (O-6); 6 Lieutenant Colonels (O-5); 10 Majors (O-4)

Navy. Page 2 lists Naval officers who were nominated in the following numbers and grades for the position indicated:

- **Presiding Officer.** 5 personnel in the following grades: 3 personnel in the grade of Captain (O-6) and 2 personnel in the grade of Commander (O-5)
- **Commission Members.** 20 personnel were nominated in the following grades: 8 Commanders (O-5); 12 Lieutenant Commanders (O-4)

Air Force. Page 3 lists Air Force officers who were nominated in the following numbers and grades for the positions indicated:

REVIEW EXHIBIT 26—ATTACHMENT 2

- **Presiding Officer.** 5 personnel were nominated in the following grades: 3 personnel in the grade of Colonel (O-6) and 2 personnel in the grade of Lieutenant Colonel (O-5)
- **Commission Members.** 36 personnel were nominated in the following grades: 8 Colonels (O-6); 14 Lieutenant Colonels (O-5); and 14 Majors (O-4)

Army. Pages 4 and 5 lists Army officers who were nominated in the following numbers and grades for the positions indicated:

- **Presiding Officer.** 18 personnel were nominated in the following grades: 13 personnel in the grade of Colonel (O-6); and 5 personnel in the grade of Lieutenant Colonel (O-5). 9 personnel (5 Colonels and 4 Lieutenant Colonels) were reserve status, 4 personnel (O-6) were retired status, and 5 personnel (4 Colonels and 1 Lieutenant Colonels) were active status.
- **Commission Members.** 31 personnel were nominated in the following grades: 3 Colonels (O-6); 10 Lieutenant Colonels (O-5); and 18 Majors (O-4)

In the record of trial, these redacted pages were numbered as 142, 143, 146, 147, and 149. As part of Review Exhibit 26, Attachment 2, these redacted pages were numbered as 1, 2, 5, 6, and 8.

I certify that the above description of Review Exhibit 26, Attachment 2 is an accurate summary of the information contained therein.

//signed//
M. Harvey
Chief Clerk of
Military Commissions



DEPARTMENT OF THE ARMY
Office of the Provost Marshal General
2800 Army Pentagon
Washington, D.C. 20310-2800

REPLY TO
ATTENTION OF:

DAPM-OPS

MEMORANDUM THRU

THE JUDGE ADVOCATE GENERAL

TJR, 17 Feb 04

ARMY GENERAL COUNSEL *Tom Taylor 17 Feb 04*

FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Identifying Personnel to Serve as Members and Presiding Officers for
Military Commissions

1. The enclosed files are submitted pursuant to your letter of December 20, 2002, directing that each Service identify 25 officers who meet eligibility criteria for service as military commission members and presiding officers. Enclosed please find a list of all nominated personnel. They are divided in category by primary and alternate candidates for military commission members, both active and reserve component. Candidates for service as presiding officer are comprised of active, reserve component and retired officers who have volunteered for recall to active duty (TAB A). Note that the Army has forwarded completed packets for 32 board members and 18 presiding officer nominees

a. At TAB B are the files pertaining to nominees for military commission membership. Files of active component nominees are at TAB B (1); at TAB B (2) are reserve component nominees. Tab B (3) are the alternate candidates.

b. At TAB C are the files pertaining to nominees for presiding officer service. Files of active component nominees are at TAB C (1); at TAB C (2) are reserve component nominees; at TAB C (3) are retired Officer nominees.

2. POC is MSG Homer, DSN 224-5052 or COMM (703) 614-5052.

3 Encls

MICHAEL S. GALLOUCIS
COL, MP
Chief, Operations Division

Attach 2

Review Exhibit

~~236~~ 26A

Page 4 Of 8

001866



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC 20330

Office of The General Counsel

FEB 24 2004

MEMORANDUM FOR DEPARTMENT OF DEFENSE GENERAL COUNSEL

FROM: SAF/GC

SUBJECT: Nomination of Officers to Serve on Military Commissions

Per your request, attached is a list of officers nominated by the Air Force to serve as members of Military Commissions. All possess the necessary security clearance and all are immediately available. The names of the individuals nominated for the position of Presiding Officer were forwarded to you last year along with completed Military Commission Member Data sheets and their three most recent Officer Performance Reports. Of the nominees to be Commission Members, the Military Commission Member Data sheets and most recent three Officer Performance Reports for [REDACTED] were forwarded to you when they were previously nominated. Attached are Military Commission Member Data sheets and the three most recent Officer Performance Reports for the remaining 33 of our nominees to be Commission Members.


MARY L. WALKER
General Counsel

Attachment:
Nominees for Military Commission Membership

attach to Review Exhibit 26A

Page 7 Of 8

001869

FOR OFFICIAL USE ONLY

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640



APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

Legal Advisor

June 25, 2004

FOR : Appointing Authority for Military Commissions
FROM: Brigadier General Thomas L. Hemingway, Legal Advisor to the
Appointing Authority *Thomas L. Hemingway*
SUBJECT: Selection of Military Commission Members

- Purpose. To select Members, Alternate Members, and Presiding Officers of Military Commissions.
- Discussion. Section 4(A), Military Commission Order (MCO) No. 1, requires you to appoint members and alternate member(s) of Military Commissions.
 - Composition. You must appoint at least three, but no more than seven, members to each Commission. You must also appoint one or two alternate members to each Commission.
 - Subject to the limits above, the number of members and alternate members appointed to each Commission is within your discretion.
 - You must designate a Presiding Officer from among the members of each Commission.
 - Only a Commission of seven members, not including alternate members, may impose a sentence of death. (Section 6(G), MCO No. 1)
 - Qualifications. Each member and alternate member of a Commission must 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." (Section 4(A)(3), MCO No. 1)
 - Personnel selected by you as Commission members must be those whom you determine "to be competent to perform the duties involved." (Section 4(A)(3), MCO No. 1)

Attach 3 to Review Exhibit 26A

Page 1 Of 3

FOR OFFICIAL USE ONLY

001880

- A member designated as a Presiding Officer must be "a Military Officer who is a judge advocate of any United States armed force." (Section 4(A)(4), MCO No.1)
- Nominations. Each of the services has nominated commissioned officers for your consideration in appointing Commission members (Encls 1 and 2). Enclosure 2 contains the names of nominees who are judge advocates and who have been nominated to serve as Presiding Officers. Copies of personnel records for each nominee are at Enclosures 4 thru 6.
 - The criteria provided to the services to secure nominations are more restrictive than the qualifications established in MCO No. 1 (see Encl 3). You are not limited to appointing only officers nominated by the services; you may appoint any qualified Military Officer of any United States armed force.
- Recommendations.
 - That you select one five-member Commission to be available to hear cases referred by you for which you have determined that a sentence of death will not be sought. One of the five members will be designated as the Presiding Officer. One alternate member should be selected.
 - Members (Non-Presiding Officer). Indicate your selections by placing your initials in the space beside the names of four officers on Enclosure 1, or by writing new names at the bottom of the list and initialing in the space beside their names.
 - Presiding Officer. Indicate your selection by placing your initials in the space beside the name of one officer on Enclosure 2 (nominees who are judge advocates), or by writing a new name at the bottom of the list and initialing in the space beside the name.
 - Alternate Member. Indicate your selection by placing your initials beside the name of one officer on Enclosure 1 or Enclosure 2, or by writing a new name at the bottom of the list and initialing in the space beside the name. In addition, place the letter "A" beside your initials to designate the officer as an alternate member.
 - That in the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member automatically takes the place of that member.

attach 3 to Review Exhibit 26A

Page 2 Of 3²
001881

- That neither rank, race, gender, religion, duty position, nor branch of service be used for the deliberate or systematic exclusion of otherwise qualified persons from Commission membership.
- That you sign the notification letters to Commission members (Encl 7).
- That you authorize me to prepare and execute all appropriate orders and documents to reflect your selections.

The recommendations of the Legal Advisor are:

approved JDA 25 June 2004 disapproved _____ other _____

attach 3 to Review Exhibit 26A

Page 3 Of 3

REVIEW EXHIBIT 26
ATTACHMENT 4

This document constitutes a releasable summary of Attachment 4 of Review Exhibit (RE) 26.

Attachment 4 of RE 26 is not included in order to protect the privacy and security of the individuals nominated by the military services to be the Presiding Officer and Commission members.

Attachment 4 of RE 26 consists of eight pages of information concerning the nominated military personnel, which were formatted into a table or matrix.

The table includes the names, grades, gender, service, duty position, unit, security clearance, command experience, combat experience, and other comments. The Appointing Authority's initials appear next to the names of the military personnel he selected to be the Presiding Officer and Commission members.

I certify that the above description of Review Exhibit 26, Attachment 2 is an accurate summary of the information contained therein.

//signed//
M. Harvey
Chief Clerk of
Military Commissions

shall be a commissioned officer of the United States armed forces and that the Appointing Authority will appoint members and alternate members determined to be competent to perform the duties involved. MCO No. 1, Para. 4(A)(3). Article 25 of the Uniform Code of Military Justice (UCMJ), which governs the selection of *court-martial* members, does **not** apply to these proceedings.

a. General Counsel Acted Within His Authority and Discretion

(1) MCO No. 1 directs the Department of Defense (DoD) General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions” MCO No. 1, para. 8(A)

(2) The Honorable Mr. William J. Haynes II, as DoD General Counsel, reasonably deemed it necessary to solicit nominees from the different Services. As these cases clearly are beyond the pale of any ordinary court-martial case, and as court-martial procedural rules do not pertain, his decision to solicit experienced potential members, in the rank of O-4 and above, was reasonable and within his discretion.

(3) The nomination process used by the Department of Defense and relied upon by the Appointing Authority was a reasonable means of obtaining a pool of competent Commission members. To ensure a cross-section of services were considered for selection, Mr. Haynes directed the different Branches to submit 25 nominees each. The Services selected from a pool of thousands of officers. To ensure a cross-section of components was considered for selection, Mr. Haynes also directed Service Secretaries to consider not only the active component, but also Reserve, National Guard, and Retired personnel. To ensure fairness in the proceedings, Mr. Haynes established as a “mandatory criteria” the “reputation for integrity and judgment.” Based upon the unique and complex role of a military commission member as a trier of fact and law, and the potential need to process highly classified information during the course of a commission proceeding, Mr. Haynes established “mandatory criteria” of nominees in the grade of O-4 and above and a Top Secret security clearance and “Preferred Criteria” of “combat or operational experience” and “command experience.” Nominees also submitted “Military Commission Member Data Sheets” to ensure the nominees’ qualifications were current and verified by the nominee, and to ensure the availability of a nominee for service as a Commission member. This was a reasonable process to ensure that potential members were competent, fair, and available for service.

b. Appointing Authority has Discretion to Select Competent Commission Members

(1) MCO No. 1 gives the Appointing Authority the discretion to select officers whom he deems “competent” to perform the duties as Commission Members. MCO No. 1, Para. 4(A)(3). Competence in this setting includes: 1) the ability to evaluate fairly and impartially evidence presented during all phases of the proceedings; and 2) the ability to make applicable findings of fact and conclusions of law during all

phases of the proceedings. Bound only by the requirements that the Commission provide a “full and fair trial” to the Accused, and that Commission members be officers and competent to perform their duties, his selections were reasonable and completely within his discretion. *See* Presidential Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Presidential Military Order), Sec. 4(a) (2); MCO No. 1, Para. 4(A)(3).

(2) The selection process used by the Appointing Authority was a reasonable means of selecting fair and competent Commission members. From the nominees submitted by the Service Secretaries, the Appointing Authority reviewed a Military Commission Member Data Sheet, which provided information on assignment history, current position, grade/rank, date of birth, gender, date of initial entry on active duty, source of commission, security clearance, branch of service, awards and decorations, civilian and military education, and periods of non-availability. The Appointing Authority also had the opportunity to review up to three Officer Evaluation Reports from each nominee. The Appointing Authority also received counsel from his legal advisor, Brigadier General Thomas J. Hemingway, who advised the Appointing Authority that the Appointing Authority was not limited to appointing officers nominated by their services, but could appoint **any** qualified Military Officer of any United States armed forces. Brigadier General Hemingway also advised the Appointing Authority not to use rank, race, gender, religion, duty position, or branch of service for the deliberate or systematic exclusion of otherwise qualified persons from Commission membership. *See Exhibit 3, Defense Motion*. On 25 June 2004, the Appointing Authority accepted Brigadier General Hemingway’s recommendations and personally selected Commission members. It is clear from the process that the Appointing Authority’s selection process was designed to find personnel who were competent, fair, and available for service.

c. Article 25, UCMJ does not Apply to Military Commissions

(1) Defense insists that this Commission rely upon the standards articulated in Article 25, UCMJ for the selection of Commission Members and caselaw interpreting and applying court-martial standards. The President has acted within his war powers to direct that the Accused be tried by military commission, not court-martial. The President and, as delegated, the Secretary of Defense and DoD General Counsel, have established procedures that, while different from courts-martial, provide for fundamental fairness. Furthermore, the procedures governing military commissions have been sanctioned by Congress. With the codification of the UCMJ in Title 10 of the U.S. Code, Congress specifically preserved the procedures for military commissions in Article 21 as they have historically been recognized. As the Supreme Court recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), a case decided after the UCMJ’s enactment:

Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed*

*by statute. It has been adapted in each instance to the need that called it forth. * * **

With this practice before them, the Committees of both Houses of Congress recommended the reenactment of Article of War 15 as Article 21 of the new code. They said, "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial."

Madsen, 343 U.S. at 346-347, 351 n.17 (emphasis added).

(2) In publishing Military Commission Order No. 1, the Department of Defense deliberately chose different criteria for qualified Commission Members than for court-martial panel members. Commission Members must: 1) provide a "full and fair trial" to the accused; 2) be an officer from any armed service; and 3) be "competent" to perform their duties. See Presidential Military Order, Sec. 4(a) (2); MCO No. 1, Para. 4A (3). There is no directive that the Appointing Authority rely upon the standards articulated in Article 25, UCMJ or rely upon a nomination and selection process akin to those used in courts-martial.

(3) The different qualification criteria for Commission members than for court-martial panel members is indicative of the inherently different role that military commissions perform from traditional courts-martial. Courts-martial adjudicate alleged criminal offenses committed by service members under the UCMJ. In contrast, Military Commission Members are triers of both fact and law in trials where they must adjudicate alleged violations of the Law of Armed Conflict by enemy combatants. Additionally, military commissions are designed to consider and protect highly classified and sensitive information. More senior, experienced members are better suited to these functions.

d. UCMJ Applicability

(1) Although Article 25, UCMJ does not apply, the Prosecution prevails even under an analysis of Article 25, UCMJ case law. When Defense alleges an improper selection under Article 25, UCMJ, Defense shoulders the burden of establishing a "systematic inclusion or exclusion" of qualified personnel from the selection process. *United States v. Roland*, 50 M.J. 66, 69 (CAAF 1999). When Defense establishes such an inclusion or exclusion, the Government must show "by competent evidence that no impropriety occurred" in the selection process. *United States v. Kirkland*, 53 M.J. 22, 24 (CAAF 1999).

(2) A court-martial panel may not be "stacked" to achieve a desired result. *Roland*, 50 M.J. at 69 (citing *United States v. White*, 48 M.J. 251 (1998); *United States v. Hilow*, 32 M.J. 439, 440 (CMA 1991); *United States v. Smith*, 27 M.J. 242 (CMA 1988)). Although court "stacking," the deliberate inclusion or exclusion of members to achieve a desired result, is impermissible, not all systematic inclusions or exclusions constitute unlawful court stacking. *United States v. Simpson*, 55 M.J. at 674, 691 (involving the

intentional exclusion of nominees from the U.S. Army Ordnance School, the accused's place of assignment) (citing *United States v. Upshaw*, 49 M.J. 111, 113 (1998); *United States v. Lewis*, 46 M.J. 338, 341 (1997)). The motive of the convening authority is crucial in determining whether the panel selections constitute court "stacking." *Simpson*, 55 M.J. at 691. (citing *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988)). For instance, courts have upheld that it was proper for convening authorities to take race, ethnicity, or gender into account during court-martial selection if the motive for doing so was to include such members as important segments of the military community. *Id.* However, if the motive for selecting particular members is to achieve a desired outcome, their selection violates Article 25(d) (2), UCMJ. *Id.* at 692. The court considers all of the evidence available in the record to determine whether an intent to "stack" actually existed. *United States v. Bertie*, 50 M.J. 489, 492 (CAAF 1999).

(4) There is no assertion of "court stacking," and nor reasonably could there be. As discussed, selecting nominees from thousands of qualified members in the ranks of O-4 and above to perform in this setting only evinces a desire to ensure that nominees are competent to provide a full and fair trial.

(5) Although the Defense states that the General Counsel's instructions excluded the majority of all commissioned officers in the armed forces from consideration, it does not necessarily follow that the General Counsel's instructions excluded the majority of **competent** officers from consideration. Duties as a Commission member necessarily require the member to play a quasi-judicial role. Other quasi-judicial roles in the military include serving on administrative separation boards, serving as an Investigating Officer under Article 32 of the UCMJ, and serving as a Commander, which involves making recommendations on potential courts-martial and determining appropriate disposition in nonjudicial punishment cases under Article 15, UCMJ. In these quasi-judicial roles, a preference for O-4s and above is the norm. *See, e.g.*, Discussion to Rule for Courts-Martial 405(d)(1), Manual for Courts-Martial (2002 ed.) ("The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training").

7. Attached Files. None.

8. Oral Argument. If Defense is granted an oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. None anticipated.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

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:

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

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 26C
Page 2 of 2

STANDARD FOR SELECTION

- Officer from any armed service. MCO No. 1, Para. 4A (3).
- “Competent” to perform duties as Commission members. MCO No. 1, Para. 4A (3).
- Appointing Authority selects. MCO No. 1, Para. 4A (3).

OVERVIEW

- The standard for the selection of Commission Members is MCO No. 1.
- Art. 25 does not apply to Commission proceedings.
- Bottom line – Nomination and selection process is lawful.

UNITED STATES

V.

DAVID M. HICKS

IMPROPER SELECTION OF
COMMISSION MEMBERS:
PROSECUTION ORAL ARGUMENT

NOMINATION PROCESS

- Mandatory criteria of grade of O-4 and above reflects intent to have “competent” nominees – those with experience, education, and judicial temperament.
- Commission members
 - 1) determine both law and fact – quasi-judicial role
 - 2) law of war proceeding

QUASI-JUDICIAL ROLE

- O-4s and above more likely to have prior experience serving in quasi-judicial roles:
 - 1) Commanders Experience
 - Art. 15 proceedings
 - Reviewing investigations
 - Court-martial actions
 - 2) I/O on Art. 32, UCMJ investigation
 - 3) Summary Court-Martial officer
 - 4) Administrative separation board duty

ARTICLES THAT APPLY TO MILITARY COMMISSIONS

- Article 21 – Jurisdictions
- Article 36 – President may prescribe rules
- Article 47 – Continuances
- Article 48 – Contempt
- Article 50 – Admissibility of court of inquiry records
- Article 104 – Aiding the Enemy
- Article 106 – Spies

CONCLUSION

- MCO No. 1 is proper standard for determining the selection of Commission Members.
- Art. 25 doesn't apply to Commission proceedings; Congress didn't intend for it to apply.
- Selection process is lawful.

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
MODIFY CHARGES – LACK
OF SUBJECT-MATTER
JURISDICTION – OFFENSES
MUST BE COMMITTED
DURING INTERNATIONAL
ARMED CONFLICT**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves to modify all charges against Mr. Hicks so that they exclude all conduct prior to 7 October 2001, and states in support of this motion:

1. **Synopsis:** The military commission lacks jurisdiction to try Mr. Hicks for any law of war violation prior to 7 October 2001 because the law of war is not applicable to conduct committed prior to the existence of armed conflict – in this instance, the United States and Afghanistan.
2. **Facts:** The United States armed forces commenced military action within the borders of Afghanistan on 7 October 2001.
3. **Discussion:** Military commissions have jurisdiction to hear cases involving violations of the law of war, which becomes operable only during armed conflict, and which governs only that conduct committed during the period of such armed conflict. The law of war “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached”¹ Thus, the initiation of an armed conflict marks the earliest point at which conduct may fall within the jurisdiction of a military commission.

The armed conflict between the United States and Afghanistan began on 7 October 2001, when United States military aircraft participated in air strikes within the boundaries of Afghanistan. Because this armed conflict involved two states, it constitutes an international armed conflict, to which the law of war became applicable as of that date: 7 October 2001.²

In that context, the charges against Mr. Hicks are invalid because they encompass the following time frames, which include substantial periods to which the law of war does not apply:

¹ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, 35 I.L.M. 32, 54 (1996).

² See Common Article 2 to the Geneva Conventions: *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, Geneva Conventions). Available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>>.

RE 27A
Page 1 of 2

Charge 1: 1 January 2001 to December 2001;

Charge 2: 11 September 2001 to 1 December 2001; and

Charge 3: 1 January 2001 to 1 December 2001.

As detailed above, the law of war did not apply prior to 7 October 2001, which marks the inception of the armed international conflict between the U.S. and Afghanistan. As a result, none of the events alleged in the charges that occurred prior to 7 October 2001, can be considered by this commission as violations of the law of war, or evidence of any such subsequent alleged violation. Indeed, conduct prior to 7 October 2001, must be stricken from the charges, and barred from the commission's consideration of any remaining allegations.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of expert witnesses.

B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Article 2.

6. **Relief Requested:** The defense requests that the charges be modified by replacing the inception date in Charges 1 to 3 with 7 October 2001.

7. The defense requests oral argument on this motion.

By:


M.D. MORI

Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL

Joshua L. Dratel, P.C.

14 Wall Street

28th Floor

New York, New York 10005

(212) 732-0707

Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT

Major, U.S. Army

Detailed Defense Counsel



fulltext



Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

Chapter I. General Provisions

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

Attachment 1 to RE 27A

- j. Prosecutor v Dusko Tadic, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paragraph 67, International Criminal Tribunal in Yugoslavia, 2 October 1995
- k. Rome Statute of the International Criminal Court, Article 8.2(f);
- l. Prosecutor v Kunarac, *Judgment*, paragraph 56, International Criminal Tribunal in Yugoslavia, 12 June 2002
- m. Jeffrey Addicott, *TERRORISM LAW: THE RULE OF LAW AND THE WAR ON TERROR*, pg 12, 23-25 (2d ed. 2004)
- n. United States v. Rockwood 48 M.J. 501, 508 n.14 (A.Ct.Crim. App.1998)
- o. El-Shifa Pharmaceutical. Industry. Corporation. v. United States, 55 Fed. Cl. 751, 771-772. (Fed.Cl.2004).
- p. DoD Military Comission Instruction No. 2
- q. Geneva Convention I, Article II, 1949.
- r. Braverman v. United States 317 U.S. 49, 53 (1942)
- s. United States v. Rucker 586 F.2d 899, 906 (2d Cir. 1978)
- t. United States v. Diaz 176 F.3d 52, 98 (2d Cir.1999)
- u. United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989)
- v. United States v. Jimenez Recio 537 U.S. 270, 276 (2003)
- w. Carlson v United States 187 F.2d 366, 370 (1951)
- x. United States v. Hersh 297 F.3d 1233, 1244-45 (11th Cir. 2002)

5. Facts.

- a. As the United States Supreme Court succinctly stated in Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004):

On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations,

organizations or persons.’ Authorization for Use of Military Force (‘the AUMF’), 115 Stat 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.¹

Id. at 2635.

b. The international community immediately recognized the attacks of September 11, 2001 as an act of war, and invoked provisions of international treaties applicable to international armed conflict. *See, e.g.*, UN Security Council Resolution 1368 of 12 September 2001; NATO Press Release, 12 September 2001; White House Press Release, September 14, 2001.²

c. On September 20, 2001, President Bush, in an address to the Joint Session of Congress and the American people,³ noted that the September 11 attacks constituted “an act of war against our country.”⁴ He also condemned the Taliban regime and put it on notice that it must either assist in bringing the terrorists to justice or “share in their fate.”⁵ Warning the American public to expect “a lengthy campaign, unlike any other we have ever seen,”⁶ the President delivered a message to the United States military: “Be ready. I’ve called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.”⁷

d. Indeed, the September 11 attacks on the United States were an act of war, sparking the commencement of major combat operations in Afghanistan against the al Qaida network and the Taliban regime, known as Operation Enduring Freedom. But the war did not leap into existence on September 11, 2001. This war – declared and waged by al Qaida against the United States – has existed since the early 1990s.⁸ As a Federal Claims Court has stated, “Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings – the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania – are sufficient to confirm the President’s assertion that a state of war exists between the United States and [al Qaida].” El-Shifa Pharmaceutical Industry Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

e. On October 7, 2001, the President announced that on his orders, the U.S. military had “begun strikes against al Qaeda terrorist training camps and military installations of

¹ *Id.* at 2635.

² Available at www.whitehouse.gov/news/releases/2001/09/20010914-12.html.

³ Address to a Joint Session of Congress and the American People of September 20, 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Final Report of the National Commission on Terrorist Attacks Upon the United States, Authorized Edition (2004), at 46, 48, 59.

the Taliban regime in Afghanistan.”⁹ Operations in Afghanistan continue,¹⁰ as do worldwide operations against al Qaida.¹¹

6. Discussion.

“When lawless wretches become so impudent and powerful as not to be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked.”

-Attorney General James Speed, 1865
11 Op. Atty Gen. 297 (1865).

The United States is engaged in a war against the international terrorist group known as al Qaida. This is an international armed conflict that has existed between al Qaida and the United States since the early 1990s and continues to date. Al Qaida has operations worldwide, and has attacked in diverse parts of the globe, to include East Africa, Yemen, and the United States. Afghanistan is but one theatre in this ongoing conflict. The operations levied against the Taliban regime were only necessary after the Taliban refused to turn over Usama bin Laden and others responsible for the September 11th attacks, and for its support of al Qaida’s terrorist operations within their borders.

a. The President has the authority to declare war against al Qaida as a non-state actor and to prosecute those who violate the laws of war

As the President of the United States expressly declared in his Military Order of November 13, 2001 (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism), “International terrorists, including members of the al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of Armed Conflict that requires the use of the United States Armed Forces.*” The President also determined that the individuals subject to his order were to be tried for violations of the laws of war and other applicable laws by military tribunals. See President’s Military Order of November 13, 2001, section 1(a) & 1 (e).

The President, in his constitutional role as Commander in Chief, and through his broad authority in the realm of foreign affairs, has the full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war. See United States v Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The President’s decision to recognize that an armed conflict exists is a political question. “It is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial

⁹ Presidential Address to the Nation of October 7, 2001, available at www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

¹⁰ *See, e.g.*,

¹¹ *See, e.g.*, Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, October 4, 2004 (the war against al Qaida “will likely go on for years”).

notice of such determination and are bound thereby.” Verano v DeAngelis Coal Co. 41 F.Supp 954, 954 (M.D.Pa.1941).

The President, in his order of 13 November 2001, declared that he was acting pursuant to both his authority as Commander in Chief of the Armed Forces under the Constitution and under the “Authorization for Use of Military Force” given him by Congress. Congress, in its Joint Resolution to “authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States” also found that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States, and expressly authorized the President to use “all necessary and appropriate force *against those nations, organizations, or persons* he determines planned, authorized, committed or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” See Joint Resolution of Congress to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States (emphasis added). It has therefore been clearly established that both the President and Congress recognize the President’s inherent authority as Commander in Chief to prosecute an armed conflict against not only nations, but organizations and persons as well.

The President’s decision to treat the conflict with al Qaida as an armed conflict, despite al Qaida not being a “state actor”¹² falls within his discretion as Commander in Chief and is inherent in his war powers. “War powers are to be construed broadly...” and “the power to wage war is the power to wage war successfully.” See United States v. Hirabayashi, 46 F. Supp. 657, 661 (D. Wash. 1942) *citing* Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U.S. 146 (1919).

Under his war powers as Commander in Chief, the President has the Constitutional authority¹³ to determine that an armed conflict exists with al Qaida, a non-state actor. Deciding to wage war on a non-state actor is not a novel position in our Nation’s history:

¹² ...It is clear from the actions of the United Nations, the United States and the North Atlantic Treaty Organization that the events of September 11th, 2001 were internationally considered an “armed attack” on the United States. The unprecedented armed attack determination was significant because it, in turn, immediately signaled that the United States intended to frame the terror attack as an event equivalent to an “act of war” under international law. The use of terms “war” or “act of war” traditionally refers to the use of aggressive force against a sovereign State by another State in violation of the United Nations Charter and customary international law. The United States Congress passed a “Use of Force” resolution and the President labeled the attack “an act of war.” The United Nations, in Security Council Resolution 1368, also recognized the inherent right of the individual or collective self-defense in accordance with its Charter. Al Qaida, with many indices of a State, excepting one (stable geographic limitations) was being treated as a “virtual state.” For all intents and purposes al Qaida is a “virtual State,” which is defined as having “many characteristics of the classic nation-State, but able to walk in the shadows of international law because it has no fixed national boundaries...The al Qaida virtual State has a military, a treasury, a foreign policy, and links to other nation-states.” Jeffrey Addicott, Terrorism Law: The Rule of Law and the War on Terror pp. 12, 23-25 (2004).

¹³ *U.S. Const., art. II, §2.*

Military action against the Greytown's quasipolitical enemy and President Jefferson's military force against the Barbary Pirates on the shores of Tripoli are other historical examples of military force against loosely organized non-state enemies. And it follows that the President as Commander in Chief can conclusively designate by his actions a state of war, so he can also designate as Commander in Chief the identity of the enemy targets for the purposes of applying military force or engaging in combat activities.

The Prize Cases, 67 U.S. 635 (1862), recognize that the President's declaration of a blockade - of the Confederate ports - is an act of war which is conclusive of the question of whether a state of war exists, whether or not war is formally declared by Congress. *id.* at 668. The court saw no difference between the nature of that war - between nations, or between a nation and insurgents. Similarly, we are not bound by formality here. See United States v. Rockwood, 48 M.J. 501, 508 n.14 (Army Ct. Crim. App. 1998) ("when courts have decided whether 'time of war' exists for various purposes, they have generally looked to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches. (citations omitted).

We do not regard a war against a non-state, non-insurgent group - stateless terrorists - to be any less a war. See generally Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror,"* 4 Scholar 209, 209-225 (2002). Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings - the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania - are sufficient to confirm the President's assertion that a state of war exists between the United States and those same terrorists determined to have been operating a weapons-related factory in Khartoum. *id.* at 240 n.183.

El-Shifa Pharmaceutical. Industry. Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

Under his war powers as Commander in Chief, the President not only has the Constitutional authority to determine that an armed conflict exists with al Qaida, a non-state actor, and to determine that the laws of war should apply to the conflict, but nothing under international law prohibits him from doing so. Under principles of international law, states have a "wide measure of discretion which is only limited in certain cases by prohibitive rules." The Case of S.S. Lotus (France v. Turkey), P.C.I.J. Ser. A, No. 10 at 19 (1927). The *Case of the S.S. Lotus* stands for the proposition that a state may act as it wishes in regard to its sovereign interests, provided nothing in international law specifically prohibits it. In other cases, every state remains "free to adopt the jurisdictional principles which it regards as best and most suitable." *Id.* There is no prohibition under international law against the United States waging war with, or applying the laws of armed conflict to, a non-state actor such as al Qaida. "The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent state, not from the state's relationship to the perpetrator, victim or act." In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D.O.H.1985) citing United States v. Brust at 6, Case No. 000-

Mauthausen-7 (DJAWC, Sept. 19, 1947), aff'd, War Crimes Board of Review, Office of the Judge Advocate (Nov. 6, 1947).

b. An armed conflict exists under international law whenever there is a resort to protracted armed violence between governmental authorities and organized armed groups

In the first international criminal tribunals held since World War II, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") came to one concise definition of when an armed conflict exists for purposes of applying international law: "An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between states *or protracted armed violence between governmental authorities and organized armed groups*, or between such groups within the states.... International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved." Prosecutor v Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J). This definition has become the generally accepted definition of armed conflict in international law. See Rome Statute of the International Criminal Court, Article 8.2(f)¹⁴; see also Prosecutor v Kunarac, Judgment, paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.

The Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia did the following analysis of the events that occurred in Yugoslavia to see whether the circumstances could be considered, under its definition, to be armed conflict:

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed – a factual issue on which the Appeals Chamber does not pronounce – international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship....In light of the foregoing, we

¹⁴ In fact, although the United States is not party to the ICC, as of 27 September 2004, 97 countries are States parties to the Rome Statute of the International Criminal Court and have accepted this definition. <http://www.icc-cpi.int/statesparties.html>

conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

Id. at paragraph 10.

c. The war with Al Qaida began well before January 2001

DoD Military Commission Instruction No. 2 (hereinafter “MCI No. 2), paragraph 5(C) defines the phrase “in the context of and was associated with armed conflict” as follows:

Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war,” or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

DoD Military Commission Instruction No. 2, para. 5(C).

This definition matches the principles, definitions and analysis of Tadic regarding whether conduct has a nexus to armed conflict. This is a proper definition for the Commission Members to use in determining whether acts were committed “in the context of and associated with armed conflict.”

Precisely when the armed conflict with al Qaida began is a question of fact to be determined at trial. At trial, the Prosecution will show that as early as 1991, Usama bin Laden and other al Qaida leaders began to make statements that al Qaida’s primary purpose was to attack the United States, and that al Qaida began taking acts in furtherance of that purpose. Although the United States Government did not specifically know of al Qaida’s existence prior to 1996, the evidence now shows that al Qaida had been plotting and conspiring to kill U.S. service members for nearly five years prior to the United States learning of the group’s existence.

As a general proposition, the laws of war apply in all cases of declared war or armed conflict, even if the state of war is not recognized by one of the parties. See Geneva Convention I, Art. II (1949). Following this logic, as well as the definition in

MCI No. 2, the focus of inquiry in determining the existence of armed conflict is the intent of the attacker – al Qaida – rather than the United States.

Evidence at trial will show that the first operation that al Qaida executed against the United States dates back at least to 1993. Starting around 1992, Usama bin Laden and other al Qaida leaders made a number of private declarations against the United States that were disseminated amongst members of the al Qaida network. In 1996, after relocating al Qaida to Afghanistan, Usama bin Laden publicly declared war on the United States. In this *fatwa*, he declared that all Muslims have the duty to kill U.S. service members in the Arabian Peninsula. In 1998, he issued another *fatwa*, broadening this call to murder to civilians wherever they may find them. Attacks committed by al Qaida included attacks on the U.S. Embassies in Kenya and Tanzania in 1998, on U.S.S. Cole in 2000, and on the United States. Thousands perished as a result of these and other brutal attacks.

Applying the MCI No. 2 and Tadic definition, these facts quickly add up to the existence of armed conflict. The Defense assertion that the armed conflict began on 7 October 2001 simply is not supported by the facts or the law.

d. The crimes charged against the accused were all committed during a period of time when the laws of war governed

Furthermore, regardless of when the armed conflict actually began, overt acts to a conspiracy charge can pre-date the crime itself. An overt act need not be itself criminal, but it must advance the purpose of the conspiracy. MCI No. 2 para. 6(C)(6)(b)(4). This is a long established judicial standard: an overt act “may be that of only a single one of the conspirators and need not be itself a crime.” Braverman v. United States 317 U.S. 49, 53 (1942), *citing* Bannon v. United States, 156 U.S. 464, 468-9 (1895); *See also* United States v. Collier 14 M.J. 377, 378 (C.M.A.1983).

Conspiracy is a continuing crime. This conclusion derives from the well-established principles that (1) a conspiracy continues “until its aim has been achieved, it has been abandoned, or otherwise terminated,” United States v. Rucker, 586 F.2d 899, 906 (2d Cir. 1978); and (2) absent withdrawal, a conspirator’s “participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators.” United States v. Diaz, 176 F.3d 52, 98 (2d Cir.1999). “A conspiracy is a continuum. Once a participant knowingly helps initiate the agreement and sets it in motion, he assumed conspirator’s responsibility for the foreseeable actions of his confederates within the scope of the conspiratorial agreement, whether or not he is aware of precisely what steps they plan to take to the accomplish the agreed goals.” United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989). The Supreme Court has also endorsed the view that a conspiracy “terminates when the crime or crimes that are its object are committed” or when the relevant “agreement . . . is abandoned....” United States v. Jimenez Recio, 537 U.S. 270, 276 (2003) *citing* American Law Institute’s Model Penal Code § 5.03, p. 384 (1985).

Absent withdrawal by the Accused, all of the overt acts taken by the Accused or another co-conspirator, regardless of the date acts were undertaken, and regardless of exactly when it may be that the laws of war governed the conduct, are relevant to show the conspiracy in action and the Accused's participation therein. Since conspiracy is a continuing crime, courts have even held that overt acts taken in furtherance of a conspiracy *before the conspiracy became illegal*, were relevant to prove the defendant's intent in a conspiracy once it becomes illegal, providing at least one overt act was taken after the conspiracy was made illegal. See United States v. Hersh, 297 F.3d 1233, 1244-1245 (11th Cir. 2002). (The indictment alleged 17 overt acts in furtherance of the conspiracy, only two of which were illegal when they occurred. The Eleventh Circuit concluded that there was no *ex post facto* concerns in that particular case and utilized the defendant's overt acts prior to the conspiracy becoming illegal to establish the defendant's intent). See Hersh 297 F.3d at 1247. "The overt acts merely manifest that the conspiracy is at work." Carlson v United States 187 F.2d 366, 370 (1951) *citing* United States v. Offutt 75 U.S.App.D.C. 344 (1942). Hence, regardless of when evidence at trial demonstrates that armed conflict commenced, the overt acts alleged are still properly charged.

e. **Conclusion**

When the armed conflict began is a factual determination that the Commission Members will make after evidence has been presented on the merits. As outlined, the Prosecution asserts that armed conflict began years prior to the Accused's alleged involvement beginning in January 2001. Accordingly, the Defense motion should be denied.

7. Oral Argument. If the Defense is permitted oral argument, the Prosecution requests to respond.

8. Additional Information. None.

9. Witnesses/Evidence.

a. Transcript, President Clinton's Press Conference August 20, 1998
<http://www.clintonpresidentialcenter.org/legacy/082098-speech-by-president-address-to-nation-on-terror.htm>

b. Transcript, General Shelton's briefing on the missile strikes in Sudan and Afghanistan, 20 August 2004 http://www.pbs.org/newshour/bb/military/july-dec98/cohen_8-20.html

c. Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council 2/1998/780, 20 August 1998 <http://www.jb.law.uu.nl/jb-vol/US-SC.pdf>

d. Joint Resolution by Congress to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107

e. Transcript, President Bush's address of 7 October 2001 announcing the beginning of strikes against al Qaida training camps and military installations of the Taliban regime in Afghanistan.
<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>

f. Statement by NATO invoking Article 5 of the Washington Treaty
<http://www.nato.int/docu/pr/2001/p01-124e.htm>

g. United Nations Resolution 1368
<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf>

h. Department of Defense Operation Enduring Freedom Timeline & related links
www.defenselink.mil/home/features/1082004a.html

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

not follow them; their operations are designed to cause the maximum amount of damage to civilians and to cause the maximum amount of unnecessary suffering to their targets. As a matter of law, LOAC does not apply to our operations against al Qaida, and the U.S. is not now, and never has been involved in an international armed conflict with al Qaida.

Footnote 12 in the government's response validates this principle. In that footnote the government acknowledges that international armed conflict can only occur between two States, and cites to Mr. Addicott's book in which he asserts al Qaida is "a virtual State," with which the United States could have an international armed conflict. While Mr. Addicott's assertion has absolutely no basis in the law, and has no support whatsoever from legal scholars, the very fact the government is arguing al Qaida is a State proves that an international armed conflict can only occur between two State entities.

The government's reliance on Mr. Addicott's assertions is even more questionable when compared to other government assertions in this case. For example, in the Prosecution Response to the Defense Motion to Dismiss All Charges for Denial of Fundamental Rights at paragraph 3g., the government cites with approval statements made by President Bush on 7 February 2002 in which the President himself stated that none of the provisions of the Geneva Conventions "apply to our conflict with al Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaida is not a high contracting party to Geneva."

A (2). The U.S. was involved in an international armed conflict with the former Taliban regime in Afghanistan, but that international armed conflict has ended.

In October 2001, the United States exercised its right of self-defense under Art. 51 UNC against Afghanistan after its government, the Taliban regime, refused to surrender Usama Bin Laden and other al Qaida operatives operating in Afghanistan. The United States, along with a coalition of other nations and armed Afghani groups known as the Northern Alliance conducted military operations in Afghanistan.

This was an international armed conflict. All the rules of the LOAC that govern armed conflict between two State entities were in play in operations against the Taliban. The United States could capture and detain enemy combatants, and could hold them until the armed conflict ended, at which time they should have been released, repatriated, or tried under appropriate law.

The international armed conflict in Afghanistan ended with the collapse of the Taliban regime and the creation of a new government under Mr. Ahmed Karzai called the Transitional Islamic State of Afghanistan (TISA). The TISA is the recognized government of Afghanistan.

The United States is currently engaged in combat operations against what are apparently former Taliban regime personnel in Afghanistan along its border with Pakistan. These military operations do not constitute an international armed conflict. Under the LOAC the ongoing U.S. combat operations in Afghanistan are not a continuation of the 2001-2002 international armed conflict against the former government of Afghanistan, the Taliban regime. The Taliban regime, the former government and state entity of Afghanistan, no longer exists. The ongoing U.S. combat operations in Afghanistan against former Taliban regime personnel can perhaps be characterized as combat operations in support of an internal armed conflict between the TISA and an armed rebel group consisting of former Taliban regime personnel. While the LOAC

applies to such a conflict, the rules governing such a conflict are set forth in Common Art. 3 of the Geneva Conventions.

Common Art. 3 requires that the United States turn over to the host nation all rebel group personnel captured by U.S. forces during combat operations to the host nation, in this case the TISA. The TISA may then deal with them under its domestic law. The personnel of the rebel group do not enjoy combatant immunity, so they may be prosecuted by the host nation for criminal acts they engaged in during the internal armed conflict.² The host nation, however, is constrained by its own domestic law, including the treaties to which it is a party, and customary international law to comply with procedural rules in prosecuting rebel personnel. The United States has no role in this process.

In its response to this defense motion and others, the government has espoused a position that the United States is involved in a “Global War” with al Qaida, or that because this is “wartime” that the government may invoke the LOAC to justify its treatment of Mr. Hicks. While the defense does not deny that combat operations have been ongoing on several fronts over the past 3-4 years, and that the United States has a right to defend itself under Art. 51 of the U.N. Charter, the terms “Global War,” “War on Terror,” or “wartime” are merely rhetorical or political devices that have no relevance to a legal discussion of the rules applicable to the military operations in which the United States has been involved. Any legal discussion of the LOAC and its implications must start with an analysis of what type of armed conflict, if any, is involved in a military operation, and what, if any rules under the LOAC are implicated by the armed conflict or lack thereof. Any discussion of “Global Wars” or “the War on Terrorism” merely serve to confuse and obfuscate the legal issues relevant to Mr. Hicks’, or any other, case before the commission.

Given the various misleading statements and unsupported, out-of-context references the government put forth in its response to the defense motion, it is necessary for the defense to review them individually and debunk the government’s assertions.

B (1). Paragraph 6a of the Government Response

In para. 6a, the government asserts “[t]he President has the authority to declare war against a non-state actor.” This assertion is misleading. The President can declare that a state of “armed conflict” exists with whomever he wishes. However, that declaration has no impact whatsoever on the existence of an international armed conflict as defined by the Geneva Conventions. At best, as the government points out, such a declaration by the President is a political statement. It may have some impact on U.S. domestic law. For example, such a declaration may have implications for the insurance industry’s “war” clauses in insurance policies, but they do not trigger the applicability of the LOAC.

The government’s citation to The Prize Cases is misleading as well. The Civil War was a special type of conflict known as a “Belligerency.” Belligerencies are internal armed conflicts in which the rebel group or force maintains all the attributes of a State entity—territory, armed forces, embassies, legislature, judicial system, monetary system, etc. Because the rebel group has all the attributes of a State, under the LOAC, all the same rules for international armed

² See Common Art. 3 of the Geneva Conventions.

conflict are applicable. Thus, the court in The Prize Cases determined that a “War,” then the term used for an international armed conflict, was taking place.

B (2). Paragraph 6b of the Government Response

In para. 6b, the government quotes an opinion by Professor Cassese (an expert in international law the defense requested as an expert witness), from his ruling in a case before the ICTY. In that opinion he stated that “[a]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between states or protracted armed violence between governmental authorities and organized armed groups, or between such groups within states”

This statement must be examined in the context of the case in which it appeared. Professor Cassese was ruling on a case arising out of the series of conflicts occurring in Yugoslavia. During those conflicts there were many governmental and non-governmental armed groups throughout Bosnia, Croatia, Albania, Kosovo, Serbia, Macedonia, and Montenegro. Some of these groups controlled territory, some did not. Some were organized, some were not. Some were supported by other states, some were not. None, however, were like the loosely associated, globally located, secret organization that we identify as al Qaida.

Professor Cassese was describing a situation in which both international and internal armed conflicts were ongoing. His ruling was that LOAC applied in that situation. It should not be read to encompass the U.S. operations against al Qaida around the world. Indeed, if that were the case, the U.S. would be legally bound by the LOAC in its operations against al Qaida. As stated above, even the President has stated that LOAC does not apply to our military operations against al Qaida.

B (3). Paragraph 6c of the Government Response

The government cites to MCI 2 to support its argument there was an armed conflict with al Qaida before January 2001. As stated above, we have never been involved in an armed conflict with al Qaida for purposes of the application of the LOAC. Moreover, MCI 2 was drafted by the government, for the government, specifically to prosecute the Guantanamo Detainees. It does not reflect the law; it is merely a statement of what the government would like the law to be. MCI 2 is hardly persuasive authority for the government in this case.

The government’s assertion that the “focus of the inquiry in determining the existence of an armed conflict is the intent of the attacker . . .” is wrong. The Geneva Conventions set out specific definitions of armed conflict to make the intent of hostile parties is irrelevant. To determine whether the LOAC applies, one simply looks at what type or types of groups are involved, and, based on that, and nothing else, determines what type of armed conflict, if any, is ongoing. Once that is determined, either the whole of the LOAC is applicable, Common Art. 3 is applicable, or domestic law is applicable. It is that simple. To look at the intent of the groups would be counterproductive.

In the case of al Qaida’s attacks on the U.S., the analysis is simple. Al Qaida is not a state. It is not a rebel group with territory operating inside the U.S. Accordingly, there can not be, and never will be, an armed conflict that triggers the application of any part of the LOAC to military operations against al Qaida. It does not matter that al Qaida has declared war on us, or that the President has declared a “War on Terrorism” focused on al Qaida—for purposes of the LOAC, there is not armed conflict as a matter of law.

B (4). Paragraph 6 d. of the Government Response

The government response discusses only the charged offense of conspiracy. For a full discussion of why this charge fails to state an offense, see the Defense Motion to Dismiss Charge 1, and the Defense Reply to Prosecution Response to the Defense Motion to Dismiss Charge 1. These documents fully explain why Mr. Hicks cannot be convicted of conspiracy to commit any offense.

C: Conclusion

As detailed in the defense motion, the LOAC did not apply to U.S. military operations in Afghanistan until 7 October 2001, when the international armed conflict between the U.S. and the former Taliban regime in Afghanistan began. Events before that date the government has included in its charges against Mr. Hicks should not be considered by this commission. Accordingly, all allegations against Mr. Hicks, background or otherwise, pre-dating 7 October 2001 should be stricken from the charge sheet.

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

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Joshua Dratel
Civilian Defense Counsel

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

)
)
)
)
)
)
)
)
)
)

**DEFENSE MOTION TO
DISMISS FOR LACK OF
JURISDICTION: PRESIDENT'S
MILITARY ORDER OF 13
NOVEMBER 2001 IS INVALID
UNDER UNITED STATES AND
INTERNATIONAL LAW**

4 October 2004

The Defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss all charges for lack of jurisdiction, and states in support of this request:

1. **Synopsis:** Mr. Hicks has been brought before this military commission pursuant to the provisions of the President's Military Order (PMO) of 13 November 2001. Any jurisdiction this military commission has over Mr. Hicks derives solely from the PMO and no other source. However, the PMO is invalid under U.S. law because there exists neither statutory nor common law authority for the President to create this military commission. Neither was this military commission "established by law" as required by international law. Accordingly, this military commission does not have authority or jurisdiction to try Mr. Hicks for any offense.

2. **Facts:** None.

3. **Discussion:**

A: Power to Constitute Tribunals

In his *Military Order — Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* of 13 November 2001 (the PMO), President Bush purported to create this military commission. Constitutionally, power to create a military commission rests with the legislative branch of government; not with the executive branch. Article I of the United States Constitution vests in Congress the exclusive power to constitute "tribunals inferior to the Supreme Court" (i.e. a military commission) and to define and punish offenses "against the Law of Nations. Nevertheless, President Bush asserted that he had authority to create this commission based on the power "vested in him" by the United States Constitution as well as the following two acts of Congress:

- the Authorization for Use of Military Force Joint Resolution (AUMF);¹ and
- sections 821 and 836 of title 10, United States Code (Article 21 and Article 36).

However, none of these authorities specifically authorized the President to convene military commissions for the detainees at Guantanamo Bay. To do so, the President required a specific grant of authority from Congress.

¹ Public Law 107-40, 115 Stat. 224 (2001).

RE 28A
Page 1 of 5

1. The War Power in the US Constitution—The President’s powers under Article II are insufficient authority for the President to create a military commission. Article II (2) of the United States Constitution makes the President the Commander in Chief of the Army and Navy, and authorizes him to grant reprieves and pardons for offenses against the United States. Article II, however, does not discuss the creation of tribunals. The power to create military tribunals is vested in the Congress by Article I.

2. The Authorization for Use of Military Force Joint Resolution (AUMF)—The AUMF is concerned solely with the authorization of the use of the United States Armed Forces. Under section 2, entitled “Authorization for use of United States Armed Forces,” it states that the President is “authorized to use all necessary and appropriate force” against those responsible for the terrorists attacks that occurred on 11 September 2001, or those who harbored those responsible. It then refers to section 8(a)(1) of the War Powers Resolution, which regulates the President’s power to introduce United States Armed Forces into hostilities.

The AUMF certainly authorized military action against those involved in the 11 September 2001 attacks. The Supreme Court has also found that it authorized the detention of enemy combatants. In *Hamdi v. Rumsfeld*,² the Court held that the AUMF authorized the detention of enemy combatants captured in Afghanistan. The Court stated that:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.³

The object of the detention was “to prevent a combatant’s return to the battlefield.” “He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released.”⁴

However, the court did not go so far as to authorize the exercise of military criminal jurisdiction over them. The United States military gains such jurisdiction only when acting as an occupying power, or when Congress has granted such jurisdiction specifically by statute.⁵ Because the AUMF and the War Powers Resolution make no mention whatsoever of military commissions, Congress has not provided a specific authority for the President to create military commissions.

² ___ U.S. ___, ___, 124 S.Ct. 2633, 2640 (2004).

³ *Id.*

⁴ *Id.*

⁵ See Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L. J. 1259, 1284 (2002).

3. **Article 21 and Article 36**—Article 21 states that the provisions conferring jurisdiction upon courts-martial “do not deprive military commissions . . . of concurrent jurisdiction.”⁶ This statute is not an affirmative grant of jurisdiction. Rather it is a limitation on the exclusive jurisdiction of courts-martial to those instances when Congress has authorized the use of military commissions. It provides simply that the jurisdiction of courts-martial does not deprive military commissions, when properly convened, of jurisdiction they have over certain offenses defined by statute or by the law of war.

During WWII, military commissions were set up in Hawaii by President Roosevelt, under what was then Article 21. The Supreme Court, in *Duncan v. Kahanamoku*,⁷ struck down the commissions because Congress “did not specifically state” or “explicitly declare” that the military could close the civil courts. The Court construed the law in light of “our political traditions and our institution of jury trials in courts of law[,]” traditions that “can hardly suffice to persuade us that Congress was willing to enact a . . . decision permitting such a radical departure from our steadfast beliefs.”⁸ Accordingly, Article 21 is not an affirmative grant of jurisdiction by Congress for the use of military commissions.

Article 36 states only that the President may prescribe regulations setting out pretrial, trial, and post-trial procedures for military tribunals, including courts-martial and military commissions.⁹ Essentially, it amounts to a delegation of power by Congress, to the President, to set the rules for tribunals that have already been established by Congress. The section does not delegate the power to *create* a tribunal. The power to convene a tribunal, such as this military commission, arises only from a specific statute authorizing the establishment of that tribunal.

B: The Right to a Tribunal Established by Law

An essential institutional guarantee of a fair trial is that a criminal case not be adjudicated by a political or executive body, but by a “tribunal established by law.” This is provided for in Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁰ Similarly,

⁶ 10 U.S.C. section 821 (2004) reads in its entirety: “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.”

⁷ 327 U.S. 303, 324 (1946).

⁸ *Id.* at 315-17.

⁹ 10 U.S.C. section 836 (2004) reads in its entirety: “(a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform so far as practicable.” The requirement that the President’s procedural rules “may not be contrary to or inconsistent with this chapter” does little to confine the President’s discretion, because, with rare exception, the relevant chapter is silent with respect to procedures applicable to military commissions. The procedures that are specified can be fairly characterized as insignificant, especially in comparison to the procedures that are not specified.

¹⁰ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Ratified by the US on 8 June 1992.

Article 75(4) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*¹¹ provides that a conviction may only be pronounced by a “regularly constituted court.”¹²

“Established by law” denotes a constitution, or other legislation passed by the habitual law-making body, or the common law, delineating the competence of the court. The aim of this requirement is to ensure that tribunals are not established to consider the case of a particular individual or group of individuals.

The European Court of Human Rights has interpreted the phrase “established by law” contained in Article 6 of the *European Convention on Human Rights*.¹³ The Court recognized that the central purpose of this requirement is to ensure that judicial organization does not depend on the discretion of the executive, but that it is “regulated by law emanating from Parliament.”¹⁴ The law establishing the tribunal must be comprehensive in scope, setting forth the matters falling within the jurisdiction of the court and establishing the organizational framework for the judiciary.

Here, Congress has *not* created the military commission(s) at issue. Rather, the military commission was “created” by section 4(a) of the PMO. It states “[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission” Section 4(b) and (c) then delegate the power to the Secretary of Defense to issue such orders and regulations to appoint one or more military commissions, and provide rules for the conduct of proceedings.

In making this Military Order, the President relied on the Constitution, the AUMF, and sections 821 and 836 of title 10, United States Code. These provisions are insufficient to fulfill this requirement.¹⁵ None of them properly “establish” the commission. Instead, they at most confer limited jurisdiction on military tribunals not yet established by law.

C: Conclusion

Mr. Hicks has been brought before this military commission pursuant to the provisions of the PMO. The jurisdiction of this military commission over Mr. Hicks is derived solely from that

¹¹ Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

¹² The *American Declaration on the Rights and Duties of Man* states in article XXVI states “Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws...”: OAS Res XXX, adopted by the Ninth International Conference of American States (1948). Available at <<http://www.cidh.oas.org/Basicos/basic2.htm>>.

¹³ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁴ *Coeme and Others v. Belgium*, App. Nos. 00032492/96 et al., Eur.Ct.H.Rts., Judgment of 22 June 2000, [98], quoting *Zand v. Austria*, app. no. 7360/76, Eur. Comm’n H.Rts., Commission Report of 12 October 1978, DECISIONS AND REPORTS (DR) 15, pp. 70 and 80. Judgment available at <<http://www.worldlii.org/eu/cases/ECHR/2000/249.html>>.

¹⁵ Authorization for the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001); and ss 821 and 836 of title 10 of the US Code.

PMO. However, the PMO is invalid under United States and international law. Accordingly, this commission does not have jurisdiction to try Mr. Hicks for the offenses charged.

5. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The defense reserves the right to request witnesses after reviewing the Government response.

B: Attachments

1. Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals* (2002), page 1284.
2. *International Covenant on Civil and Political Rights*, Article 14(1).
3. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75(4).
4. *American Declaration on the Rights and Duties of Man*, Article XXVI.
5. *Coeme and Others v. Belgium*, European Court of Human Rights (2000), para. 98.

6. **Relief Requested:** The defense requests that all charges be dismissed from this commission.

7. The defense requests oral argument on this motion.

By: 
for M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel



The Yale Law Journal

Waging War, Deciding Guilt:
Trying the Military Tribunals

by
Neal K. Katyal and Laurence H. Tribe

111 YALE L.J. 1259

Reprint
Copyright © 2002 by
The Yale Law Journal Co., Inc.

Volume 111

April 2002

Number 6
Attachment 1 to RE 28A

Page 1 of 2

3. *The Differences Between the Roosevelt and Bush Orders*

Our general argument is that Congress must specifically authorize the use of military tribunals before their use is allowed, even for unlawful combatants charged with violations of the laws of war. In *Quirin*, this authorization was the result of several legislative decisions stitched together. *First*, Congress had declared war and had underscored the government's total commitment to the war effort:

[T]he state of war between the United States and the Government of Germany . . . is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States.⁹⁵

Nothing even close to that World War II authorization, or a wartime emergency in which Congress's consent cannot be obtained, is present today. Significantly, the Resolution passed by Congress several days after the September 11 terrorist attacks permits only the use of "force"; applies only to persons or other entities involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] . . . future acts of international terrorism against the United States by such nations,

In another World War II case, the Court faced the issue of the executive's authority to order military tribunals in the Philippines to try violators of the law of war. In *In re Yamashita*, 327 U.S. 1 (1946), General Yamashita of the Imperial Japanese Army was tried and convicted by a military commission ordered under the President's authority. The Court pointed to three executive announcements about the need for such military tribunals and three treaties that were ratified and codified in the United States Code that made what Yamashita did a crime. *Id.* at 10-11, 15-16. *Yamashita* read *Quirin* to permit military tribunals to try offenses against the law of war, but it explicitly tethered its view to a declaration of war. The *Yamashita* Court held that the trial and punishment of enemies who violate the law of war is "an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed." *Id.* at 11-12 (emphasis added); see also *id.* at 12 ("The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power . . . to remedy, at least in ways Congress has recognized, the evils which the military operations have produced." (emphasis added)). The Court went on to note that its constitutional holding was limited to that circumstance only, and that "it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied." *Id.* at 23.

95. Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796, 796 (emphasis added). In *Quirin*, total war was involved, for the Nazi saboteurs "were invaders, their penetration of the boundary of the country, projected from the units of a hostile fleet, was in the circumstances of total war a military operation, and their capture, followed by their surrender to the military arm of the government, was a continuance of the same operation." CORWIN, *supra* note 54, at 120.

Attachment 1 to RE ~~28A~~ 28A

Page 2 of 2



**Office of the High
Commissioner for Human Rights**



International Covenant on Civil and Political Rights

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 2200A (XXI) of 16 December 1966**

entry into force 23 March 1976, in accordance with Article 49

Attachment 2 RE 28A
Page 1 of 2

Article 14 ▶▶ General comment on its implementation

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Attachment 2 to RE 28APage 2 of 2



fulltext



Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Attachment 3 to DT 28A

Page 1 of 2

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) anyone charged with an offence shall have the right to be tried in his presence;
- (f) no one shall be compelled to testify against himself or to confess guilt;
- (g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 3 to RE

28A

2 of 2



Inter-American Commission on Human Rights

Organization of American States

english

español

français

português

HOME

PUBLICATIONS

SEARCH

LINKS

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

(Approved by the Ninth International Conference of American States,
Bogotá, Colombia, 1948)

Attachment 4 to RE 28A
Page 1 of 2

Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Right to due process of law.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Attachment 4 to RE 28A
Page 2 of 2

**COEME AND OTHERS v. BELGIUM (32492/96) [2000] ECHR
249 (22 June 2000)**

SECOND SECTION

CASE OF COËME AND OTHERS v. BELGIUM

(Applications nos. 32492/96, 32547/96, 32548/96,
33209/96 and 33210/96)

JUDGMENT

STRASBOURG

22 June 2000

Attachment 5 to RE 28A
Page 1 of 2

1. *The case of Mr Coëme*

96. Like the other applicants, Mr Coëme submitted that the rules governing the procedure to be followed by the Court of Cassation were established neither by statute nor by the Constitution. He argued on that basis that the Court of Cassation had acted as both legislator and judge at the same time, in breach of Article 6 § 1 of the Convention. Any judicial authority had to be subject to procedures intended to guarantee the integrity of its decisions to the persons within its jurisdiction and to safeguard the right to due process, a principle which the House of Representatives had fully understood in 1865. The fact that there was no statute governing procedure had in the present case led the Court of Cassation to establish an *ad hoc* procedure, making up for Parliament's failure to legislate. By laying down the applicable procedural rules itself, even by analogy, the Court of Cassation had manifestly disregarded the principle of the separation of powers as regards enactment and application of the criminal law. Even though, by a process of elimination, the procedure followed by the Court of Cassation could not be anything other than the procedure laid down for the criminal courts, this was not sufficient to satisfy the requirement of an accessible and foreseeable procedure.

According to Mr Coëme, this also constituted a breach of Article 6 § 2 of the Convention, in so far as that provision laid down the principle "*nullum iudicium sine lege*".

97. The Government submitted that it could not be inferred that the procedure before the Court of Cassation was not laid down by domestic law merely because the procedure to be followed for the trial of ministers was laid down neither by the Constitution nor by any implementing legislation. The procedure to be followed was the procedure which existed for the ordinary criminal courts, and this was perfectly foreseeable in the light of the teachings of case-law and legal theory, and also on account of the fact that the other three types of procedure – those laid down for the assize courts, juvenile courts and military courts – were obviously not applicable. The Court of Cassation had therefore not acted as an *ad hoc* legislature, nor had it gone beyond the bounds of a reasonable interpretation of existing law by applying the procedure of the ordinary criminal courts, while introducing a number of modifications made necessary by the constitutional requirement that it had to sit as a full court.

98. The Court observes in the first place that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive" (see the *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33). According to the case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament" (see *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80). Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.

99. A tribunal "is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner" (see the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, p. 29, § 64). It must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards. There is no doubt that the Court of Cassation, which in Belgian law was the only court which had jurisdiction to try Mr Coëme, was a "tribunal established by law" (see, *mutatis mutandis*, *Prosa and Others v. Denmark*, application no. 20005/92, Commission decision of 27 June 1996, unreported).

Attachment 5 to RE 28A

Page 2 of 2

UNITED STATES OF AMERICA)	
	)	PROSECUTION RESPONSE TO
	)	DEFENSE MOTION TO DISMISS
v.)	
	)	(LACK OF JURISDICTION:
	)	PRESIDENT’S MILITARY ORDER IS
DAVID M. HICKS	)	INVALID UNDER U.S. AND INT’L
	)	LAW)
	)	18 October 2004
)	
)	

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

2. Position on Motion. The Defense motion to dismiss should be denied. The President’s Military Order to establish military commissions is based firmly on Constitutional, legislative and judicial authorities.

3. Facts.

a. On 18 September, 2001, Congress enacted the *Authorization for the Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224), which authorizes the President to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

b. The President’s Military Order (PMO) of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals “for any and all offenses triable by military commission.”

c. The Secretary of Defense promulgated implementing orders to establish procedures for the appointment of military commissions, setting forth various rules governing the appointment, jurisdiction, trial and review of military commission proceedings. Military Commission Order No. 1.

d. The Accused was designated by the President for trial by military commission and a commission was appointed in accordance with commission orders and instructions.

4. Legal Authority.

a. U.S. Constitution, Art. I, §8 and Art II, §2

- b. 10 U.S.C. §§ 821, 836, 850, 904 and 906
- c. *Authorization for Use of Military Force Joint Resolution*, Public Law 107-40, 115 Stat. 224.
- d. President's Military Order, *Detention, Treatment, and trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001.
- e. *Ex parte Quirin*, 422 U.S. 806 (1975).
- f. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- g. *Ex parte Quirin*, 317 U.S. at 32 n.10, 42
- h. *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).
- i. *Mudd v. Caldera*, 134 F.Supp. 2d 138 (D.D.C. 2001).
- j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
- k. *Hirota v. MacArthur*, 338 U.S. 197 (1948).
- l. *In re Yamashita*, 327 U.S. 1 (1946).
- m. *Loving v. United States*, 517 U.S. 748 (1996).
- n. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).
- m. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956)

5. Discussion

Military commissions have been used throughout U.S. history to prosecute violators of the laws of war.¹ "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts." *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Military commissions have tried offenders charged with war crimes as early as the Revolutionary War, the Mexican-American War, the Civil War, and as recently as WWII. *See Ex parte Quirin*, 317 U.S. at 32 n.10, 42 n.14. President Lincoln's assassins and their accomplices were imprisoned and executed pursuant to convictions rendered by military commissions. Their offenses were characterized not as criminal matters, but rather as acts of rebellion against the government itself. *See Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868). Such use of military commissions has been repeatedly endorsed by federal courts, including as recently as 2001. *See Mudd v. Caldera*, 134 F.Supp. 2d 138 (D.D.C. 2001); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The use of military commissions is firmly rooted in American military law and tradition.

On November 13, 2001, the President of the United States issued a "Military Order" concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(*hereinafter* PMO). This Order authorized the Secretary of Defense to appoint military commissions and to promulgate orders and regulations necessary to implement that purpose. This Military Commission has been appointed to try the Accused in this case pursuant to these orders. The

¹ A military commission is a form of military tribunal recognized in American law and typically used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared and the civil courts are closed. *See generally* William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920). As the Supreme Court has observed: "In general...[Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war." *Madsen v. Kinsella*, at 346 n. 9 (quoting Winthrop, *supra* at 831).

Defense now challenges the President's legal authority to establish this Military Commission and asks the Commission to rule that the PMO is an unlawful order.

a. Summary of the Prosecution Response.

The legal basis for the PMO is not a matter of speculation, but is forthrightly asserted in the first paragraph of the Order itself: "*By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows....*"

The President has inherent constitutional power as the Commander in Chief to establish military commissions. This constitutional power is at its apogee when the President is acting in his role as Commander in Chief of the Armed Forces pursuant to a congressional authorization for the use of force. The PMO is based on clear legislative authority for the use of military commissions in both the *Authorization for the Use of Military Force Joint Resolution (AUMF)* and the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §821 and 836 (Articles 21 and 36). Finally, the Supreme Court has clearly and definitively held that the President has authority to establish military commissions under the UCMJ and antecedent provisions in the Articles of War. The President's Military Order of November 13, 2001, is based upon these authorities and is a lawful exercise of presidential powers. The ICCPR and Additional Protocol I do not apply to these Military Commission proceedings and cannot deprive the President of his authority under U.S. law.

b. Summary of the Defense Argument.

The Defense argues that the PMO is unlawful on the grounds that Congress alone has the constitutional authority to establish military commissions under the circumstances in this case and has not done so. Specifically, the Defense argues that existing statutory references to military commissions under UCMJ, Articles 21 & 36, establish only the possibility for military commissions by preserving their jurisdiction. According to the Defense, actual establishment of military commissions requires enactment of special legislation for each tribunal, and the AUMF does not contain such an authorization. Thus, according to the Defense, the President has no constitutional or statutory authority to order the Secretary of Defense to convene this Commission. The PMO is therefore an unlawful exercise of executive power and violates the Separation of Powers doctrine. Finally, the Defense argues that international law requires that war crimes tribunals be grounded and established by legislative enactments, rather than executive order.

The Defense argument is built on a faulty interpretation of Article 21 and on an unduly narrow view of the President's powers as Commander in Chief under Article II, §2 of the Constitution. The Defense motion challenges the settled authority of the President to perform a function that has been recognized by law and custom throughout the history of constitutional government in the United States. In so doing, the Defense asks the Commission to deny the President's constitutional powers, Congress's clear intent in the Uniform Code of Military Justice, and the Supreme Court's settled judgment that the President has firm authority to

establish military commissions for the trial of war criminals, including unlawful belligerents. The Defense challenge must be denied as a matter of law.

c. The President has Inherent Constitutional Power to Establish This Military Commission.

The legal foundation of the PMO consists of the interlocking elements of the President's constitutional power and the statutory recognition and approval of that power by Congress in the AUMF and the UCMJ. The President's constitutional powers are at their apogee when the nation's armed forces have been activated by Congress for the necessary defense of the nation. Thus, the starting point for analysis must be the President's constitutional authority as Commander in Chief.

The Commander-in-Chief Clause, U.S. Const. art. II, §2, cl. 1, vests the President with full powers necessary to prosecute successfully a military campaign. It is a fundamental principle that the Constitution provides the federal government all powers necessary for the execution of the duties that the Constitution describes.² As the Supreme Court explained in *Johnson v. Eisentrager*, “[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.” 339 U.S. 763, 788 (1950).

One of the necessary incidents of authority over the conduct of military operations in war is the power to punish enemy belligerents for violations of the laws of war. The laws of war exist in part to ensure that the brutality inherent in war is confined within some limits. It is essential for the conduct of a war, therefore, that the United States have the ability to enforce the laws of war by punishing transgressions by the enemy. As a plurality of the Supreme Court recently upheld in *Hamdi v. Rumsfeld*: “The capture and detention of lawful combatants, and the capture, detention and trial of unlawful combatants, by ‘universal agreement and practice’ are ‘important incidents of war.’ *Ex Parte Quirin*, 317 U.S. at 28.” ___ U.S. ___, 124 S.Ct. 2633, 2640 (2004).

It was well recognized at the time of the Founding that one of the powers inherent in military command was the authority to institute tribunals for punishing violations of the laws of war by the enemy. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a “Board of General Officers” to try the British Major Andre as a spy. *See Quirin*, at 31, n. 9. At the time, there was no provision in the American Articles of War providing jurisdiction in a court-martial to try an enemy soldier for the offense of spying. In vesting the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The history of military commissions in the United States supports this conclusion, because as a matter of practice military commissions have been created under the President's

² Cf. *Request of the Senate for an Opinion as to the Powers of the President “In Emergency or State of War,”* 39 Op. Att’y Gen. 343, 347-48 (1939) (“It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance.”)

inherent authority as Commander in Chief without any authorization from Congress. In April 1818, for example, General Andrew Jackson convened military tribunals to try two English subjects, Arbuthnot and Armbrister, for inciting the Creek Indians to war with the United States. *See* Winthrop, *supra*, at 464, 832. As one author explained, General Jackson “did not find his authority to convene [these tribunals] in the statutory law, but in the laws of war.” William E. Birkhimer, *Military Government and Martial Law* 353 (3d ed. 1914).³ Similarly, in the Mexican American War in 1847, General Winfield Scott appointed tribunals called “councils of war” to try offenses under the laws of war and tribunals called “military commissions” to serve essentially as occupation courts. *See* Winthrop, *supra* at 832-33. There was no statutory authority for these tribunals; rather, they were instituted by military command, derived from the President’s ultimate authority, and without express sanction from Congress.⁴

In later practice, these various functions were all performed by tribunals known as “military commissions,” while courts-martial were the accepted statutory means by which U.S. military personnel were punished for crimes and breaches of discipline. In 1862, after the outbreak of the Civil War, general orders for the governance of the Army authorized commanders to convene military commissions to try enemy soldiers for offenses against the laws of war. *See* Winthrop at 833. It was not until 1863 that military commissions were even mentioned in a federal statute, which authorized the use of military commissions to try members of the military for certain offenses committed during times of war. *See* Act of March 3, 1863, §30, 12 Stat. 731, 736. That statute, moreover, did not purport to create military commissions; rather, it acknowledged that they could be used as alternatives to courts-martial in certain cases.

In 1865, Attorney General Speed addressed the use of military commissions to try those accused in the plot to assassinate President Lincoln. Speed found that even if Congress had not provided for the creation of military commissions, they could be used by military commanders as an inherent incident of their authority to wage a military campaign: “[M]ilitary tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war.” *Military Commissions*, 11 Op. Att’y Gen. at 305.

Following WWII, the United States and the Allied powers used military commissions extensively to try Nazi and Japanese officials for violations of the law of war and crimes against humanity. In reviewing the legal status of enemy prisoners before these commissions, the Supreme Court endorsed the view that use of military commissions is a necessary part of the tools of a commander conducting a military campaign. As the Court explained in *In re Yamashita*, “[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to

³ Birkhimer further observed that the President’s authority to convene military commissions was derived directly from the constitution itself: “Military commissions may be appointed either under provisions of law in certain instances, or under that clause of the Constitution vesting the power of commander-in-chief in the President, who may exercise it directly or through subordinate commanders.” At 357.

⁴ *See* George B. Davis, *A Treatise on the Military Law of the United States* 308 (1913) (explaining that military commissions “are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law..., which in war would go unpunished in the absence of a provisional forum for the trial of offenders.”)

disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.” 327 U.S. at 11.

Justice Douglas advanced the same reasoning in support of the President’s authority to establish *international* war crimes tribunals after WWII without any authorization from Congress. “The Constitution makes the President the “Commander in Chief of the Army and Navy of the United States...” Art. II, §2, Cl. 1. His power as such is vastly greater than that of a troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war.” *Hirota v. MacArthur*, 338 U.S. 197, 207-08 (1948) (Douglas, concurring). As the Supreme Court recognized, the President’s power extended to the creation of novel, multinational tribunals to try the enemy for war crimes. Given that broad authority, *a fortiori*, the President’s power must extend to the appointment of military commissions consisting solely of his own commissioned officers.

During and after WWII the Supreme Court has consistently and repeatedly upheld the use of military commissions by the President and his subordinate officers. Because the Articles of War authorized the use of military commissions, the Court was not required to decide whether the President may convene military commissions wholly without congressional authorization. In *Quirin*, the Court expressly declined to decide “to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.” 317 U.S. at 29. However, the Court has strongly suggested that the President does possess constitutional power to establish commissions, though it may be subject to statutory limitation by Congress. Thus in *Madsen*, the Court stated, “In the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.” 343 U.S. at 348.

d. Congress Has Authorized the President to Establish This Military Commission in The Uniform Code of Military Justice.

While the Supreme Court has never decided whether the President needs congressional authorization to establish military commissions, it has clearly held that in Article 15 of the Articles of War Congress gave authority for the use of military commissions during and after WWII. *See Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When Congress enacted the UCMJ in 1951, it incorporated the general authorization for military commissions from the Articles of War into 10 U.S.C. §821, using identical language and explicitly relying on the Supreme Court’s decision in *Quirin*. *See* H.R. REP. NO. 81-491 at 17 (1951); S. REP. 81-486 at 13 (1951).⁵ Thus it is beyond dispute that military commissions continue to fill a vital purpose in military justice in the modern era. The Defense suggestion that the enactment of the UCMJ undermines the holding of *Quirin* and other Supreme Court precedents in favor of military commissions is clearly untenable.

⁵ The House and Senate reports on H.R. 4080, which became the UCMJ, contain the same comment on Article 21: “This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts-martial. The language of AW 15 [Articles of War, Art. 15] has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U.S. 1 (1942)).”

The power to bring unlawful enemy combatants to justice, is shared by both Congress and the President under the Constitution. Under Article I, §8, Congress has authority to “declare War,” “raise and support Armies,” and “make Rules for the Government and Regulation of the Land and naval Forces.” U.S. Const. art. I, §8, cl. 11, 12, 14. In addition, Congress has authority to “define and punish...Offenses against the Law of Nations.” *Id.* art. I, §8, cl. 10. The authorization in 10 U.S.C. §821 to use military commissions to enforce the laws of war is certainly a permissible exercise of these legislative powers. The Court in *Yamashita* affirmed this understanding by explaining that congressional authorization of military commissions was an “exercise of the power conferred upon it by Article I, §8, cl. 10 of the Constitution to ‘define and punish...Offenses against the Law of Nations...’ of which the law of war is a part.” 327 U.S. at 7.

A proper understanding of 10 U.S.C. §821 begins with its text. Section 821 is entitled “Jurisdiction of courts-martial not exclusive,” and states: “The provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. §821 (emphasis added). This provision is necessary because 10 U.S.C. §818 defines the jurisdiction of general courts-martial to include “jurisdiction to try any person who by the law of war is subject to trial by military tribunal.” By its terms, §821 assumes the existence of military commissions and declares that the broad jurisdiction of general courts-martial does not curtail the use of military commissions to the full extent permitted by past executive practice. By affirmatively preserving the jurisdiction of military commissions, §821 necessarily expresses congressional approval and sanction for their use. Indeed the Supreme Court concluded that identical language found in the Articles of War “*authorized* trial of offenses against the laws of war before such commissions.” *Quirin*, 317 U.S. at 29 (emphasis added).⁶

The legislative history of §821 confirms legislative intent to approve the traditional uses of military commissions under past practice. When the language now codified in §821 was first included in the Articles of War in 1916, it was intended for the purpose of preserving the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War⁷ at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The Judge Advocate General of the Army testified before the Senate as the proponent of the new article. He explained that the purpose of Article 15 was not to create military commissions, but was intended to recognize them and preserve their authority: “It just saves to these war courts the jurisdiction they now have...” S.Rep. No. 64-130, at 40 (1916).

Given the text and history of §821, the provision must be read as preserving the broad sweep of the traditional jurisdiction exercised by military commissions throughout American military history. The statute, in other words, endorses and incorporates executive branch

⁶ See also *Quirin* at 28: “By the Articles of War, and especially Article 15, See also *Quirin* at 28: “By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals have jurisdiction to try offenders against the law of war...”

⁷ The new Article 15 stated, like the current §821, that the “provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.” Act of August 29, 1916, 39 Stat. 619, 653.

practice. The Supreme Court has adopted precisely this understanding: “By...recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction...to any use of the military commission contemplated by the law of war.” *In re Yamashita*, 327 U.S. 1, 20 (1946). In sanctioning the historic use of military commissions by the executive branch, Congress did not “attempt to codify the law of war or to mark its precise boundaries.” *Yamashita*, 327 U.S. at 7. Instead, it simply adopted by reference “the system of military common law.” *Id.* at 8. Similarly, in *Madsen v. Kinsella*, the Supreme Court determined that the effect of Article 15 was to preserve for military commissions “the existing jurisdiction which they had over such offenders and offenses” under the laws of war. 343 U.S. at 352. The Court summed up the constitutional origins of military commissions: “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.” *Id.* at 346-47.

Indeed, if §821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President’s express constitutional powers as Commander in Chief. The *Quirin* Court expressly declined “to inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents” by military commissions. 317 U.S. at 47. Under Separation of Powers principles, a clear statement of congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 446 (1989).

Other references to military commissions in the UCMJ only serve to buttress the conclusion that Congress contemplated the continued active use of these tribunals as the exigencies of national defense required. Article 36 authorizes the President to promulgate rules of procedure and evidence for “courts-martial, commissions and other military tribunals.” 10 U.S.C. §836. Section 836 supplements §821 by recognizing that the President shall determine the rules of procedure that will govern military commissions. Section 850 authorizes the use of records from courts of inquiry in certain cases before courts-martial and military commissions. Finally, 10 U.S.C. §§904 and 906 specify two particular war-related offenses triable by courts-martial, that are also commonly tried by military commission. Read in conjunction with §821, these two particular references in the punitive articles cannot reasonably be read to restrict the subject matter jurisdiction of military commissions; rather they are given as cases in which Congress fully expected the use of military commissions for the trial of “any person” including U.S. service members.

Any question about the continued vitality of §821 is dispelled by Congress’s use of identical language in the “Military Extraterritorial Jurisdiction Act.” 18 U.S.C. §3261 (2004). This law was enacted in 2000 for the purpose of extending federal court jurisdiction over “persons employed by or accompanying the Armed Forces outside the United States.” In so expanding the jurisdiction of Article III courts, Congress recognized the continuing role of

military commissions and was careful to preserve their traditional jurisdiction and historic place in American law using the same operative language found in 10 U.S.C. §821.⁸

The Defense insistence that military commissions must be authorized by Congress and not the President acting alone is fully answered by 10 U.S.C. §821. Congress has authorized the President to establish commissions when required in the exercise of his powers as Commander in Chief. In 1942, President Roosevelt invoked this same statutory authority to establish a military commission to try eight Nazi saboteurs captured in the United States and charged with conspiracy, spying, and other violations of the law of war. The defendants sought habeas corpus relief in the federal courts arguing *inter alia* that the President's order establishing the commission was unlawful and that commissions could not exercise jurisdiction over the defendants while the federal courts were open and functioning.

Rejecting these challenges, the Supreme Court in *Ex parte Quirin* held that the President had legislative authority to establish and use military commissions to try unlawful enemy combatants. After reviewing the meaning and scope of Article of War 15, the Court concluded: "By his Order creating the present Commission, [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." 317 U.S. 1, 28 (1942).

The Defense reliance on *Duncan v. Kahanamoku*, 327 U.S. 303 (1946), is also patently misplaced. In *Duncan*, the Court held that the trial of civilians in Provost Courts in Hawaii during a period of martial law was not authorized by the Hawaiian Organic Act, and therefore such Courts lacked jurisdiction. The Court specifically found that Congress intended to extend the full panoply of constitutional rights to citizens of the territory of Hawaii. Under the holding of *Ex parte Milligan*, 4 Wall. 2 (1865), American citizens could not be tried by military commissions without express authorization from Congress when the civil courts are open and functioning. The Court found no such authorization in *Duncan* and the civil courts of Hawaii were open. By contrast, the Accused in this case is not a citizen of the United States and cannot claim refuge in the *Milligan* rule. Recently, the Court noted in *Hamdi v. Rumsfeld*, that if *Milligan* had been "captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." 124 S.Ct. 2633, 2642. In *Quirin*, the Supreme Court made it clear that the congressional authorization for the use of military commissions permitted the trial of unlawful enemy combatants for violations of the law of war, even within the territorial jurisdiction of the United States when the civil courts were open and had concurrent jurisdiction over the offenses.

The Defense does not deny that the UCMJ contains legislative authorization for the use of military commissions; rather, they argue that 10 U.S.C. §821 limits the subject matter jurisdiction of military commissions to violations of the law of war. As the statutory text makes abundantly clear, the jurisdiction of military commissions under the UCMJ is as broad as the law

⁸ "Nothing 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 the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. §3261.

of war—and broader. In addition to subject matter jurisdiction over law of war offenses §821 states that military commissions have jurisdiction over offenders or offenses *that by statute or by the law of war* may be tried by military commission...” The PMO defines the jurisdictional reach of military commissions under that Order as extending to “any and all offenses triable by military commission.” The apparent circularity of this language is explained by the fact that the President was authorizing the use of commissions to the full extent permitted by customary practice and 10 U.S.C. §821.

Defense’s attempts to undermine the plain meaning of 10 U.S.C. §821 and the holding of *Quirin* are unpersuasive. Both remain vital and active sources of authority today and provide a clear basis for the PMO at issue in this case. In *Quirin*, the Supreme Court cautioned that courts must approach any challenge to the military orders of the President in time of war with great care: “[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution and laws of Congress constitutionally enacted.” 317 U.S. 1, 25 (1942).

e. The AUMF Authorizes the President to Establish Military Commissions.

The Defense contends that the legislative authorization for the use of military commissions found in 10 U.S.C. §821 does not, standing alone, authorize the President to establish military commissions. This has been soundly refuted by the foregoing analysis. Even assuming that the Defense view is correct, the AUMF constitutes authority to establish military commissions in its own right.

The President in this case has not relied solely on his own constitutional authority in establishing military commissions. Rather, he has invoked the general congressional authorization in §821 and also the specific authority to of the AUMF to use “all necessary and appropriate force” to defend the nation and prosecute the war on terrorists and those “nations, organizations and individuals” who have aided and abetted them. The Supreme Court has construed this authorization to empower the President to exercise all of the powers incident to the prosecution of war by the Commander in Chief:

There can be no doubt that the individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the “necessary and appropriate force” Congress has authorized the president to use.

Hamdi v. Rumsfeld, ___ U.S. ___, 124 S.Ct. 2633, 2640 (2004). The Court went on to say that AUMF gave the President authority to fight the war, and the “capture and detention of lawful combatants, and the capture, detention and trial of unlawful combatants, by ‘universal agreement and practice’ are ‘important incidents of war.’” *Hamdi*, at 2640 (quoting *Quirin*).

Since both the President and Supreme Court have found that a state of armed conflict exists, it is entirely lawful for the President to establish military commissions for the trial of those enemy combatants who violate the laws of war. Although there is not a formal declaration of war, one is not required, and the AUMF acts as Congressional approval for the President to prosecute a war against al Qaida and those who harbor and assist them. In authorizing the President to prosecute an armed conflict against al Qaeda, Congress has also granted him all powers necessary to carry out his constitutional duties, including the power to detain and try enemy combatants for violations of the laws of war.

f. The President's Order to Establish Military Commissions Does Not Violate Separation of Powers Doctrine.

The Defense implies that the President's Military Order violates the Separation of Powers doctrine by encroaching on legislative and judicial functions reserved to the other coordinate branches of government under the Constitution. This contention lacks merit because no separation of powers principle is violated where the President is exercising the very powers granted to him in Article II of the Constitution as discussed above.

In *Loving v. United States*, 517 U.S. 748 (1996), the Supreme Court considered a Separation of Powers challenge to the President's Article 36 powers. The petitioner in that case argued that the President's promulgation of aggravating factors for the death penalty in R.C.M. 1004 was an unconstitutional exercise of legislative powers. According to the petitioner, Article 36 was an improper delegation of legislative power to the executive branch, lacking in any intelligible principle to guide the president's rule-making function. In rejecting this contention and affirming the petitioner's death sentence, the Court noted that the delegation under Article 36 was different in kind than delegations to ordinary administrative agencies of the executive branch. The Court explained: "[T]he delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area." *Id.* at 772.

In *Loving*, the Court emphatically endorsed the President's independent constitutional powers in the area of military law. "The President's duties as Commander in Chief...require him to take responsible and continuing action to superintend the military, including courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by the express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Id.* The Court declined to consider "whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases," but readily held that "Once delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance." *Id.* at 773.

Congress's longstanding decision both to recognize and to approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require giving the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress's decision to legislate detailed rules for the

military's use of courts-martial in the UCMJ. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") In these circumstances, the President's action is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). The Accused could not possibly meet his burden in attacking the lawfulness of the military commissions because, as explained above, the Supreme Court has already squarely rejected the arguments he advances here.

g. The Provisions of the International Covenant on Civil and Political Rights and Additional Protocol I to the Geneva Conventions Do Not Apply to the Military Commission.

Finally, the Defense argues that international law requires that war crimes tribunals be grounded and established by legislative enactments, rather than executive order. Defense arguments based on international law are equally unavailing here. Pursuant to the law of war, the United States has the fundamental right to capture and detain lawful combatants and to capture, detain, and try unlawful combatants for law of war offenses. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004), citing *Ex parte Quirin*, 317 U.S. 317, 1, 28 (1942).

Defense erroneously applies an inapplicable body of law, specifically, the International Covenant on Civil and Political Rights (ICCPR) and Additional Protocol I to the Geneva Conventions (Additional Protocol I) to assert, incorrectly, that the accused is entitled to relief. The ICCPR and Additional Protocol I do not apply to these Military Commission proceedings for the reasons set forth in the "Prosecution Response to Defense Motion Alleging Improper Pretrial Detention Under International Law" (dated 15 Oct 2004) and will not be repeated here. The Commission should note, however, that even if these treaties were applicable to this case, the Military Commission here is clearly a "tribunal established by law" based upon the constitutional and statutory authority that undergirds the PMO.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "privilege of litigation" in U. S. courts. The courts of the United States have traditionally been open to nonresident aliens. And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their non-habeas statutory claims.²

This statement by the Supreme Court makes it clear that Mr. Hicks may claim the protection of the Equal Protection Clause of the Fifth Amendment, as well as other statutory claims such as a claim under the anti-discrimination laws set forth in 42 U.S.C. §1981 despite being a non-resident alien held by the U.S. at Guantanamo Bay.

In this case, Mr. Hicks' claim is that the President's Military Order unlawfully discriminates between similarly situated U.S. citizens and non-citizens in criminal prosecutions by providing U.S. citizens with trials in federal court, where they enjoy significant procedural and substantive protections, while non-citizens are subject to trial before military commissions in which they are denied many of these protections.

This type of unlawful discrimination invalidates the President's Military Order establishing this commission. Accordingly, the commission is without jurisdiction to try Mr. Hicks' case, and the charges should be dismissed.

The ICCPR is applicable in this case

The defense has filed with the commission the Defense Reply to Government Response to Motion for Appropriate Relief: Imposition of Improper Pretrial Detention, which sets forth why the ICCPR and other customary international law apply in this case. The defense respectfully incorporates by reference that section of that Reply in this Reply.

Conclusion

The President's Military Order unlawfully discriminates against Mr. Hicks on the basis of (his lack of U.S.) citizenship. Such discrimination violates the Equal Protection Clause of the Fifth Amendment, other U.S. anti-discrimination statutes, and the anti-discrimination provisions of the ICCPR, and customary international law. Accordingly, the President's Military Order establishing the commission is invalid. Thus, the commission has no jurisdiction to try Mr. Hicks, and should dismiss all charges against him.

4. Evidence: The testimony of expert witnesses.
5. Relief Requested: The defense requests that all charges be dismissed.

² *Rasul v. Bush*, ___ U.S. at ___, 124 S.Ct. at 2698 (citations omitted).

6. The defense requests oral argument on this motion.

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

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Joshua Dratel
Civilian Defense Counsel

Review Exhibit 28c

Page 3 Of 3

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

DEFENSE MOTION TO
DISMISS – LACK OF
JURISDICTION-President’s
Military Order Establishing the
Commission Violates Equal
Protection Clause of the United
States’ Constitution

04 October 2004

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges on the ground that the military commission lacks jurisdiction because its distinction between citizens and non-citizens denies Mr. Hicks Equal Protection of the laws, and states in support of this motion:

1. **Synopsis:** Under the President’s Military Order of 13 November 2001, an Australian citizen such as Mr. Hicks is subject to trial before a military commission. In contrast, United States citizens are by the terms of the PMO *not* eligible for trial before the military commission, and instead must be prosecuted – for the same or similar alleged conduct – in the federal courts, in which the government acknowledges they would be guaranteed extensive judicial and constitutional protections.¹ Further still, citizens of other nations, such as Great Britain, Pakistan, Saudi Arabia, and France (among others), have been, and continue to be, released and repatriated without trial and/or punishment. Such discrimination on the sole basis of citizenship violates the equal protection guarantees of the United States Constitution, and the law of war and human rights law under which the United States is legally bound. Therefore, the President’s Military Order of 13 November 2001, establishing this military commission is invalid because it expressly discriminates against non-citizens, and between non-citizens of different countries.

2. **Facts:** United States citizens, such as John Walker Lindh and Yasser Esam Hamdi, have been captured in Afghanistan with Taliban troops and charged with joining and supporting international terrorist organizations hostile to the United States, and with taking up arms against their own country in a conspiracy to kill U.S. nationals and attack U.S. interests and property.

U.S. citizens such as Mr. Lindh have been afforded the full protections of the Constitution and the judicial guarantees of a trial in federal court. Mr. Hamdi, solely by virtue of his U.S. citizenship, was plucked from Guantanamo Bay and spared trial by this

¹ This is not a concession that such protections do not apply to Mr. Hicks in these military commission proceedings, or a waiver of his assertion of such rights. Indeed, it is Mr. Hicks’s position that such rights do apply to these proceedings if the commission is be a valid form of adjudication. See *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2650 (2004); *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004).

RE 29A
Page 1 of 8

military commission system. More recently, after the Supreme Court vindicated Mr. Hamdi's right to Due Process, and to counsel, the government has agreed to repatriate Mr. Hamdi to Saudi Arabia without seeking any judicial or other finding as to his conduct or culpability.

In addition to unwarranted and unreasoned distinctions between U.S. citizens and aliens, the government has discriminated among aliens of different nationalities. For example, the United States Government has during the course of the past 30 months released and repatriated – without trial, punishment, or any sanction or factual finding – many Guantanamo detainees to their own countries, including Great Britain, Pakistan, Saudi Arabia, France, Afghanistan, Sweden, and Denmark.

3. Discussion:

A: Introduction

The President's Military Order (the PMO or the Order) of 13 November 2001, establishing this military commission is invalid because the Order expressly discriminates against non-citizens. Under the Order, a non-citizen such as Mr. Hicks, alleged to be an unlawful combatant during the conflict in Afghanistan, is subject to trial before a military commission, a tribunal affording him few, if any, of the protections provided by our Constitution and civilian or military justice systems, as well as by international law. At the same time, U.S. citizens who were allegedly unlawful combatants in Afghanistan are capable of prosecution only in a federal court in which they are afforded the full panoply of Constitutional protections.

Such disparate treatment – based exclusively on citizenship – of persons alleged to have committed the same misconduct violates the equal protection guarantees of both the Fifth Amendment and 42 U.S.C. §1981. In addition, discrimination on the basis of citizenship violates articles common to the four 1949 Geneva Conventions.² The International Committee of the Red Cross Commentary on the Geneva Conventions explains that these articles common to the four Geneva Conventions have the effect that “court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up

² *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), art 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), art 129; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146. All four conventions were ratified by the United States on 2 August 1955. Available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>>. The article states “... In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.”

RE 29A
Page 2 of 8

special tribunals to try war criminals of enemy nationality,”³ Furthermore, discrimination on the basis of citizenship also violates the United States Government’s legal obligations under international human rights law. The *International Covenant on Civil and Political Rights* (ICCPR) sets out in article 14(1) that all persons “shall be equal before the courts and tribunals.”⁴

Thus, the PMO is unconstitutional and invalid. Accordingly, this military commission lacks jurisdiction to try Mr. Hicks on any charge, and the charges against Mr. Hicks must be dismissed.

B. The Order Violates the Fifth Amendment’s Equal Protection Guarantee

The PMO applies only to individuals who are not United States citizens.⁵ There is no precedent for our Government to authorize the trial of non-citizens before a military tribunal while expressly exempting U.S. citizens alleged to have committed the very same acts. All prior United States’ military commissions applied to both citizens and non-citizens alike.⁶ For example, President Roosevelt’s 1942 proclamation establishing the jurisdiction of military commissions over seven individuals who entered the United States with the intent to commit acts of sabotage had express provisions ensuring that United States citizens could be tried by military commission.⁷ Such evenhanded treatment of all “persons,” whether citizens or non-citizens, is required when the government seeks to use military commissions to try and punish persons for violations of the law of war or other offenses.⁸

The PMO violates this precedent by granting the protections of the federal courts to United States citizens but denying those protections to non-citizens like Mr. Hicks.

³ See Jean S. Pictet (ed), *Commentary — III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), p. 623.

⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by the United States on 8 June 1992. Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

⁵ Section 2(a) of the PMO states [t]he term “individual subject to this order” shall mean any individual who is not a United States citizen” Section 4.(a) of the PMO states [a]ny individual subject to the order shall, when tried, be tried by military commission”

⁶ It is generally agreed that the United States began using military commissions in 1847 during the Mexican-American War. David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2027. Unlike the Order in this case, however, the Order used in the Mexican-American War subjected both citizens and non-citizens to military tribunals. See General Orders, No. 287, at ¶ 9 (Sept. 17, 1847); Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons*, 12 (quoting memoir stating that “all offenders, Americans and Mexicans, were alike punished” under Order); see also Glazier, 89 Va. L. Rev. at 2030. The application of military commission jurisdiction to citizens and non-citizens alike continued through World War II, the last time our government tried individuals before military commissions. See *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁷ *Id.* at 22.

⁸ See *id.* at 37.

Thus, the PMO departs from constitutional and international dictates, as well the fundamental traditions of fairness, that underlie and enforce the guarantee of equal protection.

C. Government May Not Discriminate Against Non-citizens in Criminal Prosecutions

The federal government has clear authority to differentiate between citizens and non-citizens in the areas of foreign affairs and immigration. Non-citizens may be deported or even detained for extended periods of time for reasons associated with their immigration status. However, this authority to differentiate between citizens and non-citizens does not extend to situations in which the government seeks to punish non-citizens.⁹

As far back as 1896, the Supreme Court held that the government must use the same processes for non-citizens as it does for citizens when trying non-citizens for criminal misconduct. In *Wong Wing v. United States*,¹⁰ the Supreme Court declared that if the government “sees fit to . . . subject[] the persons of such alienage to infamous punishment,” discrimination is constitutionally intolerable: “even aliens shall not be held to answer for a capital or other infamous crime” without affording them the same protections with which the Fifth Amendment cloaks citizens.¹¹

Since *Wong Wing*, the Supreme Court has repeatedly reaffirmed the principle that while the federal government may discriminate against non-citizens with respect to immigration and foreign affairs, it may not use different procedures and processes to try and/or punish non-citizens.¹² The Court’s declaration that it will not “bolt the door to

⁹ See e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that “[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection”).

¹⁰ 163 U.S. 228, 237 (1896).

¹¹ *Id.* at 237-38.

¹² See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of “punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution”) (internal quotation and citation omitted). See also *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong* for the proposition that “[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime”); *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001) (noting that although the federal government has wide latitude to set “criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States,” it is settled that “an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.”) (citing *Wong*).

equal justice,” applies with equal force here to Mr. Hicks since the most fundamental right of all – the essential right of liberty from confinement – is at stake.¹³

Since the Equal Protection clause requires that distinctions be rational, the Court has condemned systems in which unreasoned distinctions, such as citizen versus non-citizen, are used to impede open and equal access to the courts.¹⁴ While the government may impose special burdens upon defined classes in order to achieve permissible ends, the Equal Protection Clause requires that the distinctions that are drawn have “some relevance to the purpose for which the classification is made.”¹⁵ Here, in contrast, there is no legitimate reason for subjecting Mr. Hicks to trial before a military commission while making a similarly situated U.S. citizen ineligible therefore.

A comparison of Mr. Lindh’s situation and circumstances with those of Mr. Hicks vividly illustrates the point. Just like Mr. Hicks, Mr. Lindh was seized in Afghanistan, allegedly in the course armed conflict on the side of the Taliban.¹⁶ Yet unlike Mr. Hicks, Mr. Lindh, solely because of his U.S. citizenship, was *not* transferred to Guantanamo Bay to await trial by military commission, but was instead charged in federal court with conduct mirroring that alleged against Mr. Hicks: someone who joined a conspiracy to undertake violent acts against U.S. citizens, property, and interest, and who pursued those objectives by engaging U.S. forces in armed hostilities in Afghanistan.¹⁷

Indeed, Mr. Hicks’ charge sheet specifically alleges that he traveled to Konduz, Afghanistan in November 2001, where “he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces.”¹⁸

Thus, there is no substantive distinction between the conduct alleged against Mr. Hicks and that alleged against Mr. Lindh. Yet they have received vastly different treatment, both in terms of their detention, as well as in the systems in which the government seeks to adjudicate their cases, based on a wholly invalid criterion: Mr. Lindh’s U.S. citizenship, and Mr. Hicks’s lack thereof.

That distinction is based exclusively on the PMO. Thus, the PMO violates the Equal Protection Clause of the U.S. Constitution, as well as the provisions of 42 U.S.C. §1981, and is invalid. Accordingly, this commission is without jurisdiction to try Mr. Hicks, and all charges against him should be dismissed.

D. The Government Has Discriminated Among Citizens of Different Foreign Countries

The Government has also violated the Equal Protection Clause by treating similarly situated non-citizens held at Guantanamo Bay Naval Base differently.

¹³ See *Griffin v. Illinois*, 351 U.S. 12 at 24 (1956).

¹⁴ See e.g. *Rinaldi v. Yeager*, 384 U.S. 305 at 310 (1966).

¹⁵ See *id.* at 308.

¹⁶ See *United States v. Lindh*, 212 F. Supp. 2d 541, 568 (E.D. Va 2002).

¹⁷ *Id.*

¹⁸ *Id.*

Specifically, the Government has released hundreds of detainees to their home countries without subjecting them to any process or tribunal, while it has charged Mr. Hicks and designated him for prosecution.

Mr. Hicks is being held at Guantanamo Bay Naval Base pursuant to an Executive (*i.e.*, Department of Defense) finding that there was “no doubt” that he and the other Guantanamo detainees were “enemy combatants” and thus did not merit any process to determine their status. Notwithstanding that conclusory finding, Mr. Hicks has never been granted any process that would put the government’s assertion to the test, or provide him any opportunity to contest it. Indeed, the Government has detained more than 600 persons at Guantanamo Bay Naval Base for more than two years without affording the detainees any such process.¹⁹

In addition, the Government has released and repatriated many detainees to their own countries (as listed *ante*).²⁰ Those detainees who have been released were detained for the same or substantially similar reasons as Mr. Hicks (and for roughly the same period of time). Yet Mr. Hicks has been, in effect, singled out for continued detention, prosecution, and, ultimately, potential punishment. The Government has not and will not disclose its reasons for releasing certain detainees, but for many the only apparent reason is their citizenship — *i.e.*, British citizens who were detained were not subjected to military commissions and were instead released solely because of the intercession of their government (and the same is almost certainly true with respect to the other persons released).

For the reasons stated above, the Government, when it seeks to impose punishment, may not discriminate between individuals based on citizenship. Here the government is doing just that. Since the government here, in its prosecution of Mr. Hicks, has violated the Equal Protection Clause of the Constitution, the terms of 42 U.S.C. §1981, and the international standards and principles requiring equal protection, the charges against him must be dismissed in their entirety.

E. The Equal Protection Clause Applies in this Case

Certainly, Equal Protection, in all its forms, and from all of its sources, applies to Mr. Hicks in this case. Recently, in *Rasul v. Bush*,²¹ a case in which Mr. Hicks has been a named plaintiff since its inception, the Supreme Court held that 28 U.S.C. §2241, which

¹⁹ In response to recent Supreme Court rulings, the government has fashioned the Combatant Status Review Tribunal (hereinafter “CSRT”), which is designed to determine whether Guantanamo detainees are “enemy combatants.” While the CSRT framework falls well short of affording due process, and/or satisfying the standards of the Geneva Convention and/or the U.S. military regulations implementing the Convention, at least one of the detainees was found by the CSRT not to be an enemy combatant, despite the government’s finding almost three years ago that there was “no doubt” as to the detainees all being “enemy combatants.”

²⁰ A Department of Defense news release dated 18 September 2004 disclosed that as of that date 191 detainees had been released from Guantanamo including, at least 34 Pakistanis, 5 Moroccans, 4 French, 7 Russians, 4 Saudis, 1 Spanish, 1 Swede, 5 Britons, and numerous citizens of other nations.

²¹ ___ U.S. ___, (2004)

RE 29A
Page 6 of 8

authorizes U.S. District Courts to hear *habeas corpus* petitions, was available to Mr. Hicks and the other Guantanamo detainees, despite their never having been physically within the territory of the United States.²² In so ruling, the Supreme Court rejected the Government's argument that statute was inapplicable outside the territorial jurisdiction of the United States.

The Court reasoned that because the detainees, including Mr. Hicks, were held in United States's custody at Guantanamo Bay Naval Base, an area over which the United States exercises "complete jurisdiction and control," they could invoke the federal courts' authority under §2241.²³ Further, the Court opined that the detainees could bring other non-*habeas* claims in federal court despite their military detention outside United States territory.²⁴ Moreover, the Court affirmed the detainees' physical confinement at Guantanamo Bay Naval Base did not affect their ability to pursue in the federal courts their claims that implicate the "same category of laws listed in the *habeas corpus* statute."²⁵

As the Court pointed out in *Rasul*, §2241 extends the writ to prisoners held in "violation of the Constitution, or laws or treaties of the United States."²⁶ The Equal Protection Clause is a part of the Constitution of the United States. The ICCPR is a treaty of the United States.

In addition, even if the commission were to find that the Equal Protection Clause did not apply to detainees held at Guantanamo Bay Naval Base, the similar provision of the ICCPR which requires that persons be treated equally before the courts and tribunals would apply there, as the ICCPR applies to all individuals subject to a State Party's jurisdiction.²⁷ This includes Guantanamo Bay Naval Base. Thus, the applicability of Equal Protection to Mr. Hicks – under any of these alternative bases – cannot be disputed.

F: Conclusion

The PMO and subsequent Executive action (the release of other non-citizens from detention at Guantanamo) has discriminated against Mr. Hicks on the basis of his citizenship. Thus, the PMO establishing military commissions violates the Equal Protection Clause of the United States' Constitution and the United States' legal obligations under the law of war and human rights law, and is invalid.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 124 S.Ct. at 2699.

²⁵ *Id.*

²⁶ 28 U.S.C. §2241.

²⁷ ICCPR, art 2. See also the International Criminal Court's Advisory Opinion: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. Available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The defense reserves the right to call witnesses after reviewing the Government response to this motion.

B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, art 49.
2. Jean S. Pictet (ed), *Commentary — III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), p. 623.
3. *International Covenant on Civil and Political Rights*, Articles 2 and 14(1).
4. David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, pages 2027 and 2030.
5. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ.

6. **Relief Requested:** The Defense requests that all charges be dismissed.

7. The defense requests oral argument on this motion.

By:



M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

RE 29A
Page 8 of 8



fulltext



**Convention (I) for the Amelioration of the Condition of the Wounded and Sick in
Armed Forces in the Field. Geneva, 12 August 1949.**

Attachment 1 to RE 29A

Page 1 of 2

Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following, of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Attachment 1 to RE 29A
Page 2 of 2

THE GENEVA CONVENTIONS
OF 12 AUGUST 1949

COMMENTARY

III
GENEVA
CONVENTION

RELATIVE TO THE TREATMENT
OF PRISONERS OF WAR

Attachment 2 to RE 29A

Page 1 of 2

INTERNATIONAL COMMITTEE OF THE RED CROSS

in fact possible to him" (Report of the International Law Commission covering its Third Session). Later, on the basis of comments by Governments, the Commission changed this wording to provide that the accused would be responsible under international law only if, in the circumstances, it was possible for him to act contrary to superior orders.

PARAGRAPH 2. — SEARCH FOR AND PROSECUTION OF PERSONS
WHO HAVE COMMITTED GRAVE BREACHES

The obligation on each State to enact the legislation necessary implies that such legislation should extend to any person who has committed a grave breach, whether a national of that State or an enemy.

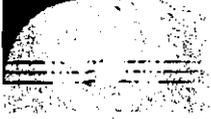
The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all despatch. The necessary police action should be taken spontaneously, therefore, and not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.

Extradition is restricted by the domestic law of the country which detains the accused person. Indeed, a rider is deliberately added: "in accordance with the provisions of its own legislation". Moreover, a special condition is attached to extradition: the Contracting Party which requests the handing over of an accused person must make out a *prima facie* case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. The exact interpretation of "*prima facie* case" will in general depend on national law but it may be stated as a general principle that it implies a case which in the country requested to extradite would involve prosecution before the courts.

Most national laws and international treaties on the subject preclude the extradition of accused who are nationals of the State detaining them. In such cases, Article 129 quite clearly implies that the State detaining the accused person must bring him before its own courts.

Attachment 2 to RE 29A

Page 2 of 2



**Office of the High
Commissioner for Human Rights**



International Covenant on Civil and Political Rights

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 2200A (XXI) of 16 December 1966**

***entry into force* 23 March 1976, in accordance with Article 49**

Attachment 3 to RE 29A
Page 1 of 3

Article 2 **▶▶** **General comment on its implementation**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Attachment 3 to RE 29A
Page 2 of 3

Article 14 **▶▶** **General comment on its implementation**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Attachment 3 to RE 29A
Page 3 of 3

89 Va. L. Rev. 2005, *

Copyright (c) 2003 Virginia Law Review Association
Virginia Law Review

December, 2003

89 Va. L. Rev. 2005

LENGTH: 37641 words

NOTE: **KANGAROO COURT OR COMPETENT TRIBUNAL?: JUDGING THE 21ST CENTURY
MILITARY COMMISSION**

NAME: David Glazier*

Attachment 4 to RE 29A
Page 1 of 3

A. The Mexican War: Origin of the Military Commission

Many commentators contend that the United States first used military tribunals to try spies during the Revolution.⁸⁰ A key difference between those trials and later use of military commissions, however, was a specific statutory grant of court-martial jurisdiction over spies enacted by Congress in 1776.⁸¹ The early spy trials thus do not share the "common law" basis of later tribunals that were used to extend jurisdiction to persons not otherwise subject to American military justice. The conclusion that military jurisdiction was strictly limited to persons subjected to military authority by Congress was specifically endorsed by the early commentators on American military justice. Major Alexander Macomb, who published the first U.S. military justice treatise in 1809, wrote that military jurisdiction extended only over those persons Congress specifically included in the Articles of War.⁸² The same conclusion was reached in a more comprehensive treatise published by Captain William C. De Hart in 1846. Captain De Hart noted that in the United States, only Congress by "'positive provision to that effect'" can make an individual subject to military jurisdiction.⁸³

It is generally agreed that the real origin of the military commission dates from the Mexican War of 1846-1848.⁸⁴ Modern scholars, however, virtually all overlook one very important fact: These trials were first established to permit prosecution of American soldiers, not Mexicans. This distinction is significant because it strongly suggests there was good reason for the military commission to provide the same standards of due process as the court-martial did right from its beginnings.

The Articles of War that were in effect in that era included no authority to punish servicemembers for offenses against civilians. When a U.S. soldier murdered a Mexican early in the conflict, the **[*2028]** Secretary of War concluded that the only available remedy was to discharge the killer and send him home.⁸⁵ Discontented with that result, General Winfield Scott, the U.S. Army commander, resolved to correct this injustice by imposing martial law in Mexico and convening "military commissions" (a term he coined) to try U.S. soldiers for civil offenses not covered by the Articles of War, such as murder, rape, and robbery.⁸⁶ He implemented this policy through general orders that were promulgated in captured Mexican territory. These orders set forth the shortcomings in existing U.S. law, enumerated the offenses to be punished, and defined the commissions to be used, specifically stating that they were to be based on the court-martial procedures of the Articles of War.⁸⁷ In his memoirs, General Scott colorfully described the reception his martial law plan received from his civilian superiors prior to his departure for Mexico:

Attachment 4 to RE 29A
Page 2 of 3

Given General Scott's purpose, it should come as no surprise that his military commission followed the pattern of the court- [*2030] martial in procedure, rights granted the accused, rules of evidence, and post-trial review.⁹⁴ First, of course, the rules of court-martial practice were the ones familiar to the American officers who composed these courts. But even more importantly, as the analysis that follows will show, a majority of the persons tried by the military commissions in Mexico were American citizens. For an American-trained lawyer like General Scott, due process considerations would have demanded no less.

This correlation between the court-martial and the military commission is borne out by analysis of general orders issued by Army commanders in Mexico during the war. Both courts-martial and military commissions were convened by essentially identical general orders that specified the time and place of convening, the composition of the trial panel, and the prosecuting judge advocate.⁹⁵ In this era, the Articles of War permitted a general court-martial to consist of between five and thirteen officers, but required the full thirteen when "that number [could] be convened without manifest injury to the service."⁹⁶ In Mexico, this seems to rarely have been practicable without inflicting such injury upon the Army, and most court-martial convening orders reviewed by the author show smaller numbers.⁹⁷ The orders stressed that the court-martial could continue to meet only if the membership remained "not less than the minimum [five] prescribed by law."⁹⁸ This same practice was observed for military commissions, including the phraseology about the "minimum prescribed by law,"⁹⁹ even though at [*2031] this point in history the military commission had not been accorded any formal legal recognition.

Attachment 4 to RE 29A
Page 3 of 3

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

9 July 2004

2004
9 July
General List
No. 131

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY

Attachment 5 to RE 29A
Page 1 of 3

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)*).

Attachment 5 to RE 29A

Page 2 of 3

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .”, the Committee reached the following conclusion:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

Attachment 5 to RE 27A
Page 3 of 3

)	
	)	PROSECUTION RESPONSE TO
	)	DEFENSE MOTION TO
UNITED STATES OF AMERICA	)	DISMISS FOR LACK OF
v.	)	JURISDICTION – Challenging
	)	the President’s Military Order on
DAVID M. HICKS	)	the grounds that it violates the
	)	U. S. Constitution’s Equal
	)	Protection Clause
)	
	)	18 OCTOBER 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.
2. Position on Motion. The Defense motion should be denied.
3. Facts Agreed upon by the Prosecution: The Prosecution disagrees with the Defense’s characterization of the facts.
4. Facts.
 - a. The Accused is not a citizen of the United States. He is an Australian citizen.
 - b. On July 3, 2003, the President determined that the Accused is subject to the President’s Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.
 - c. On June 9, 2004, the following charges were approved and referred to this military commission: Charge 1: Conspiracy to attack civilians; to attack civilian objects; to commit murder by an unprivileged belligerent; to commit the offense of destruction of property by an unprivileged belligerent; and to commit the offense of terrorism; Charge 2: Attempted Murder; and Charge 3: Aiding the Enemy.
5. Legal Authority Cited:
 - a. The President’s Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
 - b. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, (1973)
 - c. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990)
 - d. Hamdi v. Rumsfeld, 316 F.3d 450, (4th cir. 2003)
 - e. Al Odeh v. United States, 321 F.3d 1134 (D.C. Cir. 2003)

- f. Rasul v. Bush, 124 S.Ct. 2686 (2004)
- g. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)
- h. Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985)
- i. War Crimes Act of 1996, 18 U.S.C. § 2441
- j. The Geneva Convention on Prisoners of War
- k. International Covenant on Civil and Political Rights
- l. 138 Cong. Rec. S 4781 (April 2, 1992)
- m. Humanitarian Law and the Protection of War Victims (1975)
- n. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004)
- o. Wesson v. Warden, 305 F.3d 343, 348 (5th Cir. 2002)
- p. Johnson v. Eisentrager, 339 U.S. 763 (1950)

6. Discussion.

The Defense asserts that the Accused's case should be dismissed because the President's Military Order violates equal protection under the Fifth Amendment of the United States Constitution as the commissions are available to try only non-citizens. Alternatively, they suggest that the President's Military Order is also invalid under the International Covenant on Civil and Political Rights (ICCPR) and The Geneva Conventions. The Defense assertions are without merit. Non-resident aliens have no recourse to the United States Constitution, so the Accused's constitutional claim must fail. Additionally, the ICCPR and the Geneva Conventions have no application in this context.

a. Non-resident aliens are not entitled to Constitutional Protections.

The Supreme Court determined in Johnson v. Eisentrager, 339 U.S. 763 (1950), that the Fifth Amendment does not afford protection to aliens outside the United States. In that case, the United States captured German citizens who were engaged in unlawful combat in China. Id. at 766. After a military commission convicted them of war crimes, the United States transported them to Germany for imprisonment. Id. While in Germany, they filed habeas corpus petitions challenging their detention on grounds that it violated the Fifth Amendment. Id. Although the Supreme Court ultimately concluded that it lacked jurisdiction to entertain their habeas petitions, id. at 777-778, the Court asserted that the Fifth Amendment does not apply to non-resident aliens. The Court said:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. Cf. *Downes v. Bidwell*, 182 U.S. 244 [21 S.Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784.

The Supreme Court has, however, also held that aliens are entitled to some constitutional rights. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990) (Citing *Plyer v. Doe*, 457 U.S. 202, 211-212 (1982)(illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590-596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); *Bridges v. Wixson*, 326 U.S. 135, 148 (1945)(resident aliens have First Amendment Rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)(Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)(resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)(Fourteenth Amendment protects resident aliens). Each of the cases cited by the *Verdugo-Urquidez* court, though, stand only for the proposition that aliens may gain limited constitutional rights after coming within the territory of the United States and developing substantial connections with this country. Id.

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Id.

In *Verdugo-Urquidez*, United States and Mexican Officials arrested Rene Martin Verdugo-Urquidez in Mexico and brought him to the United States for trial. At the time, Verdugo-Urquidez was a both a citizen and resident of Mexico. Id. at 262. At his trial, Verdugo-Urquidez sought to exclude evidence obtained by searching his residences in Mexico on grounds that the searches violated the Fourth Amendment. Id. The Supreme Court rejected this argument, concluding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country. Id. at 274-275. Citing *Eisentrager* to support this proposition, the Court said that “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” Id. at 269.

In *Verdugo-Urquidez*, the respondent – like the Accused in the present case – argued that treating him differently from United States citizens and residents would

violate equal protection. The Court emphatically dismissed this contention. The Court said:

Respondent also contends that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution. . . . But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens. *Cf. Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

Id. at 273.

Finally, in Verdugo-Urquidez, the Court emphasized that applying the Constitution to aliens living abroad would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Id. The Court explained that the United States regularly employs Armed Forces outside this country, and that Armed Forces engage in many activities that might constitute searches and seizures. Id. at 273-274. The same reasoning applies to the Fifth Amendment. The United States unavoidably treats U.S. citizens differently from foreign citizens when it uses its military power abroad.

Saying that the Constitution does not afford rights to non-resident aliens does not mean that the United States can act unrestrained by any law. The United States must abide by the law of war. The law of war requires that the Accused receive a full and fair trial by military commission. But it does not require the United States to treat him exactly as it would treat a U.S. citizen.

The Accused in this case is not a resident of the United States, nor has he ever been, either legally or otherwise. He has no contacts whatsoever with the United States other than engaging in conspiracies to attack it and being detained at the U.S. Naval Station at Guantanamo Bay, Cuba. The fact that he is detained in Guantanamo does not help him because, "this sort of presence – lawful but involuntary – is not the sort to indicate any substantial connection with our country." Id. at 271. Therefore the Accused has no recourse at all to the Fifth or Fourteenth Amendments and his motion must, therefore, fail at its inception.¹

¹ The Supreme Court's recent decision in Rasul v. Bush, 124 S.Ct. 2686 (2004), in no way affects the validity of the Eisentrager and Verdugo-Urquidez holdings denying constitutional protections to non-resident aliens. Rasul merely interpreted 28 U.S.C. § 2241 to provide a vehicle for persons detained by the

b. The President's Military Order doesn't deny an Accused a fundamental right.

The conduct of Military Commissions pursuant to the President's Military Order does not discriminate in the allocation of fundamental rights. The Defense claims that Military Commissions discriminate in the allocation of fundamental rights. However, heightened scrutiny applies only to the differential allocation of *constitutionally guaranteed* rights. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it has already been established by the Supreme Court that the Accused has no right to equal protection under the Fifth Amendment, indeed he has no constitutionally guaranteed rights, so there is no deprivation upon which heightened scrutiny may be applied. Thus, the Accused's claim must also fail in this regard.

c. The ICCPR is inapplicable to the Accused's case.

(1) Defense relies on the ICCPR to allege violations of Articles 2 and 14(1) of the treaty. However, such reliance is misplaced; the ICCPR does not apply to prosecutions for violations of law of war offenses and is, therefore, not relevant to Military Commission proceedings. By requesting relief under the ICCPR, the Accused is requesting that the Military Commission disregard United States law and decisions delivered since U.S. ratification of the ICCPR in 1992.

(2) The Coalition, including the United States, is engaged in an armed conflict with al Qaida and the Taliban. The Law of Armed Conflict applies to this war, not the ICCPR. The Laws of Armed Conflict regulate the interactions between belligerent states and the interactions between a state and individual members of enemy forces. The Law of Armed Conflict includes such treaties as the Hague and Geneva Conventions and was negotiated with the exigencies of war in mind. In contrast, the ICCPR is part of a body of law known as Human Rights Law, a distinctly separate body of law. Treaties under Human Rights Law were not negotiated with the requirements of wartime in mind² and therefore cannot apply to the ongoing armed conflict. By placing such emphasis on the ICCPR for relief, Defense is sidestepping the applicable body of law, the Law of Armed Conflict.

(3) The President and the United States Senate at the time of ratification made clear that the ICCPR did not expand protections beyond those already provided

United States to challenge the circumstances of their detentions. The Court's holding was based on statutory construction and did not rely on the existence of any constitutional right. The fact is the United States has always given its citizens more rights than non-citizens when it comes to constitutional rights. The Constitution is the social compact between the United States and its citizenry. To hold that it has unfettered and equal application to all persons, wherever situated and regardless of alienage, would provide the full penumbra of procedural and substantive protections guaranteed to citizens via the Constitution to all people of the world.

² See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, 15 (1975) (Humanitarian law is valid only in the case of armed conflict, while human rights are essentially applicable in peacetime... The two systems are complementary, and indeed they complement one another admirably, but they must remain distinct).

under United States *domestic* law and in fact would not be applicable in any area that might conflict with the United States Constitution or laws. See Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (“Nothing in this Covenant requires or authorizes legislation, or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”).³ Despite explicit reservations and mention on the effect ratification of the ICCPR would have on domestic law, no mention is made on the applicability of the ICCPR on the Law of Armed Conflict.⁴ This silence indicates that the United States did not contemplate application of the ICCPR to the Law of Armed Conflict and military commissions. To argue otherwise would be to conclude that the President entered into a treaty in which he agreed, without comment, to limit his ability as Commander and Chief to wage war and detain enemy combatants. Such an argument is not plausible.

d. International Covenant on Civil and Political Rights is not Self-Executing

The ICCPR has no legal impact on the military commissions. The Senate, in ratifying the ICCPR, specifically stated that “the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992). As Assistant Secretary of State Richard Schifter explained during the Foreign Relations Committee’s hearing on the ICCPR, the non self-executing provision means that “the Covenant provisions **when ratified, will not by themselves create private rights enforceable in U.S. courts**; that could be done by legislation adopted by Congress. **Since U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation.**” ICCPR Hearing at 18 (emphasis added). Treaties are binding agreements between States; individuals are not parties to treaties. The ICCPR, therefore, does not provide individuals with rights enforceable in U.S. courts. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004); *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002) (relief denied because treaty is not self-executing and Congress has not enacted implementing legislation).

e. The Geneva Conventions do not apply to the Accused.

The Accused claims that the Geneva Conventions require that he be tried in the same courts as a U.S. citizen would. He is incorrect for two reasons. First, the Geneva Conventions are not self-executing. Second, they are inapplicable to the Accused.

³ See also Senator Clairborne Pell, Chairman, Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (the ICCPR is rooted in Western democratic traditions and values and guarantees basic rights and freedoms consistent with our own constitution and Bill of Rights).

⁴ The Senate’s silence on the applicability of the law of armed conflict on the ICCPR is significant as the treaty was the subject of much debate in the Senate. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. President Carter submitted the ICCPR to the Senate in 1979. The ICCPR was finally ratified by the Senate in 1992. See Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992)

Federal law distinguishes “self-executing” international agreements from “non-self-executing” international agreements. An international agreement is “non-self-executing” in any of the following circumstances:

- a. if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or
- b. if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or
- c. if implementing legislation is constitutionally required.

Restatement (Third) of Foreign Relations Law § 111(4) (1987). If a treaty is “non-self-executing” then it does not give individuals rights that they may enforce in a judicial proceeding. “Courts in the United States are bound to give effect to . . . international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.” *Id.* § 111 (3).

That the Geneva Conventions are not self-executing is demonstrated in the text of the conventions themselves, their legislative history, and case law. Indeed the Geneva Conventions contain many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

What discussion there is [in the text of the Geneva Conventions] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a “meeting of their representatives” with the aid of diplomats from other countries, “with a view to settling the disagreement.” Geneva Convention, at Article 11. Similarly, Article 132 states that “any alleged violation of the Convention” is to be resolved by a joint transnational effort “in a manner to be decided between the interested Parties.” *Id.* at art. 132; *cf. id.* at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for “persons committing . . . grave breaches of the present Convention”). We therefore agree with other courts of appeals that the language in the Geneva Convention is not “self-executing” and does not “create private rights of action in the domestic courts of the signatory countries.”

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also Al Odeh v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, Rasul v. Bush, 124 S.Ct. 2686 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); Handel v. Artukovic, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the

contracting parties sought to go beyond diplomacy to enforce violations of the treaty: “grave breaches,” which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the conventions does not suggest otherwise. In fact, the Senate Report makes clear that the conventions are not self-executing. In the section titled “Provisions Relating To Execution Of The Conventions,” the Report states that “the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches.” S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as “an advance over the 1929 instruments which contained no corresponding provisions.” Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them “could not” invoke the Geneva Convention because:

It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 conventions was operating post-Eisentrager, yet no mention was made of the new conventions or their implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that “the weight of world opinion,” would “exercise a salutary restraint on otherwise unbridled actions.” S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit’s conclusion in Hamdi that the Geneva Conventions are not self-executing is undoubtedly correct. As such, Mr. Hicks’ motion should be denied on those grounds.⁵

⁵ United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW “as a defense to criminal prosecution,” is not controlling in this instance because the Fourth Circuit, a

Even if the GPW were self-executing, the Accused's motion should be denied because the President has declared that the GPW does not apply to al Qaida. See Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7, 2002), available at www.library.law.pace.edu/government/detainee_memos.html. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference, see Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). The President's memorandum should be given deference by the Commission and the Accused's request to dismiss should be denied.

f. Conclusion.

The Accused, as a non-resident alien, has no constitutional rights. Thus his motion must be dismissed in the first instance. Also, the Accused has no applicable rights under the ICCPR or the Geneva Conventions. For these reasons, the Defense Motion should be denied.

7. Attachments. None.

8. Oral Argument. If Defense is granted oral argument, Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. No witnesses will be needed to decide this motion.

//Original Signed//


Lieutenant Colonel, U.S. Marine Corps
Prosecutor

superior court, in Hamdi subsequently held the GPW to be non-self-executing. Hamdi at 468. Moreover, the case of United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, Noriega was an advisory opinion by a district court. Id. at 799. Second, Noriega's reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. Id. at 797. Thus, by the very reasoning in Noriega, Article 103 of the GPW, a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.

over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "privilege of litigation" in U. S. courts. The courts of the United States have traditionally been open to nonresident aliens. And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their non-habeas statutory claims.²

This statement by the Supreme Court makes it clear that Mr. Hicks may claim the protection of the Equal Protection Clause of the Fifth Amendment, as well as other statutory claims such as a claim under the anti-discrimination laws set forth in 42 U.S.C. §1981 despite being a non-resident alien held by the U.S. at Guantanamo Bay.

In this case, Mr. Hicks' claim is that the President's Military Order unlawfully discriminates between similarly situated U.S. citizens and non-citizens in criminal prosecutions by providing U.S. citizens with trials in federal court, where they enjoy significant procedural and substantive protections, while non-citizens are subject to trial before military commissions in which they are denied many of these protections.

This type of unlawful discrimination invalidates the President's Military Order establishing this commission. Accordingly, the commission is without jurisdiction to try Mr. Hicks' case, and the charges should be dismissed.

The ICCPR is applicable in this case

The defense has filed with the commission the Defense Reply to Government Response to Motion for Appropriate Relief: Imposition of Improper Pretrial Detention, which sets forth why the ICCPR and other customary international law apply in this case. The defense respectfully incorporates by reference that section of that Reply in this Reply.

Conclusion

The President's Military Order unlawfully discriminates against Mr. Hicks on the basis of (his lack of U.S.) citizenship. Such discrimination violates the Equal Protection Clause of the Fifth Amendment, other U.S. anti-discrimination statutes, and the anti-discrimination provisions of the ICCPR, and customary international law. Accordingly, the President's Military Order establishing the commission is invalid. Thus, the commission has no jurisdiction to try Mr. Hicks, and should dismiss all charges against him.

4. Evidence: The testimony of expert witnesses.
5. Relief Requested: The defense requests that all charges be dismissed.

² *Rasul v. Bush*, ___ U.S. at ___, 124 S.Ct. at 2698 (citations omitted).

6. The defense requests oral argument on this motion.

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

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Joshua Dratel
Civilian Defense Counsel

Review Exhibit 29C
Page 3 Of 3

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

DEFENSE MOTION TO
STRIKE THE WORD
"TERRORISM" FROM
CHARGE 1: TERRORISM
IS NOT AN OFFENSE TRIABLE
BY MILITARY COMMISSION

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves to strike the word "terrorism" from Charge 1 on the ground that terrorism is not an offense under the law of war, and states in support of this motion:

1. **Synopsis:** Terrorism is not a cognizable offense under the law of war, and is therefore not triable by military commission.
2. **Facts:** The motion requires a response to a question of law, relating to the law of war.
3. **Discussion:**

A: Introduction — The Military Commission Lacks Subject-Matter Jurisdiction

Military Commission Instruction No. 2 directs that this military commission can try only those offenses that existed under the law of war at the time of their commission. In fact, Section 3(A) explicitly states that "[n]o offense is cognizable in trial by a military commission if that offense did not exist prior to the conduct in question." In addition, international law prohibits States from charging individuals with conduct that did not constitute a criminal offense at the time of its commission: Article 15(1) of *International Covenant on Civil and Political Rights* (ICCPR)¹ provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Article 75(4)(c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)² provides the same, as does the U.S. Constitution, Art. I, sec. 9, cl. 1, which prohibits *ex post facto* laws.³

No American military commission has ever charged or tried an individual with the offense of "terrorism." That is fully consistent with established principles, since "terrorism" is

¹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

² Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>>.

³ The language of Article 75(4)(c) of Additional Protocol I is very similar to Article 15 of the ICCPR. It states "[n]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed".

RE 30A
Page 1 of 4

not an offense under the law of war. Consequently, it is not within the jurisdiction of a military commission. The only other source of jurisdiction for a military commission to charge and adjudicate an allegation of "terrorism" is Congress, but without a specific authorization from Congress that this military commission can try individuals for "terrorism," it does not possess subject matter jurisdiction to do so. Yet Congress has *not* so authorized the offense of "terrorism" in the context of military commissions; as a result, this military commission lacks jurisdiction to try Mr. Hicks for conspiracy to commit terrorism.

B: Terrorism Is Not a War Crime

As one commentator has explained, "[t]here is no doubt that the international community has a vested interest in the prosecution of individuals suspected of committing acts of international terrorism. Pursuing this worthy goal actually raises many issues, however, not the least of which is the fact that there is no international recognized definition of terrorism."⁴

Nor is there even an internationally accepted definition of "terrorism" as a substantive offense. While there are currently 12 international conventions relating to specific acts which fall under the rubric of "terrorism,"⁵ international criminal law and the law of war have failed to agree upon a definition of "terrorism" itself as a substantive offense. Indeed, "[o]ne of the most challenging problems for prosecutors in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law. Several international treaties cover acts that fall under the general category of terrorism, although, as noted above, the general practice is to prosecute individuals for the underlying criminal acts, not for the undefined crime of 'terrorism.'"⁶

Indeed, even the U.S. has recognized the absence of a universal definition of terrorism in the international context – a sharp but telling divergence from its current position before this commission. When drafting the *Rome Statute of the International Criminal Court* (ICC Statute) between 1996–98, "the United States vigorously opposed the inclusion of terrorism within the ICC's jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorist cases."⁷ Ultimately, the U.S. prevailed: the ICC Statute, which now represents the most recent, universally accepted and comprehensive list of war crimes does not list "terrorism" amongst its 51 types of war crimes.⁸

⁴ Daryl A. Mundis, "Prosecuting International Terrorists," *Terrorism and International Law: Challenges and Responses* (International Institute of Humanitarian Law and the George C. Marshall European Center for Security Studies, 2003), p. 85.

⁵ For a full explanation of all past conventions considered and adopted see, C. Bassiouni, *International Terrorism: Multilateral Conventions (1937–2001)* (available on request).

⁶ Daryl A. Mundis, "Prosecuting International Terrorists," *Terrorism and International Law: Challenges and Responses* (International Institute of Humanitarian Law and the George C. Marshall European Center for Security Studies, 2003), p. 88 (citations omitted).

⁷ David Stoelting, "Military Commissions and Terrorism," 31 *Denver Journal International and Policy* 427 (2003).

⁸ See Article 8 — War Crimes, *Rome Statute of the International Criminal Court*. Available at <<http://www.un.org/law/icc/statute/rome.htm>>.

In April 2000, the U.S. State Department reiterated the lack of an accepted definition of terrorism in its report on the "Patterns of Global Terrorism."⁹ It reported, "no one definition of terrorism has gained universal acceptance." Thus, due to international disagreement, and the ongoing attempt to create an internationally accepted definition of terrorism, no substantive offense of terrorism exists under international criminal law or the law of war.

"Terrorism" remains a descriptive term, which encompasses a wide range of precise substantive offenses under international law (such as hijacking and taking of hostages), rather than a substantive offense itself. Thus, it is not available here as a component of the conspiracy charge.

C: Congress Has Not Made "Terrorism" an Offense Triable by Military Commission

Other than offenses already cognizable under the law of war, Congress has designated only two other offenses to be eligible for trial by military commission: those enumerated in Articles 104 and 106 of the Uniform Code of Military Justice. Article 104 relates to "Aiding the enemy," and Article 106 relates to "Spies." In stark contrast, Congress has *not* enacted legislation making terrorism an offense triable by military commission.

The President's Military Order of 13 November 2001¹⁰ seeks to establish a forum for trying persons accused of acts of terrorism. In its opening sections, it states that military commissions are needed due to "the nature of international terrorism" for "the prevention of terrorist attacks." Section 2 states that its purpose is to create a forum to try members of al Qaeda and any person who "has engaged in, aided and abetted, or conspired to commit, acts of international terrorism."

Despite these pronouncements, the Military Order cannot confer jurisdiction on military commissions to try the offense of terrorism unless that offense pre-existed the commission of those offenses under the law of war. Only Congress has the power legislate to create new offenses triable by military commission, and it has not done so here – nor could it at this time, since such designation would constitute an impermissible *ex post facto* law.

D: Conclusion

At the time that Mr. Hicks allegedly conspired to commit an act of "terrorism," there was no internationally recognized substantive offense of terrorism under international criminal law or the law of war. Therefore, military commission (subject matter) jurisdiction to try Mr. Hicks for a charge of conspiracy to commit terrorism does not exist, and any references to "terrorism" in the charges must be stricken as a result.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

⁹ Available at <<http://www.state.gov/www/global/terrorism/1999report/patterns.pdf>>.

¹⁰ Military Order of 13 November 2001, 66 Fed. Reg. 57833 (16 November 2001).

5. Evidence:

A: The testimony of expert witnesses.

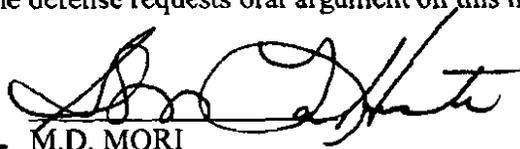
B: Attachments

1. *International Covenant on Civil and Political Rights*, Article 15.
2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.
3. Daryl A. Mundis, "Prosecuting International Terrorists," *Terrorism and International Law: Challenges and Responses*, pp. 85-95 (2003).
4. David Stoelting, "Military Commissions and Terrorism," 31 *Denver Journal International and Policy* 427 (2003).
5. *Rome Statute of the International Criminal Court*, Article 8 — War Crimes.
6. U.S. State Department, "Patterns of Global Terrorism" (2000).

6. Relief Requested: The defense requests that the word "terrorism" be struck from Charge 1.

7. The defense requests oral argument on this motion.

By:



M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel



**Office of the High
Commissioner for Human Rights**



International Covenant on Civil and Political Rights

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 2200A (XXI) of 16 December 1966**

entry into force 23 March 1976, in accordance with Article 49

**status of ratifications
declarations and reservations**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1 **▶▶ General comment on its implementation**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no

Attachment 1 to RE 30A

Page 1 of 2

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Attachment 1 to RE 30A

Page 2 of 2

9/27/2004



fulltext



Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

PREAMBLE.

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

Have agreed on the following:

PART I. GENERAL PROVISIONS

Art 1. General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

Attachment 2 to RE 30A

Page 1 of 3

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 2 to RE 301

Page 2 of 3

the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Attachment 2 to RE 30A
Page 3 of 3

PROSECUTING INTERNATIONAL TERRORISTS

Daryl A. MUNDIS (*)

I. Introduction

There is no doubt that the international community has a vested interest in the prosecution of individuals suspected of committing acts of international terrorism. Pursuing this worthy goal actually raises many issues, however, not the least of which is the fact that there is no internationally recognized definition of terrorism *per se*.¹ Prior to the large-scale crimes that were committed in the United States on September 11, 2001, the typical terrorist crimes included offences against aircraft, such as hijacking; bombings of government buildings or facilities, such as the U.S. Embassies in Africa or U.S. military installations in the Middle East; or civilian buildings, such as the 1993 bombing of the World Trade Center. All of this changed after September 11, however, due both to the scale of the crimes committed and the methods by which the perpetrators carried them out. The objectives of this brief paper are to:

- explore the possible forums for the prosecution of international terrorism;
- analyse the applicable substantive law concerning the crime of terrorism;
- discuss procedural issues arising from terrorism trials; and
- discuss evidentiary issues concerning such trials.

II. Choice of Forum

In the wake of the terrorist attacks on the United States in September 2001, the issue of where the alleged perpetrators of these crimes should be tried was among the hottest topics of discussion among international lawyers.² The following legal fora might have jurisdiction over such cases: the International Criminal Court (ICC);³ an *ad hoc* International Criminal Tribunal for the Prosecution of Acts of Terrorism, similar to the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); some other type of Special Court, like those in Kosovo, East Timor or Sierra Leone; national civilian courts, including "regular" or special courts; or military courts-martial or tribunals. Each of these options will be discussed.

A. International Criminal Court

The ICC does not have specific jurisdiction for crimes considered acts of terrorism. However, the underlying criminal act could provide the basis for one of the crimes for which the ICC *does* have subject matter jurisdiction, such as war crimes or crimes against humanity. With respect to war crimes pursuant to Article

(*) Trial Attorney, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. The views expressed herein are solely those of the author and are not attributable to the United Nations, International Criminal Tribunal for the former Yugoslavia or Office of the Prosecutor.

8 of the ICC Statute, such acts must be committed *during* an armed conflict. Under the ICC Statute, the elements of war crimes do *not* include a plan or policy to commit the offence and the scale of the alleged criminal acts does not form part of the offence.⁴ Article 7 of the ICC Statute governs crimes against humanity and in accordance with the jurisdictional elements of that offence, the attack must be directed against a civilian population and be part of a widespread or systematic attack,⁵ committed pursuant to or in furtherance of a State or organisational policy.⁶

B. Ad Hoc International Criminal Tribunal for the Prosecution of Acts of Terrorism

It would be possible for the UN Security Council to establish an *ad hoc* International Tribunal for the Prosecution of Persons Responsible for Committing Terrorism, similar to the ICTY and ICTR. Based on the experience of the Security Council in establishing the ICTY and ICTR, however, such international criminal tribunals have historically been used only when national courts have completely broken down, which is not the case in most of the States that are likely to prosecute alleged terrorists. Moreover, building such tribunals is slow, costly and requires a significant level of political will.

C. Special Courts

Special Courts, similar to the models used by the international community in Sierra Leone, Kosovo, or East Timor, could be established to prosecute crimes of international terrorism.⁷ Such a court or courts could be located where the crimes were committed, with the local judiciary and prosecution supplemented by international involvement, including international judges and prosecutors. The Special Court could be structured in such a way as to include members of specific ethnic or other groups, such as Muslim judges or prosecutors in the case of the September 11 attacks. Special Courts typically receive significant international financial and logistical assistance.

D. National Courts

Concerning prosecution of alleged terrorist acts in national courts, two issues arise: which nation's courts would have jurisdiction (and perhaps which State is best suited to pursue the prosecution), and once that issue is determined, which court within that State? The first issue concerns jurisdiction and may raise issues concerned with extradition. States have historically asserted jurisdiction under international criminal law on one or more of the following bases:⁸

- Territorial Jurisdiction (location where the crime was committed);
- Active Personality Principle (crime committed by a national of the State seeking to assert jurisdiction);
- Passive Personality Principle (the victim was a national of the State seeking to assert jurisdiction); and/or
- Protective Principle (the criminal conduct affects the security or other important interests of the State seeking to assert jurisdiction).

In the event that more than one State could assert jurisdiction, other issues may surface, including which State is best suited to conduct the prosecution. Moreover, if the accused is in custody, issues concerning extradition may arise if the State seeking to assert jurisdiction does not have custody of the accused. These issues are beyond the scope of this article. However, suffice it to say that they may raise significant hurdles to prosecution and in fact may actually preclude prosecution. For example, the accused may avoid trial if the custodial State is unable to exercise jurisdiction, and unwilling or unable⁹ to extradite the individual to a State which may impose the death penalty, and other States that do not impose the death penalty are similarly unable to exercise jurisdiction.

Assuming that the jurisdictional issues (and any other issues concerning choice of forum and extradition) are resolved, the next issue concerns the choice of which national court is the appropriate forum to conduct the prosecution. There are essentially three options, depending on the State concerned: "regular" civilian courts, special courts, and military courts.¹⁰ Each of these options has pros and cons and will be discussed in turn.

1. *"Regular" Civilian Courts*

The primary advantages of proceeding in "regular" civilian courts are that because such courts pre-date the acts of terrorism, there are generally no human rights or due process concerns, and they afford public trials. On the other hand, trial in such courts can be problematic for several reasons. First, the prosecution may be hindered in presenting evidence due to the source of that information. When derived from the intelligence community, national authorities may be reluctant to allow certain evidence (or its sources) to be disclosed in court. Second, significant security concerns arise with respect to the witnesses, victims, jurors, judges, and court personnel. Third, many national criminal procedure and evidentiary codes do not contain provisions allowing for variations in certain types of trials. For example, problems relating to evidentiary exclusions, prohibitions on hearsay evidence or evidentiary chains of custody may prove fatal to successful prosecution of terror charges.

2. *Special Courts*

To alleviate these problems, many States have tailored provisions permitting certain types of offences, such as terrorism, to be prosecuted in special courts, with special procedural and evidentiary rules. For example, witnesses may be permitted to testify anonymously or judges may be permitted to preside over such trials anonymously. In some instances, the right of the accused to confront the witnesses or evidence against him or her may be curtailed. Many of these special courts have failed to meet international necessary process standards with respect to the rights of the accused.

3. *Military Courts*

To alleviate some of these concerns, some States use military courts, a term which may include courts-martial, military tribunals or military commissions.¹¹

Military courts tend to have several significant advantages over civilian courts. First, trials may be conducted expeditiously. Second, trials before military courts may be held virtually anywhere in the world, with no need for significant physical infrastructure or resources. Third, because the legal bases for such courts typically pre-date the alleged crimes, they are usually free from the criticism that they were created for specific purposes.¹² Finally, military courts usually have procedures, such as various forms of protective measures, for adducing evidence from intelligence sources.

On the other hand, military trials may raise human rights concerns, particularly where the accused is a civilian, or when the court's assertion of personal jurisdiction may not be solidly grounded. Moreover, such proceedings may tend to be conducted without full public access, with all the problems inherent in such secret proceedings. Finally, trial by military courts may raise constitutional issues, such as separation of powers.

III. Substantive Law

One of the most challenging problems for prosecutors in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law.¹³ Several international treaties cover acts that fall under the general category of terrorism, although, as noted above, the general practice is to prosecute individuals for the underlying criminal acts, not for the undefined crime of "terrorism." In addition, there are several regional efforts, particularly within the European Union, to define and prosecute crimes of terror.

A. Substantive Law: International Agreements

Several multinational treaties criminalize specific offences as falling under the rubric of terrorism. Clifton M. Johnson, an attorney-adviser in the U.S. State Department and formerly the Department's primary attorney on terrorism issues, has identified seven provisions that are common to recent antiterrorism conventions.¹⁴ These treaty provisions:

1. Apply only to crimes with an international element;
2. Obligate States Parties to criminalize the covered offences irrespective of the motivation of the perpetrators;
3. Obligate States Parties to take into custody offenders found on their territory;
4. Facilitate the extradition of offenders;
5. Require States Parties to afford one another the greatest measure of assistance in connection with criminal investigations or proceedings related to the enumerated crimes;
6. Prohibit the political offence doctrine being the grounds for the refusal of an extradition or request for mutual legal assistance;
7. Provide for the transfer of prisoners in order to assist the investigation or prosecution of covered offences.¹⁵

The following international treaties have provisions outlawing crimes that

have come to be considered acts of terrorism, and, as such, provide the substantive law bases for prosecuting acts of terrorism.¹⁶

Convention for the Suppression of Unlawful Seizure of Aircraft (“Hijacking Convention”) (1970).¹⁷ Article 1 of this treaty provides that any person on board an aircraft in flight who unlawfully, by force or threat thereof (or by any other form of intimidation), seizes or exercises control of the aircraft or attempts to do so or acts as an accomplice to anyone who performs such acts, commits the offence of hijacking.¹⁸

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the “Safety of Aircraft Convention” of 1971.¹⁹ This Treaty prohibits several acts,²⁰ including:

- acts of violence against other persons on board the aircraft if such acts are likely to endanger the safety of the aircraft;
- destruction of the aircraft rendering it incapable of flight or which is likely to endanger its safety in flight;
- placing a device or substance on board the aircraft that is likely to destroy the aircraft, render it incapable of flight or which is likely to endanger its safety in flight;
- destruction of or interference with air navigation facilities or their operation if such acts are likely to endanger the safety of aircraft in flight; or
- communication of information known to be false which endangers the safety of an aircraft in flight.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, the “Convention on Protection of International Persons” of 1973.²¹ This Treaty prohibits the murder, kidnapping, or attack upon the person or liberty of an “internationally protected person,” including diplomats.²² Moreover, it also proscribes a violent attack on the official premises, private residence, or means of transport of such persons, if the attack is likely to endanger their safety or liberty.²³ The Convention also forbids threats²⁴ and attempts to commit these offences,²⁵ and includes a provision setting forth accomplice liability.²⁶

International Convention Against the Taking of Hostages, the “Hostage-Taking Convention” of 1979.²⁷ Article 1 of this Convention provides that:

- Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”).²⁸

The Convention on the Physical Protection of Nuclear Materials of 1980.²⁹ This Treaty seeks to safeguard nuclear material³⁰ and requires States Parties to enact national legislation prohibiting the following offences:³¹

- unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or injury to any person or substantial damage to property;
- theft, robbery, embezzlement or fraudulent obtaining of nuclear material;
- acts constituting a demand for nuclear material by threat, use of force or other means of intimidation;
- threat to use nuclear material to cause death, serious injury or substantial property damage; and
- attempts to commit any of the above acts or any act that constitutes participation in any of the above acts.³²

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation of the International Airport Security Convention of 1988.³³ This Convention supplements the Safety of Aircraft Convention of 1971 by extending that treaty to cover similar acts committed at airports.³⁴

Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the "Maritime Navigation Safety Convention" of 1988.³⁵ This convention prohibits a wide range of activities that endanger the safe navigation of ships at sea, including:

- seizure or the unlawful exercise of control over a vessel;
- acts of violence against persons on-board the vessel;
- destruction of the ship or its cargo;
- the placing of a device or substance on the ship that it likely to endanger the vessel;
- destruction of maritime navigation facilities;
- false communication likely to endanger the safe navigation of the vessel; and
- killing or injuring any person during the attempted commission of any of these offences.³⁶

Article 2 of this treaty, like many of the other treaties referred to in this section, proscribes attempts to commit any of these offences and sets forth accomplice liability.³⁷ Article 2(c) also makes it an offence to threaten another person to commit certain of the enumerated acts.³⁸

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of the "Safety of Fixed Platforms on Continental Shelf Convention" of 1988.³⁹ This agreement, which supplements the Maritime Navigation Safety Convention, imports many of the provisions of that treaty for the protection of crimes committed on board or against fixed platforms located on the continental shelf.

The International Convention for the Suppression of Terrorist Bombings of 1997.⁴⁰ Article 2 of this important convention provides that any person commits an offence under this treaty if that person:

- unlawfully or intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place or public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily harm;⁴¹ or
- with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.⁴²

The treaty also provides for the criminalization of attempts to commit any of the offences listed above⁴³ and for broad accomplice liability.⁴⁴

The International Convention on Suppression of Financing Terrorism of 1999.⁴⁵ The principal purpose of this treaty is to require States Parties to criminalize and establish jurisdiction over the enumerated offences and reaffirms the *aut dedere aut judicare* principle concerning these crimes.

B. *Substantive Law: Regional Efforts*

Regional organizations, such as the European Union, are also working on common legal frameworks to define terrorist offences and several provisions of the Treaty on European Union⁴⁶ pertain to terrorism and mutual assistance in combating the problem. For example, Article 29 specifically lists terrorism as a crime requiring common position, while Article 30 provides for police co-operation in combating terrorism and Article 31 sets forth measures governing judicial co-operation. The European Commission has also proposed a Council Framework Decision on combating terrorism to strengthen inter-European co-operation on this issue.⁴⁷

C. *Substantive Law: Galic Trial at the ICTY*

General Stanislav Galic, the former commander of the Sarajevo Romanija Corps of the Bosnian Serb Army is being prosecuted before the ICTY for his alleged role with respect to the Siege of Sarajevo, during a 23-month period from September 1992-August 1994. In its Pre-Trial Brief,⁴⁸ the Prosecution has stated that "the principal objective of the campaign of sniping and shelling of civilians was to terrorize the civilian population."⁴⁹ The Pre-Trial Brief elaborates upon this objective in the following terms:

The intention to spread terror is evident, *inter alia*, from the widespread nature of civilian activities targeted, the manner in which the unlawful attacks were carried out, and the timing and the duration of the unlawful acts and threats of violence, which consisted of shelling and sniping. The nature of the civilian activities targeted demonstrates that the attacks were designed to strike at the heart, and be maximally disruptive, of civilian life. By attacking when civilians were most vulnerable, such as when seeking the necessities of life, visiting friends

or relatives, engaging in burial rites or private prayer, or attending rare recreational events aimed precisely at countering the growing social malaise, the attacks were intended to break the nerve of the population and to achieve the breakdown of the social fabric.⁵⁰

With respect to the legal elements required to prove the charge of inflicting terror, the Prosecution, in its Pre-Trial Brief, argued that this offence contains the following essential elements:

- unlawful acts or threats of violence;
- which caused terror to spread among the civilian population;
- the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population;
- there is a nexus between the acts or threats and an armed conflict, whether international or internal in character; and
- the Accused bears individual criminal responsibility for the acts or threats under either Article 7(1) or 7(3) of the Statute.⁵¹

The trial is expected to last into the spring of 2003, with the judgement to be rendered in mid-2003.

IV. Procedural Issues

Concerning procedural issues, the most important are those surrounding the due process rights of the accused and will obviously depend on choice of forum. Perhaps the foremost issue is whether the defendant can get a fair trial. In light of the events of September 11th, it is not unreasonable to ask if any defendant could get a fair trial before a U.S. jury for these crimes. Moreover, in preparing a defence for such crimes, it would be necessary to ensure that the accused has access to exculpatory information and the right to compel witnesses on his or her behalf. Although these rights are enshrined in the international human rights conventions concerning due process, in practice they may be extremely difficult to provide in practice.

V. Evidentiary Issues

Issues concerning evidence may also be problematic in prosecuting terrorism cases.⁵² The gathering and safekeeping of evidence is the first potential problem. Although many of these problems are not unique to prosecuting terrorist cases, the problems raised are typically more significant than in other types of prosecutions, in part because the stakes are often much higher in terrorist cases. For example, many witnesses may be unwilling or unable to testify in such cases, and it is extremely difficult to locate the "insider" witnesses who may be crucial to obtaining a conviction. Second, there are usually significant difficulties in collecting evidence in the field, especially in cases involving bombings. Although these problems may be overcome, think of the inherent difficulties in extracting evidence from the site of the World Trade Center or in the wake of the Lockerbie crime,

where evidence was strewn over miles of the Scottish countryside. In addition, there are often cultural and language difficulties to be surmounted when interviewing witnesses or suspects, a problem that may be exacerbated by the use of codes or ambiguous language among the suspects.

Similar problems result at the trial stage, when it comes time to adduce the evidence in court. One of the most difficult hurdles to be overcome is the use in court of protected sources, such as intelligence officers and informants. Governments are often hesitant to permit testimony from intelligence sources, who may be questioned about the methods used to obtain information. The same may be said of electronic intercepts and other classified forms of information. It may be necessary to fashion unique forms of protection to allow such evidence to be used in court, depending on the forum. In those instances where established rules and jurisprudence do not permit such deviations, the prosecution of such cases may need to be abandoned or shifted to another forum.³³ It may also be difficult to obtain certified court interpreters who are fluent in the nuances of dialects or are attentive to certain linguistic characteristics displayed by the witnesses or co-accused in the event that they testify.

VI. Conclusions

There are many options for bringing such perpetrators to justice, although there is no preferred method of achieving this goal, since the various types of courts all face evidentiary and procedural hurdles. Without clear legal definitions of the crimes involved, this task becomes all the more difficult. While the law may be limited in terms of the assistance that it plays in the fight against global terrorism, it nevertheless has an important role to play. As important as the prosecution of terrorists is to the international community, it is equally important to ensure that such trials are fair to the accused, because without fairness - and the perception of fairness - such trials may actually encourage other terrorists to strike.

¹ Rather, as will be discussed *infra*, many international crimes fall within the rubric of "terrorism" and the choice of prosecutorial forum may determine which specific offence to charge the accused with.

² See for example, the articles published in "Agora: Military Commissions", 96 *AJIL* 320 *et. seq.* (2002); Jordan J. PAUST, "Antiterrorism Military Commissions: Courting Illegality", 23 *Mich. J.I.L.* (No. 1, Fall 2001), pp. 1-29; Kenneth ANDERSON, "What to do with Bin Laden and Al-Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base," 25 *Harvard J. Law & Pub. Pol.* (No. 2, Spring 2002), pp.591-634.

³ Hereinafter, ICC. The ICC was discussed as a possible forum for prosecution notwithstanding the fact that the ICC came into establishment on 1 July 2002 and, pursuant to Article 11(1) of the Rome Statute of the International Criminal Court, July 17, 1998, [UN Doc. A/CONF.183/9*, corrected in UN Doc. PCN/ICC/1999/INF/3*, reprinted at 37 *ILM* 999 (1998)] (hereinafter ICC Statute), only has jurisdiction from that date forward. Consequently, the ICC has no jurisdiction over the events occurring prior to 1 July 2002. Nevertheless, the ICC will be discussed *infra*, since it is possible that future acts of terrorism may be prosecuted in that court.

⁴ ICC Statute Article 8(1) states: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The deliberate use of the phrase "in particular" is a prosecutorial guideline, not a limitation on jurisdiction. See

the commentary on ICC Statute Article 8(1), William J. FENRICK,, "Commentary on the Rome Statute of the International Criminal Court", Otto TRJFFTERER, ed., (Nomos Verlagsgesellschaft, 1999), p.181, margin 4.

⁵ ICC Statute Article 7(1).

⁶ ICC Statute Article 7(2)(a).

⁷ For a description of such courts, see Daryl A. MUNDIS, "New Mechanisms for the Enforcement of International Humanitarian Law", 95 AJIL, No. 4, October 2001, pp. 934 *et. seq.*

⁸ See Kriangsak KITTICHAISAREE, "International Criminal Law", Oxford UP, 2001, pp.38-39.

⁹ Due to national legislation or human rights obligations, for example.

¹⁰ Use of the term "military courts" includes courts-martial, military commissions and military tribunals.

¹¹ Unless specifically noted, the use of the term "military courts" in this paper refers to all three types of mechanisms. The differences between these types of courts vary depending on national legislation. Concerning the use of courts martial and military commissions under U.S. law, see Daryl A. MUNDIS, "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts" 96 AJIL, No. 2 April 2002, pp. 320-328; PAUST, *supra* note 180; ANDERSON, *supra* note 180.

¹² The proposed use of military commissions by the United States was criticized not on the basis of the proposal to try alleged terrorists by such commissions *per se*, but rather due to the unilateral decision by the Bush Administration to label scores of individuals as "unlawful combatants." This distinction over the source of the criticism for the proposed use of military commissions by the United States is significant. At any rate, through 1 May 2003, the United States has not conducted any trials by military commission.

¹³ The discussion *infra* of the trial of General Stanislav Galic before the ICTY provides a good example of an on-going international trial where the accused is charged *inter alia* with inflicting terror. Although not a prosecution for "terrorism" *per se*, this case could have important ramifications for future international prosecutions.

¹⁴ Clifton M. JOHNSON, "Introductory Note to the International Convention for the Suppression of the Financing of Terrorism", 39 ILM 268, 2000.

¹⁵ *Id.*

¹⁶ Of course, these treaties provide the legal basis for States Parties to amend their criminal codes, as required pursuant to their national constitutions, in order for these treaties to provide the bases for criminal prosecution.

¹⁷ 10 ILM 133 (1971).

¹⁸ *Id.*, Art. 1 (emphasis added).

¹⁹ 10 ILM 1151 (1971).

²⁰ Article 2 of this treaty also criminalizes attempts and aiding and abetting in the form of accomplice liability.

²¹ UN Doc. A/RES/3166 (1974), 13 ILM 41 (1974).

²² *Id.*, Art. 1(a).

²³ *Id.*, Art. 1(b).

²⁴ *Id.*, Art. 1(c).

²⁵ *Id.*, Art. 1(d).

²⁶ *Id.*, Art. 1(e).

²⁷ UN Doc. A/C.6/34/L.23 (1979), 18 ILM 1456 (1979).

94

Attachment 3 to RE 30A
Page 10 of 11

²⁸ *Id.*, para. 1. Paragraph 2 of this treaty criminalizes attempts and aiding and abetting in the form of accomplice liability.

²⁹ Reprinted in "*International Criminal Law: A Collection of International and European Instruments*", Christine VAN DEN WYNGAERT and Guy SESSIONS, eds. Kluwer, 1996, p.55 *et seq.*

³⁰ See *id.*, preambular paragraph (a) for a definition of this term.

³¹ *Id.*, Art. 7(2).

³² *Id.*, Art. 7(1).

³³ 27 ILM 627 (1988).

³⁴ *Id.*, Art. 1.

³⁵ 27 ILM 668 (1988).

³⁶ *Id.*, Art. 1. It must be stressed that in order for any of these acts to be offenses under the treaty, the safe navigation of the vessel in question must be hindered by the act.

³⁷ *Id.*, Arts. 2(a) and (b).

³⁸ *Id.*, Art. 2(c). This provision provides: "Any person also commits an offense if that person threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offenses set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question"

³⁹ 27 ILM 685 (1988).

⁴⁰ U.N. Doc. A/Res/52/164 (1988). See also U.N. Doc. A/Res/51/210 (1996).

⁴¹ *Id.*, Art. 2(1).

⁴² *Id.*

⁴³ *Id.*, Art. 2(2).

⁴⁴ *Id.*, Art. 2(3).

⁴⁵ 39 ILM 268 (2000).

⁴⁶ "*Official Journal of the European Communities*", No. C 191, 29 July 1992, p. 1 *et seq.* as amended, see "*Official Journal of the European Communities*", No. C 340, 10 November 1997, p. 1 *et seq.*

⁴⁷ See Commission of the European Communities, "*Proposal for a Council Framework Decision on combating terrorism*" (presented by the Commission), Brussels, 19 September 2001, COM(2001) 521 final, 2001/0217 (CNS).

⁴⁸ "*Prosecutor vs. Stanislav Galic*", Case No. IT-98-29-PT, "*Prosecutor's Pre-Trial Brief Pursuant to Rule*" 65 *ter* (E)(i), 23 October 2001.

⁴⁹ *Id.*, para. 22.

⁵⁰ *Id.*, paras. 23-24.

⁵¹ *Id.*, para. 142.

⁵² Obviously, depending on the forum, the evidentiary and procedural issues (described in the following section) will vary.

⁵³ This may, of course, have a serious impact on either the fairness of the trial or in the public confidence of any judgement rendered, particularly if the shift in forum comes in mid-trial.

MILITARY COMMISSIONS AND TERRORISM

David Stoelting*
31 Denv. J. Int'l L. & Pol'y 427(2003)

[*427]

President George W. Bush's Military Order of November 13, 2001, issued just thirty-two days after the terrorist atrocities of September 11, 2001, pointedly adopted the language of war and, almost by fiat, declared that terrorism was a war crime. As a result, under the Military Order the light against terrorism became a "state of armed conflict" n1 and terrorist acts became "violations of the laws of war." n2

These designations abruptly erased long-held distinctions between terrorism and war crimes and represented a signal departure from pre-9/11 practice. More specifically, the Military Order has provided the theoretical underpinning for allowing foreign terrorists to be subject to trial by American military commissions. The consequence has been the largest expansion of the jurisdiction of military commissions in American history. n3

The novelty of using military commissions to try terrorists is apparent in several respects. First, unlike every other military commission ever created by the United States government, the Military Order, which is focused almost exclusively on terrorism, is designed to create tribunals not for war criminals but for terrorists. Next, terrorism and war crimes had been defined by different legal regimes. The Order, however, collapses their definitions and blurs longstanding distinctions. Finally, military commissions have never before been used to try terrorists. As a long line of U.S. Supreme Court and Attorney General Opinions demonstrate, military commissions had been restricted to members of an organized military force acting as an agent of a state or government.

Using military commissions to try terrorists, then, represents a stark departure previous practice and policy. As a result, because the commissions envisaged by the Order at last appear to be nearing realization (almost two years after the Order's issuance), the Supreme Court may have to decide the legality of this [*428] approach. And while the government will emphasize its duty to protect national security in a time of "war," it should at least be recognized that permitting military commissions to try terrorists is a radically different approach. Indeed, supporters of the Military Order could more credibly argue that the exigencies of September 11[su'11] led to a cataclysmic transformation of international law legitimizing what had previously been illegitimate. Better to acknowledge an arguably necessary shift in the legal landscape than to assert a dubious consistency.

I. The Military Order Creates a Forum For Trying Terrorists

In the immediate aftermath of September 11[su'11], the rhetorical and symbolic purposes of the Military Order were paramount. To begin with, the Order departed starkly from prior orders creating military commissions by focusing unambiguously on terrorism rather than violations of the laws of war. This is apparent from the face of the Order, which repeatedly mentions terrorism and terrorists and clearly is directed at persons accused of terrorist acts rather than war crimes. In the "Findings" section, for example, the Order states that "international terrorists" have committed "grave acts of terrorism" and that there is a risk of "further terrorist attacks." n4 Individuals "involved in international terrorism" may "undertake further terrorist attacks." n5 Military commissions are needed due to "the nature of international terrorism" for the "prevention of terrorist attacks." n6

The Military Order, therefore, introduced and formalized the militarization of America's response to terrorism. It repudiated the idea that terrorism is strictly a criminal justice problem and, more importantly, established the legal basis for a long-term military approach to the problem of terrorism. By embracing the notion that terrorist acts are war crimes, the Military Order provided a conceptual context that sought to legitimate overwhelming force in response. Moreover, the Order delivered this message of resolve at the outset of the military response to terrorism. As a result, those suspected of terrorism during the length of this unending war are subject to what no foreign terrorist has ever faced before: an American military tribunal staffed by U.S. soldiers as judges, no habeas corpus option and no right of appeal to civilian courts.

The text of the Military Order demonstrates its single-minded emphasis on terrorists rather than war criminals. Section 2 of the Order, describing the persons eligible for trial by military commissions, does not state that war criminals are to be subject to the commissions. Instead, the persons to be tried pursuant to the Military Order are any individual who "is or was a member of the organization known as al Qaida" and any individual who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" designed to harm "the United States, its citizens, national security, foreign policy, or economy." n7 The Military Order also permits trial by military [*429] commission of any individual who has "knowingly harbored" current and former members of al Qaida or other persons that have engaged in, aided or abetted of conspired to commit terrorism. n8

The Military Order's ideological purposes were further evidenced by the fact that at the time of its promulgation there was no apparent intent to actually create commissions. Although various rules and regulations regarding the operation of the commissions have

Attachment 4 to RE 30A

been released in the twenty months after the issuance of the Order, there has been no urgency to try persons by the commissions authorized by the Order. This is unusual. Other Presidential orders resulted in the formation of panels within a short period of time. For example, the German saboteurs prosecuted pursuant to President Roosevelt's order in 1942 were already in custody when the order was issued. n9 Within a two-month period, the saboteurs were captured, the military commission was ordered and completed its proceedings, the U.S. Supreme Court heard oral arguments and upheld the legality of the trial, and the Germans were executed. In contrast, almost two years after the Order, only preliminary steps toward actually using the commissions have been taken, further suggesting that the rhetorical purposes of the Order, at least initially, were paramount.

II. Acts of Terrorism Have Not Been Considered Offenses Triable By Military Commissions

Military tribunals, not being courts of general jurisdiction, may only adjudicate crimes to the extent authorized to do by an act of Congress or the common law of war. The legitimacy of terrorists being tried by military commissions according to the Military Order, therefore, depends on whether such authorization exists either in a federal statute or in the laws of war. If neither Congress nor the laws of war permits such trials, any commissions created pursuant to the Military Order may be perceived as lacking legitimacy. n10

Regarding the first point, plainly Congress has never authorized military commissions to try terrorists. No U.S. statute permits military commissions to try terrorists. The statutory authority cited in the Military Order, Section 821 of the Uniform Code of Military Justice (UCMJ) does not state that military tribunals can be used to try terrorists. Instead, it simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war. The statute itself states that it "does not deprive military [*430] commissions ... of concurrent jurisdiction [with courts-martial] with respect to offenders or offenses that by statute or by the law of war may be tried by military commission." n11

In the absence of statutory authorization, the question becomes whether the law of war, also known as international humanitarian law, permits such prosecutions. As the U.S. Attorney General opined in 1918, military courts cannot try individuals who are "not a member of the military forces" unless they are "subject to the jurisdiction of such court under the laws of war or martial law." n12 Thus, the issue is whether the laws of war, which traditionally has defined the jurisdiction of American military commissions, can be stretched to encompass terrorism. As shown below, while not entirely mutually exclusive, the acts of terrorism committed by al Qaeda and other groups that are the focus of the Order cannot generally be fit into the definitional framework of international humanitarian law.

The question of whether terrorism can be defined as a war crimes and therefore come within the jurisdiction of military commissions, largely depends on whether terrorism can be defined as an "international armed conflict." The most universally accepted definition of war crimes, recognized in federal statutes n13 and elsewhere, is the "grave breaches" provisions of the four Geneva Conventions of 1949. n14 The Geneva Conventions require an "armed conflict which may arise between two or more of the High Contracting Parties" as a threshold requirement. n15 Isolated attacks over a period of years by persons associated with freelance terrorist networks unaffiliated with any government, however, generally have not been defined as an armed conflict. Thus, the threshold requirement for application of the Geneva Conventions - an "armed conflict" - is not satisfied by a conflict between one High Contracting Party (the United States) and a transnational network of terrorists (al Qaeda).

Violations of Common Article 3 of the Geneva Conventions, which apply to non-international armed conflicts taking place within the territory of a High Contracting Party, might be considered war crimes and therefore subject to military commissions. n16 However, Common Article 3 has traditionally been viewed as applying to an armed conflict between rebel or insurgent groups and a [*431] government. The Military Order, moreover, focuses on international rather than domestic crimes. The disconnect between terrorism and the armed conflict requirement is also underscored by the unending nature of the "war on terrorism," its worldwide geographic scope and its applicability to a limitless number of parties.

These problems are compounded by the indeterminacy and controversy over the definition of terrorism. Although multilateral treaties have been concluded defining terrorism largely in terms of specific actions such as airline hijacking, hostage-taking and bombings, n17 a comprehensive treaty definition remains elusive. The notorious subjectivity of defining terrorism, therefore, further suggests an incompatibility between the scope of war crimes and terrorism.

Yet another distinction relates to the fora in which the two crimes are prosecuted. Terrorism prosecutions largely remain a prerogative of domestic courts, while war crimes are prosecuted by both domestic courts (including military courts) and international tribunals. The United States, for example, while applying an assortment of anti-terrorism provisions in the United States Code to convict foreign terrorists in federal district courts, also supports war crime prosecutions by the international criminal tribunals in The Hague and elsewhere. n18 In addition, during the drafting of the Rome Treaty on the International Criminal Court in 1996-1998, the United States vigorously opposed the inclusion of terrorism within the ICC's jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorism cases.

This dichotomy is apparent in the fact that military tribunals have never before been used to try terrorists unaffiliated with an enemy government. Indeed, as discussed in Part III below, Supreme Court precedent endorses military jurisdiction over soldiers and agents of

enemy states, but not over civilians. The President's Military Order departs from this precedent by authorizing the military trial of foreign civilians suspected of engaging in, or conspiring to commit, acts of international terrorism.

III. The Supreme Court Has Never Approved the Use of Military Commissions to Try Foreign Terrorists

Prior to 9/11, the United States had not used military commissions to try foreign civilians unconnected to enemy armies. Instead, military commissions [*432] have tried persons acting on behalf of, or at the direction of, a foreign government. n19 The Military Order does not require that defendants have any governmental connection. Quite to the contrary, the Order permits the prosecution of persons acting wholly independent of any government or conventional military group. Its very purpose is to provide a forum for a wide range of persons that have never before been prosecuted by military tribunals: foreign terrorists unaffiliated with any government.

Although the Military Order is sui generis, its advocates argue that the precedent approving military commissions in other contexts justifies the trial of terrorists by military commissions. As the White House Counsel argued shortly after the issuance of the Military Order, "the use of such [military] commissions has been consistently upheld by the Supreme Court." n20 In fact, the Supreme Court has never upheld the use of military commissions to try foreign terrorists. The Court's jurisprudence only holds that military commissions may try foreign citizens that act on behalf of a country at war with the United States. n21 The Court has also been suspicious of overly broad jurisdiction for military tribunals.

The Quirin and Yamashita cases are frequently cited for the proposition that foreign terrorists may be properly tried by military tribunals. Neither case, however, involved a foreign terrorist, and both involved persons acting as agents of an enemy government in a declared war against the United States. In Quirin, the defendants were agents of a foreign government during a declared war against the United States. They landed on the American coast wearing German military uniforms, and "received instructions in Germany from an officer of the German High Command." n22 They were paid by the German government, and trained at a German "sabotage school." n23 The charging document stated that the defendants were "enemies of the United States and acting for ... the German Reich, a belligerent enemy nation." n24

Quirin variously refers to the defendants as "unlawful belligerents," "enemy belligerents," "unlawful combatants," and "enemy combatants." Nothing in Quirin, however, supports the argument that these categories can be expanded to include foreign terrorists who are not organized as a military force, and who operate independent of any government. The defendants in Quirin themselves were, of course, agents of an enemy government during a declared war. Moreover, of the "familiar examples" of enemy combatants referenced by the Court in dicta, such as "the spy" or one who "comes secretly through the [military] lines," none encompass foreign terrorists. n25 The Court cites examples of enemy combatants [*433] tried by military commissions from the Revolutionary War, the Mexican War, and the Civil War. In every instance, the enemy combatant was a member or agent of a conventional military force during a recognized armed conflict between two such military forces. n26

In Yamashita, the defendant was a Commanding General of the Imperial Japanese Army. n27 After Yamashita surrendered to the United States Army, General MacArthur ordered a military commission be convened to try him. The Supreme Court held that Yamashita was an "enemy combatant" and that the military commission was properly convened "pursuant to the common law of war." n28 The term "enemy combatant," however, was plainly used in Yamashita to connote a member of the organized military in a declared war against the United States. n29 Nothing in Yamashita supports the extension of the enemy combatant label to cover foreign terrorists. Indeed, the Court appears to limit its holding to violations of the laws of war during declared wartime:

The trial and punishment of enemy combatants who have committed violations of the law of war ... is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists - from its declaration until peace is proclaimed. n30

In Quirin and Yamashita, the Court used narrow language to uphold the jurisdiction of military commissions to try captured enemy soldiers during a declared war. These decisions nowhere provide direct support for the contention that military commissions may try terrorists. In contrast, Supreme Court decisions such as Milligan, Duncan and Reid (described below), limiting the authority of military commissions outside of the Quirin/Yamashita context, adopt broad language to restrict and limit the authority of military commissions to try civilians.

In Ex Parte Milligan, the Supreme Court held that a United States citizen could not be detained or imprisoned by the military absent a declaration of martial law. In granting Milligan's habeas corpus application, the Court held that "martial law, established on such a basis, destroys every guarantee of the Constitution and effectively renders the "military independent of and superior to the civil power." n31 Similarly, in Duncan v. Kahanamoku, the Court ruled that a civilian held by the military, when the civilian courts were open and functioning, [*434] cannot be tried by a military tribunal. n32

The Court again articulated the principle that military jurisdiction over civilians should be limited, not expanded, in Reid v. Covert. n33 In Reid, the Court held that the military could not exercise criminal jurisdiction over civilian defendants accused of murdering soldiers stationed overseas. The Court stated that "the Founders envisioned the army as a necessary institution, but one dangerous to liberty if

not confined within its essential bounds." n34 Reid, moreover, puts to rest the argument that Milligan is no longer good law in view of Quirin. n35 In Reid, the Supreme Court, fifteen years after Quirin, described Milligan as "one of the great landmarks in this Court's history." n36

In addition, prior Opinions of the United States Attorney General do not approve military commissions in the absence of a declaration of martial law, or when the accused is a civilian not charged with war crimes. n37 For example, in 1918 the U.S. Attorney General opined on the status of Pable Waberski, an agent of the German government sent to the United States to "blow things up." n38 Applying Milligan, the Attorney General distinguished between an "act of war" and a "crime," and concluded that the acts of espionage of which Waberski was accused did not qualify as violations of the laws of war. n39 As a result, Waberski could not be tried by a military tribunal:

In this country, military tribunals, whether courts-martial or military commissions, can not [sic] constitutionally be granted jurisdiction to try persons charged with acts or offences [sic] committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. n40

The issue of international personality informed another Attorney General Opinion approving trial by military commissions over the Mood Indian tribe. n41 The Attorney General found it appropriate to apply the rules of war to such conflicts because the Indian tribes "have been recognized as independent communities for treaty-making purposes" and are capable of engaging in "a negotiation for peace after hostilities." n42 Al Qaida, in contrast, is not recognized as ["435] having the ability to engage in international treaties or peace talks.

The clarity of Milligan, Duncan and the Attorney General Opinions underscores the fact that, before 9/11, members of al Qaida were not considered "enemy combatants" and the United States was claimed to be in an "armed conflict" with al Qaida. This consensus existed even though it was known that al Qaida and bin Laden had planned and executed a series of deadly terrorist attacks against American targets; that bin Laden had issued a religious edict calling for Americans to be murdered; and that al Qaida planned future attacks against the United States. n43 Moreover, even absent the "enemy combatant" or "armed conflict" designations, the U.S. was not been prevented from undertaking military strikes against terrorist targets when necessary. The United States did so against Libya in 1985, against Iraq in 1993, and against Sudan and Afghanistan in 1998.

After September 11[su'th], however, Quirin and Yamashita were resurrected in support of the U.S. government's argument that the response to 9/11 qualifies as a "time of war" and that foreign terrorists are "enemy combatants." These designations were intended to legitimize not only the use of military tribunals against foreign terrorists, but also the indefinite detention by military authorities of U.S. and foreign citizens in the United States and in Guantanamo Bay.

IV. Conclusion

Certainly the laws of war should to some extent conform to changing circumstances and not remain static. It is also true, however, that international humanitarian law should not be infinitely malleable to suit any circumstance and that our commitment to the rule of law should not be self-serving. As the Supreme Court stated in Yamashita, "we do not make the laws of war but we respect them." n44 Before September 11[su'th], the United States regularly lambasted other countries for trying terrorists before military tribunals. Now, however, this is described as criticism of "the process and not the forum." n45 If the United States is to embark now on military trials of foreign civilians, the legal justification for this unprecedented step needs to be clearer. Continuing to justify such trials as consistent with "internationally accepted practice with deep historical roots" n46 will undermine their legitimacy. Absent a greater degree of consensus on the legality of such measures, the United States should not champion military trials of civilians as an acceptable international norm.

FOOTNOTES:

* Of the New York Bar; Immediate Past Chair, Committee on International Criminal Law, ABA Section of International Law and Practice; Chair, Committee on African Affairs, Association of the Bar of the City of New York. This article arises from a paper delivered on March 23, 2002, as part of the Sutton Colloquium at the University of Denver College of Law. I am grateful to the organizers of the Colloquium, including Prof. Ved P. Nanda, Prof. Michael Scharf and Prof. Paul Williams. The views expressed herein are solely those of the author.

n1. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

n2. Id.

n3. See William H. Taft, Remarks at the OSCE Human Dimension Implementation Meeting (Sept. 10, 2002) ("The act of detaining enemy combatants is not an act of punishment. Rather, it is intended first and foremost to prevent enemy combatants from continuing to fight.") (transcript available at <http://www.osce.org/odihr/hdim/2002/doc/speech<uscore>1.pdf>).

n4. Military Order, *supra* note 1.

n5. *Id.*

n6. *Id.*

n7. *Id.*

n8. Military Order, *supra* note 1.

n9. Appointment of Military Commission, 7 *Fed. Reg.* 5103 (July 2, 1942).

n10. The Military Order relies upon the President's authority as Commander in Chief and the Authorization for Use of Military Force Joint Resolution, 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001). The President's authority as Commander in Chief to create military commissions, however, must be exercised consistently with the laws of war. As to the Joint Resolution, it authorized the use of force, not the creation of military commissions to try terrorists. It has been argued that authorizing military force against terrorism necessarily includes authorizing military trial of terrorists. There is no evidence, however, that Congress intended to approve military commissions, which had never been used previously to try terrorists.

n11. 10 U.S.C. 821 (2003). See also *Ex Parte Vallandigham*, 68 U.S. 243, 249 (1863) ("Military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war").

n12. Trial of Spies by Military Tribunals, 31 U.S. Op. Att. Gen. 356, 364.

n13. See War Crimes Act of 1996, 18 U.S.C. 2441 (defining war crimes to mean, *inter alia*, any conduct (1) defined as a grave breach under the Geneva Conventions; (2) prohibited by Hague Convention IV; (3) that violates common Article 3 of the Geneva Conventions; or (4) willfully kills or seriously injures civilians through mines or booby-traps).

n14. Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516; Protection of War Victims: Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Protection of War Victims: Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217.

n15. *Id.* at art. 2.

n16. *Id.* at art. 3.

n17. See Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, treaty doc. 100-19.

n18. See *United States v. Bin Laden*, 92 F. Supp.2d 189 (S.D.N.Y. 2000) (upholding extraterritorial reach of U.S. criminal statutes to persons accused of bombing U.S. Embassies in Kenya and Tanzania); *United States v. Rahman*, 189 F.3d 88, 160 (2d Cir. 1999) (affirming convictions following nine-month jury trial of ten defendants for "seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism"); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of four defendants who assisted in bombing of World Trade Center).

n19. E.g., *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950) (German citizens acting "in the service of German armed forces in China" were properly convicted of violating the laws of war following trial by military commission).

n20. Alberto R. Gonzales, Martial Justice, Full and Fair, N.Y. Times, Nov. 30, 2001, at A27.

n21. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1.

n22. *Ex Parte Quirin*, 317 U.S. 1, 7-8 (1942).

n23. *Id.*

n24. *Id.* at 15.

n25. *Id.* at 12.

n26. Quirin lists the following persons as "familiar examples" of "offenders against the law of war subject to trial and punishment by military tribunals": Major Andre, an officer of the British Army; T.E. Hogg, who had been "commissioned, enrolled, enlisted or engaged" by the Confederate Army; John Y. Beall, who held a commission in the Confederate Navy; Robert C. Kennedy, a Captain of the Confederate Army; William Murphy, a "rebel emissary"; and other "soldiers and officers 'now or late of the Confederate Army.'" *Id.* at n. 9, n. 10.

n27. *In re Yamashita*, 327 U.S. 1, 4 (1946).

n28. *Id.* at 19.

n29. *Id.*

n30. *Id.* at 11 (emphasis added).

n31. *Ex Parte Milligan*, 71 U.S. 2, 124 (1866).

n32. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

n33. *Reid v. Covert*, 354 U.S. 1 (1957).

n34. *Id.* at 23-24.

n35. In *Quirin*, Attorney General Biddle disparaged *Milligan* by arguing that "the English courts have ... long since rejected the doctrine of *Ex parte Milligan*." *Quirin*, 317 U.S. at 26.

n36. *Reid v. Covert*, 354 U.S. 1 at 30.

n37. See *Military Commissions*, 11 *Op. Att'y Gen.* 297 (1865) (approving trial by military tribunal of assassins of President Lincoln because at "time of the assassination a civil war was flagrant ...[and] Martial law had been declared").

n38. *Trial of Spies by Military Tribunals*, 31 *Op. Att'y Gen.* 356 (1918).

n39. *Id.*

n40. *Trial of Spies by Military Tribunals*, 31 *Op. Att'y Gen.* 356 (1918).

n41. *The Modoc Indian Prisoners*, 14 *Op. Att'y Gen.* 249 (1873).

n42. *Id.*

n43. See generally Exec. Order No. 13,129, (July 4, 1999) (declaring a national emergency due to finding that Afghanistan was being "used as a safe haven and base operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals"); Mark E. Kosnik, *The Military Response to Terrorism*, *NWC Rev.* (Spring 2000) available at <http://www.nwc.navy.mil/press/review/2000/spring/art1-sp0.htm> (last visited Mar. 3, 2003).

n44. *Yamashita*, 327 U.S. at 15.

n45. Pierre-Richard Prosper, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Statement Before the Senate Judiciary Committee (Dec. 4, 2001).

n46. *Id.*



Rome Statute of the
International Criminal Court

[as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999]

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Attachment 5 to RE 30A
Page 1 of 5

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death

Attachment 5 to RE 30A

or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel

Attachment 5 to RE 30A

using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

Attachment 5 to RE 30A

Page 4 of 5

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Attachment 5 to RE 30A

Page 5 of 5

9/27/2004

Patterns of Global Terrorism 1999

U.S. Department of State, April 2000

Introduction

The US Government continues its commitment to use all tools necessary—including international diplomacy, law enforcement, intelligence collection and sharing, and military force—to counter current terrorist threats and hold terrorists accountable for past actions. Terrorists seek refuge in “swamps” where government control is weak or governments are sympathetic. We seek to drain these swamps. Through international and domestic legislation and strengthened law enforcement, the United States seeks to limit the room in which terrorists can move, plan, raise funds, and operate. Our goal is to eliminate terrorist safehavens, dry up their sources of revenue, break up their cells, disrupt their movements, and criminalize their behavior. We work closely with other countries to increase international political will to limit all aspects of terrorists’ efforts.

US counterterrorist policies are tailored to combat what we believe to be the shifting trends in terrorism. One trend is the shift from well-organized, localized groups supported by state sponsors to loosely organized, international networks of terrorists. Such a network supported the failed attempt to smuggle explosives material and detonating devices into Seattle in December. With the decrease of state funding, these loosely networked individuals and groups have turned increasingly to other sources of funding, including private sponsorship, narcotrafficking, crime, and illegal trade. This shift parallels a change from primarily politically motivated terrorism to terrorism that is more religiously or ideologically motivated. Another trend is the shift eastward of the locus of terrorism from the Middle East to South Asia, specifically Afghanistan. As most Middle Eastern governments have strengthened their counterterrorist response, terrorists and their organizations have sought safehaven in areas where they can operate with impunity.

The amended law requires the Department of State to report on the extent to which other countries cooperate with the United States in apprehending, convicting, and punishing terrorists responsible for attacking US citizens or interests. The law also requires that this report describe the extent to which foreign governments are cooperating, or have cooperated during the previous five years, in preventing future acts of terrorism. As permitted in the amended legislation, the Department is submitting such information to Congress in a classified annex to this unclassified report.

Definitions

No one definition of terrorism has gained universal acceptance. For the purposes of this report, however, we have chosen the definition of terrorism contained in Title 22 of the United States Code, Section 2656f(d). That statute contains the following definitions:

- The term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant¹ targets by subnational groups or clandestine agents, usually intended to influence an audience.
- The term “international terrorism” means terrorism involving citizens or the territory of more than one country.
- The term “terrorist group” means any group practicing, or that has significant subgroups that practice, international terrorism.

The US Government has employed these definitions of terrorism for statistical and analytical purposes since 1983.

Domestic terrorism is a more widespread phenomenon than international terrorism. Because international terrorism has a direct impact on US interests, it is the primary focus of this report. Nonetheless, the report also describes, but does not provide statistics on, significant developments in domestic terrorism.

Contents

Introduction	iii
The Year in Review	1
Africa Overview	3
Angola	3
Ethiopia	6
Liberia	6

¹ For purposes of this definition, the term “noncombatant” is interpreted to include, in addition to civilians, military personnel who at the time of the incident are unarmed or not on duty. For example, in past reports we have listed as terrorist incidents the murders of the following US military personnel: Col. James Rowe, killed in Manila in April 1989; Capt. William Nordeen, US defense attache killed in Athens in June 1988; the two servicemen killed in the La Belle discotheque bombing in West Berlin in April 1986; and the four off-duty US Embassy Marine guards killed in a cafe in El Salvador in June 1985. We also consider as acts of terrorist attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the site, such as bombings against US bases in Europe, the Philippines, or elsewhere.

Attachment 6 to RE 30A
2 of 2

including the AUMF and Sections 821 and 836 of Title 10, United States Code.³

e. In his Order, the President determined that “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁴

f. The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed”⁵ He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.⁶

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)⁷ and over offenses (violations of the laws of war and all other offenses triable by military commission).⁸ The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions”⁹

³ Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

⁴ 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).

⁵ *I.d.* at Section 2(a).

⁶ *I.d.* at Section 2(b).

⁷ Military Commission Order (MCO) No. 1, para. 3(A).

⁸ *I.d.* at para. 3(B).

⁹ *I.d.* at para. 8(A).

h. The General Counsel of the Department of Defense issued a series of Military Commission Instructions (MCIs) for trials by Military Commission. Included in these instructions is MCI No. 2 which addresses "Crimes and Elements for Trial by Military Commission," in which one of the enumerated crimes is "Terrorism." The elements of the crime of "Terrorism" are identified as follows:

- (1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;
- (2) The accused:
 - (a) intended to kill or inflict bodily harm on one or more persons;
 - or
 - (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
- (3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and
- (4) The killing or destruction took place in the context of and was associated with armed conflicts

Military Commission Instruction No. 2, para. 6B.2a.

i. On June 9, 2004, the Appointing Authority approved charges against the Accused including Conspiracy to Commit the Offense of Terrorism. Terrorism is an enumerated charge in MCI No. 2,¹⁰ and Conspiracy is an enumerated form of liability.¹¹ On June 25, 2004, the Appointing Authority referred the charges to the Military Commission for trial.

4. Legal Authority Cited.

- a. Military Commission Order (MCO) No. 1.
- b. Military Commission Instruction (MCI) No. 2.
- c. President's Military Order, 66 Fed. Reg. 222 (November 16, 2001).
- d. Articles 21 and 36 of the Uniform Code of Military Justice, 10 U.S.C. §§ 821, 836.
- e. Report of the Commission on Responsibilities, UN War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: HMSO, 1948).

¹⁰ MCI No. 2, para. 6(B)(3) and (4).

¹¹ *Id.* at para. 6(C)(6) and (7).

- f. Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington D.C.: US Government Printing Office, 1949).
- g. *Kriangsak Kittichaisaree, International Criminal Law (2001)*.
- h. *Trial of Shigeki Motomura and others*, 13 Law R. Trials War Crim. 138.
- i. United States Field Manual No. 27-10: The Law of Land Warfare (Washington D.C.: Department of the Army) (1956).
- j. United Kingdom Manual of Military Law, Part III: The Law of War on Land (London: The War Office, HMSO) (1958).
- k. International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000.
- l. <http://untreaty.un.org/English/Terrorism.asp>
- m. *Madsen v. Kinsella*, 343 U.S. 341, 346-7 (1952)
- n. *Ex Parte Quirin*, 317, U.S. 1 (1942).
- p. *Hamdi, et.al. v. Rumsfeld, Secretary of Defense, et. al.*, (124 S.Ct. 2633, 2639 (2004).
- q. 18 U.S.C. §2332. Homicide.
- r. 18 U.S.C. §2332a. Use of certain weapons of mass destruction.
- s. 18 U.S.C. §2332b. Acts of terrorism transcending national boundaries.
- t. 18 U.S.C. §2332f. Bombing of public use, government facilities, public transportation systems and infrastructures.
- u. 18 U.S.C. §2339. Harboring or concealing terrorists.
- v. 18 U.S.C. §2339A. Providing material support to terrorists.
- w. 18 U.S.C. §2339B. Providing material support or resources to designated foreign terrorist organizations.
- x. 18 U.S.C. §2339C Prohibitions against the financing of terrorism.

5. Discussion. The Defense moves to strike “terrorism” from Charge 1 because terrorism is not an offense under the law of war and Congress has not enacted legislation making terrorism an offense triable by military commission. This argument is without merit.

a. Terrorism is an Offense under International Law

Terrorism is a violation of international law, both as a violation of the law of war and conventional law addressing specific aspects of terrorism. Terrorism is also a violation of U.S. law.

Acts of terrorism as a violation of laws of armed conflict were first codified in 1945 in **The Australia’s War Crimes Act of 1945**. That was followed by **Article 33 of the 1949 Geneva Convention IV, Article 51(2) of the Additional Protocol I and Article 4(d) and 13 sub-paragraph 2 of Additional Protocol II to the Geneva Conventions of 1949**. The concept of “terrorism” as a chargeable war crime was contemplated, as early as 1919 by the Commission on Responsibilities, a body created by the Preliminary Peace conference of Paris to inquire into the breaches of the laws and

customs of war committed by Germany and its allies during World War I.¹² The Australia's War Crimes Act of 1945, which criminalized "systematic terrorism," credited the work of the Commission on Responsibilities.¹³

In 1945, the concept of terrorism was again discussed at the London Conference, which was assembled to negotiate the formation of the International Military Tribunal (IMT). In fact, the British delegation went so far as to propose specific language criminalizing terror against civilians in the context of armed conflict.¹⁴ Interestingly, the proposed language does not significantly depart from the definition contained in MCI No. 2.

While terrorism as a crime was not specifically included in Article 6 of the Nuremberg Charter of 1945, the elements of terrorism can be seen in the offenses that were included in the Charter designed to prosecute and punish those who would commit offenses against civilians, that is, war crimes and crimes against humanity. Among the war crimes that incorporated elements of terrorism were: murder of the civilian population, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. The crimes against humanity that address elements of terrorism included: murder and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal. *Kriangsak Kittichaisaree, International Criminal Law p. 87 (2001)*.

The first conviction for a "terror charge" by a tribunal was delivered in July 1947 in Makassar in the Netherlands East-Indies (N.E.I.), now known as Indonesia. The offenses alleged in *Motomura*¹⁵ were charged in the indictment as

systematic terrorism against persons by the Japanese of punishable acts ... this systematic terrorism taking the form of repeated, regular and lengthy torture and/or ill-treatment, the seizing of men and women on the grounds of wild rumors, repeatedly striking them ... the aforesaid acts having led or at least contributed to the death, severe physical and mental suffering of many.¹⁶

¹² See On the Commission on Responsibilities, see UN War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: HMSO, 1948), CH.III and id at 15.

¹³ *Id.*

¹⁴ The tribunal shall have the power to try, convict and sentence any person who has, in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts namely:[...]

2. Systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians

3. Launching or waging war in a manner contrary to the laws, usages and customs of warfare and who is hereby declared therefore to be personally answerable for the violations of international law, of the laws of humanity, and of the dictates of public conscience, Reproduced in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington D.C.: US Government Printing Office, 1949), p.312.

¹⁵ *Trial of Shigeki Motomura and others*, 13 Law R. Trials War Crim. 138 ("Motomura case").

¹⁶ *Id.* at pp.138-9.

13 of the 15 accused were convicted of systematic terrorism practiced against civilians for acts including unlawful mass arrests.¹⁷ Seven of those convicted were sentenced to death and the rest to prison sentences ranging from 1 to 20 years.¹⁸

With this background, the nations that drafted the Geneva Conventions of 1949 adopted the offense of terrorism into the fourth Geneva Convention for the protection of civilian populations. Article 33 of that Convention states in part: “No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of **terrorism** are prohibited.” (Emphasis added.)¹⁹

In the 1970s, *terrorism* was included in the two additional protocols to the Geneva Conventions of 1949. Article 51(2) of Additional Protocol I, relating to international armed conflict, prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.” Article 4.2(d) of Additional Protocol II, relating to internal conflicts, prohibits acts of terrorism against civilians. And Article 13.2 of this same Protocol states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

More importantly, the first modern International Criminal Tribunal since the Second World War charged with addressing violations of the laws of war, the International Criminal Tribunal, Yugoslavia (ICTY), tried and convicted a former military officer of “attacking civilians with the intent of inflicting terror.” The crimes charged in this case (*Prosecutor v. Stanislav Galic*, ICTY Case No. IT-98-29-T (December 5 2003)) includes violations of Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949, under Article 3 of the Statute of the Tribunal. *Galic*’s acts of terrorism during the period of 10 September 1992 to 10 August 1994 were described as conducting “a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population.” The Accused in this case is charged with conspiracy to commit terrorism for acts that occurred from January 2001 through December 2001. The elements of the charge of terrorism under MCI No. 2 and that of Article 3 of the ICTY statute both focus on the same underlying conduct of attacking civilians with the intent to inflict terror.

Additionally, the offense of terrorism as a violation of the laws of armed conflict for the protection of civilians in an international conflict and in a non-international conflict was further codified in 1994 when the statute of International Criminal Tribunal for Rwanda (ICTR) was promulgated by the United Nations Security Council and ratified by the General Assembly of the United Nations.

¹⁷ *Id.* at p. 140.

¹⁸ *Id.* at p. 140.

¹⁹ Armed forces manuals also incorporated the prohibition. See, for example, United States Field Manual No. 27-10: The Law of Land Warfare (Washington D.C.: Department of the Army), para. 272 (1956); United Kingdom Manual of Military Law, Part III: The Law of War on Land (London: The War Office, HMSO), para. 42 (1958).

Article 4(d) of the ICTR statute restates the prohibition on terrorism contained in Articles 4 and 13 of the Additional Protocol II. The ICTR has the power to prosecute persons committing serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular **murder** as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) **Acts of terrorism**;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h) Threats to commit any of the foregoing acts.

ICTR Statute, 25 May 1993. (Emphasis added).

In addition to *terrorism* being a violation of the laws of armed conflict, it is also proclaimed as an international crime in several international conventions dating from the 1970s to the present. These conventions address various aspects of international terrorism, such as financing of terrorism, and terrorist bombing. In defining terrorism, the conventions all address the same essential elements, primarily focused on violent attacks on civilian populations. For example, the 1999 International Convention for the Suppression of Financing of Terrorism,²⁰ adopted and ratified by 117 countries, including the United States,²¹ defines the criminal act of terrorism as an “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”²² The above elements mirror the elements of “Terrorism” found in MCI No. 2 with the exception of the requirement of a nexus to armed conflict.

The Accused in this case has been charged with an offense that is clearly a violation of the laws of armed conflict. Acts of terrorism have been considered as an offense under the law of war as early as 1919 and codified in Article 33 of the 1949

²⁰ International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000

²¹ Parties who have ratified *available at* <http://untreaty.un.org/English/Terrorism.asp>

²² *Id.*

Geneva Convention IV, Article 51(2) of Additional Protocol I, Articles 4(d) and 13 of Additional Protocol II, Article 3 of ICTY in 1993 and Article 4 of ICTR statute in 1994. Therefore, contrary to Defense's assertion, Terrorism is a cognizable offense under the laws of war, conventional law and international criminal law. Accordingly, the charge of conspiracy to commit terrorism, a violation of the law of war, is triable by a military commission.

b. Individuals Subject to Trial by Military Commission Can be Charged with Terrorism as a Violation of United States Domestic Law.

Military commissions have been part of the system of laws of the United States since the founding of our country and are the appropriate forum for the prosecution of unlawful combatants for violations of the laws of war and other offenses. The use of military commissions has been consistently approved by the United States Supreme Court and confirmed by Congress. Nothing in the legislative or judicial history of military commissions defines or limits which statutory offenses may be charged at the present Military Commissions.

As the Supreme Court of the United States stated, “[a] military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.” Thus, “[i]t has been adapted in each instance to the need that called it forth.” *Madsen v. Kinsella*, 343 U.S. 341, 346-7 (1952). (Emphasis added). In discussing the inclusion of the President’s authority to create military commissions as part of the Articles of War, the Court stated “[i]f Congress intended to *depart* from that longstanding practice by subjecting the commissions to a rigid and uniform set of procedures—tying the President’s hands during times of war in the process—it surely would have done so more plainly. *See id.* at 346 n.9. (“The commission is simply an instrumentality for the more efficient execution of the war power vested in the President as Commander-in-chief in war.” *Id.*)

The relevant provisions of the Articles of War were restated, without change in the Uniform Code of Military Justice (found in Title 10 of the U.S. Code). Section 821 of that Code states, in relevant part, that “...offenses that by statute or by the law of war may be tried by military commissions.”

Pursuant to his authority, the President ordered the establishment of military commissions to try detainees for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on “the authority vested in [him] . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and Sections 821 and 836 of Title 10, United States Code.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter “Military Order”).

On 13 November 2001, the President ordered the Secretary of Defense “[to] take all necessary measures to ensure that any individual subject to this order is detained ...

and tried in accordance with section 4” of the order.²³ Pursuant to the President’s order, the Secretary of Defense issued MCO No. 1, which is consistent with the President’s Military Order, establishing jurisdiction over violations of the law of war and all other offenses triable by military commissions.

In accordance with the President’s order, Secretary of Defense directed the General Counsel of the Department of Defense to issue instructions consistent with the PMO and the MCO No. 1. Accordingly, the General Counsel issued crimes and elements which states, in relevant part, that:

The following crimes and elements thereof are intended for use by military commissions established pursuant to [MCO No. 1] and [PMO], the jurisdiction of which **extends to offenses or offenders that by statute or the law of armed conflict** may be tried by military commission as limited by the [PMO].

MCO No. 2 3(A) (Emphasis added.)

At a minimum, the provisions of U.S. law that would be triable by military commissions would include those sections that have been promulgated as part of U.S. obligations under international conventions and that have extra-territorial application. Such offenses would include those sections of Title 18 of the U.S. Code that reflect the U.S ratification of terrorism conventions or otherwise address international acts of terrorism, including: 18 U.S.C. §2332 (Homicide); 18 U.S.C. §2332a (Use of certain weapons of mass destruction); 18 U.S.C. §2332b (Acts of terrorism transcending national boundaries); 18 U.S.C. §2332f (Bombing of public use, government facilities, public transportation systems and infrastructures); 18 U.S.C. §2339 (Harboring or concealing terrorists); 18 U.S.C. §2339A (Providing material support to terrorists); 18 U.S.C. §2339B (Providing material support or resources to designated foreign terrorist organizations); and U.S.C. §2339C (“Prohibitions against the financing of terrorism”). All of these offenses have extraterritorial application. Further, they share the basic elements definition of terrorism contained in the international conventions – an act intended to cause death or serious bodily injury to a civilian, where the purpose is to intimidate a population, or to compel a government or an international organization to do or assistance abstain from doing any act or to otherwise support or assist those who commit terrorist acts.

The elements in the above-listed offenses also mirror the elements of **Terrorism** under MCI No. 2. In addition, the acts contained in the U.S. statutes were also recognized as criminal offenses under international law at the time the Accused allegedly

²³ 66 Fed. Reg. 222 (November 16, 2001), Section 4(a) states:

Any individual subject to this order shall, be tried by military commission **for any and all offenses triable by military commission** that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

committed his crimes. Accordingly, in addition to violations of the laws of war, the Accused may be charged with certain violations of the United States Criminal Code.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA)	
)	
	)	DEFENSE REPLY ON MOTION
	)	TO STRIKE THE WORD
v.	)	"TERRORISM" FROM
	)	CHARGE 1: TERRORISM
DAVID M. HICKS	)	IS NOT AN OFFENSE TRIABLE
	)	BY MILITARY COMMISSION
)	

27 October 2004

The defense in the case of the *United States v. David M. Hicks* requests that the military commission strike the word "terrorism" from Charge 1, as terrorism is not an offense under the law of war, and states in support of this reply:

1. **Synopsis:** Terrorism is not an offense under the law of war, and is therefore not triable by military commission.
2. **Facts:** The motion requires a response to a question of law, relating to the law of war.
3. **Discussion:**

The defense moved to strike the word "terrorism" from Charge 1 because there is no international crime of "terrorism" under the law of war. In response, the prosecution did not produce one international statute with the same elements as those contained in Military Commission Instruction (MCI) No. 2.

MCI No. 2 attempts to create an offense out of the descriptive term of "terrorism." The prosecution seeks to support MCI No. 2 with case law in which courts had discussed the "concept" of terrorism. However, the prosecution fails to point out that this "concept" was never adopted as a substantive offense. In fact, in all the cases the prosecution cites, "terrorism" as defined in MCI 2 was implicitly rejected as a substantive criminal offense. For example, the prosecution cites the London Conference in 1945, however, the London Conference did not adopt an offense of "terrorism."

It is the prosecution's position that the elements of "terrorism" in MCI No. 2 are similar to the offenses that were included in the Nuremberg charter. In actuality, this position is further evidence that there is no offense of "terrorism" in international law. The Nuremberg tribunals did not try anyone for "terrorism." There was no need to do so, because the conduct that the government would label as "terrorism" was already criminalized in other specific offenses the tribunals tried

The prosecution also cites the phrase "acts of terrorism" contained in various documents as supporting their argument that there exists a separate offense of "terrorism." These documents do not support their case. The phrase "acts of terrorism" is used in a descriptive way to represent a group of distinct offenses. The phrase is used in a similar way to the phrase "white collar crime," which describes a group of offenses ranging from fraud to embezzlement.

Review Exhibit 300

Page 1 of 4

In addition, the prosecution seeks support from the trial of *Shigeki Motomura and 15 Other*,¹ because the word “systemic terrorism” was used. Again, even a cursory reading of the case will demonstrate that the phrase “systemic terrorism” was used only as a label, and therefore not as a separate substantive offense under international law. The Court in *Motomura* used the term “systemic terrorism” to label numerous acts of torture and ill-treatment against civilians and military personnel. Those underlying acts of torture and ill-treatment were used to terrorize the population, but it was the underlying acts, not the motive that was the criminalized conduct. Furthermore, the acts in the case of *Motomura* had actually been committed--the case did not involve a “conspiracy” to commit the acts of torture and ill-treatment. *Motomura* therefore provides no support for a charge of “conspiracy” to commit terrorism. Moreover, the charge against Mr. Hicks is further distinguishable from the charges in *Motomura* because the charge against Mr. Hicks does not allege that he committed any specific acts of terrorism himself.

Finally, the prosecution cites the ICTY case of *Prosecutor v. Stanislav Galic*² which addressed the offense of attacking civilians. The ICTY did not determine that an offense of “terrorism” existed in international law. The court specifically stated that it was not addressing “[w]hether the crime of terror has a foundation in customary law . . .” As such, *Galic* does not support the argument that there exists a general offense of “terrorism.” Furthermore, the prosecution incorrectly compares the *Galic* case to Mr. Hicks’ case by failing to take into account the significantly different legal circumstances that underpinned the indictment of Mr. Galic and the jurisdiction of the ICTY.

The conduct which was the focus of the *Galic* case took place during a conflict which both parties agreed would be governed by Additional Protocol I to the 1949 Geneva Conventions.³ Article 51 of that Protocol sets out prohibitions aimed at protecting civilians during an international armed conflict. In the *Galic* case, the Court considered only whether Mr. Galic had committed the offense as provided for under Protocol I, and did not consider whether he had committed an offense under any other laws.

The Court in *Galic* specifically stated that it was not taking a position with respect to whether attacking civilians with the intent of inflicting terror amounted to an offense under customary international law. The Court emphasized that it was not deciding whether the offense of “terror in a *general* sense falls within the jurisdiction of the Tribunal, but only whether a *specific* offence of killing and wounding civilians in time of armed conflict with the intention to inflict terror on the civilian population, as alleged in the Indictment, is an offence over which it has jurisdiction.”⁴ The finding of the Court in this case, therefore, has no bearing upon this specific issue that is before the commission-- whether “terrorism” as an offense in itself is a violation of the laws of war, as they applied in Afghanistan at the time of the alleged conduct of Mr. Hicks.

¹ 13 Law R. Trials War Crim. 138.

² ICTY Case No. IT-98-29-T (5 December 2003).

³ See the discussion of the “22 May Agreement” which made the Additional Protocol applicable to the conflict: id, paras 67-8.

⁴ *Galic*, paragraph 87.

The Court found that “terror” was only an element of the offense that Mr. Galic was charged with. “Terror” or “terrorism” was not an offense itself; it was merely an aggravating factor, related to the offense of attacking civilians. The Court found that “the prohibition against terror is a specific prohibition **within** the general prohibition of attack on civilians” (emphasis added). It recognized that the infliction of terror was an **element** of the criminal offense of attacking civilians, and not a criminal offense itself. Furthermore, none of the precedents relied on by the Court involved “terror,” without a simultaneous attack on civilians.

As the offense of attacking civilians with the intent of inflicting terror was not enumerated within Article 3 of the ICTY Statute, the court had to analyze the charge and facts under the four *Tadic* conditions⁵.

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; and
- (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Applying these conditions to the charge of conspiracy to commit terrorism (i.e. Charge 1 against Mr. Hicks), this charge would fail to qualify as an offense under the ICTY. The charge against Mr. Hicks fails to allege a violation of international humanitarian law (whether under international customary law or treaty law) in effect at the time of the alleged offense. Further, it fails to specify the international humanitarian law upon which the alleged violation is based. Moreover, the prosecution does not allege any acts that resulted in death or injury.⁶ To meet the *Tadic* conditions, the alleged criminal act must be serious. In *Galic*, the court found that this condition was met because the accused had participated in actual shelling and sniping of civilians “resulting in death and injury of civilians” Finally, the fourth condition can not be met because the ICTY does not recognize conspiracy as a basis for individual criminal responsibility.

D: Conclusion

At the time that Mr. Hicks allegedly conspired to commit an act of “terrorism,” there was no recognized substantive offense of terrorism under international criminal law or the law of war. Therefore, despite the attempt by the President and the Department of Defense to give this military commission jurisdiction to try Mr. Hicks for a charge of conspiracy to commit “terrorism,” the military commission does not have the required subject-matter jurisdiction to do so.

4. **Evidence:** The testimony of expert witnesses.

⁵ *Tadic*, ICTY case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995.

⁶ *Galic*, paragraph 108.

Review Exhibit 30C

Page 3 Of 4

5. **Relief Requested:** The defense requests that the word "terrorism" be struck from Charge 1.
6. The defense requests oral argument on this motion.

By:

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

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 30C

Page 4 Of 4

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**PROPOSED ESSENTIAL FINDINGS
DEFENSE MOTION TO STRIKE
TERRORISM
(D20)**

The Prosecution submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense used his properly delegated authority pursuant to section 7A of Military Commission Order No. 1 and issued Military Commission Instruction (MCI) No. 2.
2. MCI No. 2 establishes crimes and elements that are intended for use by this Military Commission.
3. The crimes and elements listed in MCI No. 2 are derived from the law of armed conflict, which is also commonly referred to as the law of war.
4. The crime of Terrorism is delineated in section 6B of MCI No. 2 in the section titled "Substantive Offenses – Other Offenses Triable by Military Commission."
5. The conduct constituting the offense of Terrorism, as delineated in MCI No. 2, was a violation of the law of armed conflict prior to January 1, 2001, the inception date of the Accused's alleged misconduct. Based on the requirement to apply and to act consistently with commission law, and finding that there is nothing in the elements of Terrorism delineated in MCI No. 2 or as contained in the charge sheet to be inconsistent with the law of armed conflict, the motion to strike the word "terrorism" from Charge 1 is denied.



KURT J. BRUBAKER
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 30-D

Page 1 Of 1

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**Defense Motion to Dismiss for
Lack of Jurisdiction: Commission
System Will Not Afford a Full and
Fair Trial**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of the charges against Mr. Hicks, and in support thereof states the following:

1. **Synopsis:** The commission should dismiss the charges against Mr. Hicks because the procedures promulgated by the President in his Military Order of 13 November 2001 (PMO) and the Secretary of Defense in Military Commission Order No. 1 (MCO No. 1) for trials by military commission (hereinafter the "commission system") is based on an outdated system that abjectly fails to provide due process and/or substantive and procedural provision sufficient to guarantee the full and fair trial required by the PMO.

2. **Discussion:**

A: Introduction

The commission system described in the PMO and MCO No. 1, and designed for the trials of the Guantanamo detainees, including Mr. Hicks, represents a giant step backward in time, both substantively and procedurally. The construction of the commission system to try Mr. Hicks for alleged criminal conduct denies him basic and fundamental rights recognized in both the civilian and military justice systems in the U.S.

The commission system bears a striking resemblance to the system in place prior to the advent of the Uniform Code of Military Justice (UCMJ) – a system rejected a half-century ago as flawed and unfair. Furthermore, the commission system ignores procedures utilized in the early 1950's by the United Nations to govern Military Commissions of the United Nations Command, Korea (hereinafter the "Korean Commission Rules"). Those procedures, which themselves were not the equal of the UCMJ in terms of safeguarding rights, provided significantly more protection for the accused than does the current commission system.

The failure of the proposed commission system to incorporate the minimal protections for the accused provided by the Korean Commission Rules and the UCMJ makes it impossible for the commission to provide a full and fair trial as directed by the President. Accordingly, the charges against Mr. Hicks before this commission must be dismissed.

B: Pre-UCMJ Military Justice and Early Reform Efforts

Before enactment of the UCMJ, both the Naval and Military justice systems were seriously flawed. The systems were intended to secure obedience, and to ensure that soldiers and sailors served the commander's will.¹ Although both systems provided for courts-martial, they did not resemble today's military courts at all. Courts-martial were merely a tool of the commander to fulfill his intentions regarding discipline.² There was little, if any, relation to civilian criminal justice. Protecting the rights of the individual was not a primary purpose of the system.³ As a result, great injustices were done in the name of discipline.⁴

During WWII, more than sixteen million men and women served in the armed forces.⁵ Many of these individuals experienced military justice from one side or the other during their service. For many, the experience represented an injustice of considerable magnitude.⁶ As a result, many individuals and institutions lobbied Congress for changes to the system – highlighting flaws in the system including the fact that defense counsel were not lawyers; that law officers who presided over trials were not lawyers; and that there was no mechanism to review and correct trial errors and/or inappropriate and disproportionate sentences.⁷

In the years after WWII, there were some minor reforms aimed primarily at providing adequate appellate review for courts-martial. But it was not until 1948 that the pace of military justice reform quickened. With the creation of the U.S. Air Force, the

¹ John S. Cooke, *Article: Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 Mil. L. Rev. 1, 3 (2000).

² *Id.*

³ *Id.*

⁴ *See id.* at 5. One such tragic event in World War I (WWI) sparked interest in reforming the military justice system. In August of 1917 sixty-three soldiers were court-martialed on charges of mutiny and murder stemming from racially charged riots in Houston, Texas. Of the sixty-three soldiers tried, many were acquitted, others were sentenced to prison terms, and thirteen, all black, were sentenced to death by hanging. The sentences were carried out the day after the trial. No report or message about the trials or the impending sentence was sent to any superior unit, or to Washington, D.C. The soldiers were simply hanged in prompt compliance with the law as it existed at the time. However, this incident and others eventually received significant national attention that precipitated sweeping reform, including review of the courts-martial system. *Id.*

⁵ *See* DEP'T OF DEFENSE, *PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED: U.S. MILITARY PERSONNEL SERVING AND CASUALTIES 2* (2003), available at <http://www.dior.whs.mil/mmid/casualty/wcprincipal.pdf>. *See also* Cooke, *supra* note 1 at 6.

⁶ *See generally* Cooke, *supra* note 1 at 6 (During WWII, the services conducted over 2,000,000 courts-martial).

⁷ *Id.*

debate turned toward the need for a system of military justice for the armed forces as a whole.⁸ As a result, Congress enacted the Uniform Code of Military Justice in 1950. The enactment of the UCMJ heralded Congress' campaign to change the thrust of military justice from a command-dominated system to one that mirrored the civilian criminal justice system by emphasizing due process and fairness.⁹ The UCMJ instituted many notable changes to the system. It created the position of law officer--the forerunner of the military judge--so that a lawyer, rather than a line officer, presided over courts-martial.¹⁰ Under the UCMJ, the accused was for the first time afforded the right to be represented by a qualified attorney in general courts-martial.¹¹ The UCMJ also codified protections against self-incrimination fifteen years before the Supreme Court's decision in *Miranda v. Arizona*,¹² and codified other rules designed to ensure that only competent evidence reached the fact-finder. Nevertheless, serious problems still plagued the system.

C: Changes to UCMJ Since 1950: Independent Military Judiciary

Over the past 50 years, the UCMJ and military justice system have changed dramatically.¹³ The change that has had perhaps the most impact on the quality of justice dispensed at the trial level has been the creation, in 1968, of a dedicated trial judiciary. The improvements in the system ushered in by the creation of a dedicated military trial judiciary have resulted in a justice system notable for high quality courts-martial, the procedures of which comport with the requirements of international law, and the findings and sentences of which overwhelmingly withstand review on appeal.

Before 1968, the UCMJ provided a "law officer" to preside over courts-martial. The law officer was a judge advocate, designated as the "legal arbiter" for a court-martial.¹⁴ A member of the judge advocate's staff, and designated by the convening authority for each court-martial,¹⁵ the law officer possessed some power to rule on

⁸ *Id.* at 19.

⁹ *Id.* at 10.

¹⁰ *Id.* at 9.

¹¹ *Id.*

¹² 384 U.S. 436 (1966). See Cooke, *supra* note 1 at 10. See JOHNATHAN LURIE, *MILITARY JUSTICE IN AMERICA, THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* 40 (2001); Walter T. Cox, *The Army, the Courts and the Constitution: The Evolution of Military Justice*, 118 *Mil. L. Rev.* 1, 14 (1987).

¹³ See generally Cooke *supra* note 1. (BG Cooke's article details the development of military justice and the UCMJ from the year 1775 to 2000).

¹⁴ See JUDGE ADVOCATE GENERAL OF THE NAVY, *INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION*, 1152-3 (2000) (Mr. Larkin speaking before the House Committee on Armed Services March 31, 1949).

¹⁵ See JUDGE ADVOCATE GENERAL OF THE NAVY, *INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE: 50TH ANNIVERSARY EDITION* *supra* note 14, at 1152-4. See also THE U.S. ARMY

questions of law, to instruct the court members prior to their deliberation. The law officer would also rule on motions to dismiss or even declare mistrials, and rule on motions for dismissal, but the court members could overrule those decisions if they chose.¹⁶

During the first major overhaul of the UCMJ in 1968, Congress created the position of military judge to preside over court-martial proceedings.¹⁷ This was a major advancement for the military justice system.

The addition of the position of military judge in 1968 was not just a change in title, it was a revolutionary leap forward that gave the courts-martial enough power and authority to offset the influence commanders formerly exercised over the system.¹⁸ In creating the position of military judge, Congress raised the level of military justice practice to conform more closely to trial procedures in U.S. District Courts.¹⁹ It also enhanced the prestige and effectiveness of the judge advocates presiding over courts-martial, making their status equal to that of civilian trial judges.²⁰ The rulings of the military judge at trial were binding on the members, and sessions of court were controlled totally by the judge.²¹

Further enhancing the power of the military judge, the 1968 amendments to the UCMJ created a wholly independent trial judiciary.²² As stated above, before 1968, the convening authority designated the law officer for each court-martial. The law officer was subject to the convening authority's control and beholden to the chain of command for efficiency reports and discipline.²³ Since 1968, military judges have been free of

COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 233 (1985) (statement of MG Kenneth J. Hodson, The Judge Advocate General of the Army before the House Subcommittee on Armed Forces, September 14, 1967).

¹⁶ *Id.* at 1154.

¹⁷ *See Cox, supra* note 12, at 19.

¹⁸ *See Cooke, supra* note 1 at 13.

¹⁹ *See THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 supra* note 16 at 64.

²⁰ *Id.*

²¹ *See id.* *See also* Jacob Hagopian, *50th Anniversary of the UCMJ Series: The Uniform Code of Military Justice in Transition*, 2000 Army Law 1, 2-3 (July, 2000).

²² *See Cooke, supra* note 1 at 14.

²³ *Cf. THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 supra* note 16, at 230-231 (statement of Hon. Charles E. Bennett before House Subcommittee on Armed Forces, September 14, 1967, discussing merits of law officers not appointed by the convening authority). *But see, e.g.,* Eugene Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213, 1228 (1997) (discussing instances of cases where military judges independence was questionable).

those types of concerns because they are assigned by and directly responsible to the Judge Advocate General or his designee, the Chief of the Trial Judiciary.²⁴ As a result, accused service members need not worry that the person sitting on the bench has ulterior motives when hearing or presiding over cases.

In light of the system in place before 1968, the immense potential for error prejudicial to the accused inherent in a pre-1968 court-martial was manifest. Legal errors were common and the rights of the accused were often ignored.²⁵ Today, the presence of highly qualified military judges at courts-martial ensure that trials are conducted fairly and in accordance with the law, and the rights of the accused protected.²⁶

D: Similarities Between the Pre-1968 Justice System and the Military Commission System

The commission system is markedly, and regrettably, similar to the pre-1968 military justice system. For example, there is no judge. While the presiding officer is a former member of the military judiciary, he is not a judge. The commission as a whole acts as both finder of fact and finder of law. This is exactly the same situation that

²⁴ UCMJ art. 26(c) states:

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

UCMJ art. 26(c) (2002); *See also*, Cooke, *supra* note 1, at 14.

²⁵ *See id.* at 74-80 (committee discussions regarding problems with special courts-martial in which there was no judge or defense counsel. Congressman Bray highlighted a Marine Corps case where a Marine, later judged to be insane, was punitively discharged with a BCD).

²⁶ *See Weiss v. United States*, 510 U.S. 163, 194 (1994). Justice Ruth Bader Ginsberg stated,

The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate

Id. *See also* *Loving v. United States*, 517 U.S. 748 (1996). *See generally* Cooke, *supra* note 1, at page 9.

existed before 1968 when the “law officer,” who was a judge advocate, presided over courts-martial.

This framework was abandoned after 1968 because it was unworkable and unfair to the accused. In those situations in which court members chose to ignore the law officer, they did, often unfairly prejudicing the rights of the accused. However, in many cases the converse was true: the law officer, by virtue of his legal training and status, often ran roughshod over the members, exerting undue influence over their decisions and deliberations – again, often unfairly prejudicing the rights of the accused. This lack of consistency and predictability is a hallmark of a vague and arbitrary system that cannot withstand constitutional scrutiny.

In addition, the Presiding Officer in the military commission has been chosen by the Appointing Authority, a figure equivalent to the Convening Authority in the military justice system. Being so appointed, the Presiding Officer is completely beholden to the Appointing Authority, in this case not only for administrative matters, but indeed for his very presence on active duty as a military officer – in effect, his very position with the commission (and more broadly, with the Department of Defense). The appearance of and potential for unlawful command influence, prejudicial to the accused, is starkly evident in such a system. Such relationships between the authority empowered to convene military criminal tribunals and members of the tribunal were rejected as unfair and inappropriate over 35 years ago.

E: The Current Commission System Has Ignored U.N.-Approved Commission Rules

In 1953, the United Nations Command, Korea, formulated rules for trying individuals before military commissions for offenses associated with the United Nations operations on the Korean peninsula.²⁷ These rules provided significantly more protections for accused individuals than the current commission system. For example, the Korean Commission Rules explicitly stated that “[t]he order of proceedings of trial shall conform generally to that prescribed for general courts-martial . . . in the armed forces of the convening authority.”²⁸ For the United States, this rule signified that military commissions would have been run just like courts-martial.

Moreover, the Korean Commission Rules specified that “[t]hese commissions will follow the rules of evidence prescribed in the Manual for Courts-martial (MCM), United States, 1951 . . .” (emphasis added). This standard is vastly different from the standard for the proposed commission system. Even in 1951, the standards for admissibility of evidence were far more stringent than the pathetically weak and

²⁷ See U.N. SUPPLEMENTAL RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMMAND KOREA, 17 March 1953.

²⁸ See *id.*

imprecise “have probative value to a reasonable person” standard for admissibility set forth in the President’s Military Order of 13 November 2001.²⁹

The effect of such an evidentiary standard is obvious: it stacks the deck in favor of the prosecution, permitting introduction of incompetent and unreliable evidence as a substitute for the type of proof demanded by all justice systems, military and/or civilian, that treat fairness as a priority. It represents an unfortunate return to an outdated system that was jettisoned for precisely the reason that the current system is invalid: it promotes unfair proceedings that generates unjust results.

F: Conclusion

The archaic and discredited procedures the Department of Defense has adopted for the trial of Mr. Hicks by this commission are not congressionally sanctioned. Their use in this important case--one in which Mr. Hicks faces life imprisonment--would represent a miscarriage of justice arguably unparalleled in the history of United States military jurisprudence. The commission system, as currently constructed, will not afford Mr. Hicks a full and fair trial. Accordingly, it does not comport with the PMO, and lacks jurisdiction to try Mr. Hicks.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Relief Requested:** The defense requests that the commission dismiss all charges against Mr. Hicks.

6. **Evidence:** Attachments:

1. United Nations Supplemental Rules of Criminal Procedure for Military Commission of the United Nations Command, Korea (1953).

²⁹ The 1951 MCM contained “. . . rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . , and prohibited hearsay evidence, involuntary confessions, and confessions obtained after confinement and deprivation of privileges. See MCM, United States, 1951 pg. 236-297.

7. **Oral Argument:** The defense requests oral argument on this motion.

By: 
M.D. MORI
 Major, U.S. Marine Corps
Detailed Defense Counsel

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

**U.N. Supplemental Rules of Criminal Procedure for Military
Commissions of the United Nations Command, Korea**
(Revised thru 17 March 1953)

SECTION I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. SCOPE OF RULES. These rules shall govern all Military Commissions of the United Nations Command conducting trials of prisoners of war charged with postcapture offenses, all reviews of such trials, and the submission and action upon all petitions for New Trial.

RULE 2. PURPOSE AND CONSTRUCTION OF RULES. These rules are intended to provide for the just determination of all proceedings; they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable delay.

SECTION II. THE COMMISSIONS

RULE 3. TYPES. There shall be two types of Military Commissions for the trial of prisoners of war for postcapture offenses: Special Military Commissions and General Military Commissions.

RULE 4. JURISDICTION OVER PERSONS. These Commissions shall have jurisdiction over all prisoners of war who are in the custody of the convening authority at the commencement of the trial and during the arraignment.

RULE 5. JURISDICTION OVER OFFENSES. These Commissions shall have jurisdiction over all postcapture offenses, including but not limited to, all violations of the laws and cus-

Attachment 1 to RE 31A
Page 1 of 7

toms of war, all violations of the laws of the Republic of Korea, all violations of rules, regulations, or orders, applicable to prisoners of war, promulgated by the Commander-in-Chief, United Nations Command, or his authorized representatives, all violations of rules, regulations, or orders of prisoner of war camp commanders or their authorized representatives, and all other acts to the prejudice of good order and discipline among prisoners of war.

RULE 6. MEMBERSHIP OF COMMISSIONS.

a. *Appointment.* The members of each Military Commission will be appointed by the Commander-in-Chief, United Nations Command, or under authority delegated by him. Unless specifically provided in the delegation of authority, a commander to whom the authority to convene such commissions is delegated will not further delegate such authority.

b. *Number.*

(1) Each General Military Commission shall consist of not less than five members.

(2) Each Special Military Commission shall consist of one or more members but not more than three members.

c. *Designation.*

(1) The order appointing a General Military Commission shall designate a President and a Law Member. The same individual may be designated both President and Law Member.

(2) The order appointing a Special Military Commission shall designate a President.

d. *Eligibility.*

(1) Any commissioned officer of the armed forces of the United Nations Command, including any commissioned officer of the armed forces of the Republic of Korea, shall be eligible for membership on a Commission.

(2) The convening authority may, in his discretion, appoint as a member

of a Commission any civilian who is a citizen of any nation of the United Nations, including any citizen of the Republic of Korea.

e. *Representation.* Where an offense involves victims of more than one nation, each such nation, in the discretion of the convening authority, may be represented on the Commissions.

f. *Vacancies.* Any vacancy occurring among the members may be filled, or any additions to a Commission may be made, by the convening authority, but the substance of all proceedings had and evidence taken in the case then on trial shall be made known to the new member. The fact that the substance of all proceedings had and evidence taken in the case has been made known to the new member will be announced by the President of a Commission in open court.

RULE 7. QUALIFICATIONS OF MEMBERS OF COMMISSION.

a. *General.* The convening authority shall appoint to a Commission only persons competent to perform the duties involved and not disqualified by personal interest or prejudice; provided that no person shall sit as a member of a Commission in any case in which he is the accuser or investigator or in which he may be required as a witness for the prosecution...

RULE 14. POWERS OF THE COMMISSIONS.

a. *General.* The Commissions shall have power to impound money and property, compel the attendance and detention of witnesses, require witnesses to produce documents and property, punish for contempt, debar from practice before the Commission any

Attachment 1 to RE 31A
Page 2 of 7

Counsel for cause subject to review by the convening authority, administer oaths and affirmations, and issue search warrants and warrants of arrest.

b. *Contempts.*

(1) A General Military Commission shall have the power to punish for contempt by imprisonment not exceeding six months, or by fine not exceeding \$500.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

(2) A Special Military Commission shall have the power to punish for contempt by imprisonment for one month or by fine not exceeding \$50.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

c. *Rules and Forms.* A Commission shall have the power to adopt supplementary rules and forms to govern its procedure, not inconsistent with the provisions hereof.

RULE 15. AUTHORIZED PUNISHMENT.

a. *General Military Commission.* A General Military Commission may sentence an accused, upon conviction, to death, to confinement at hard labor for life or for any lesser term, or such other punishment as the Commission shall determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

b. *Special Military Commission.* A Special Military Commission may not sentence an accused, upon conviction to confinement at hard labor for more than six months, but may sentence the accused to confinement at hard labor for six months or for any lesser term, as the Commission shall determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

c. *General.* The Table of Maximum Punishments or its equivalent, in effect in the armed forces of the nation of the convening authority, shall be used as a guide in determining proper punishment....

SECTION III. TRIAL

RULE 17. CONDUCT OF TRIAL. The Commissions shall confine each proceeding strictly to a fair, expeditious trial of the issues raised, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference; hold public sessions except when otherwise required by the dictates of military necessity; hold each session at such time and place as it shall determine, or as may be directed by the convening authority.

RULE 18. TRIAL PROCEDURE. The order of proceedings of trial shall conform generally to that prescribed for general courts-martial, or its equivalent, in the armed forces of the nation of the convening authority. A suggested guide for procedure before Military Commissions is attached as Annex A.

RULE 19. JOINT AND COMMON TRIALS. Two or more persons may be tried together wherever jointly charged in any specification. Common trials may be held if two or more accused are alleged to have participated in the same act or acts, or in related acts, or in the same series of acts, constituting an offense or offenses.

RULE 20. PRESENCE OF LAW MEMBER. A General Military Commission shall not receive evidence upon any matter, nor shall it vote upon its findings or sentence, in the absence of the Law Member. When the Law Member is absent at any time during the trial, the Commission will adjourn until the Law Member is present or a New Law Member is appointed.

RULE 21. PROSECUTIONS AND PROCESS. All prosecutions before the Commissions shall be conducted, and all process returnable to such Commissions shall issue, under the authority of the United Nations.

RULE 22. CHARGES AND SPECIFICATIONS.

Attachment 1 to RE 31A
Page 3 of 7

a. *Nature and Contents.* Charges and specifications shall be based on personal knowledge, or information and belief, and signed under oath by a member of the armed forces of the United Nations Command. Each charge and specification shall consist of a plain, concise, and clear statement of the essential facts constituting the offense charged.

b. *Surplusage.* A Commission may strike surplusage from the charges and specifications, and should do so when such action is plainly indicated.

c. *Amendments.* A Commission may permit the charges and specifications to be amended at any time before the findings, if no additional offense is charged and if the substantial rights of the accused are not prejudiced thereby.

d. *Bill of Particulars.* A Commission may direct in its discretion that the prosecution file a Bill of Particulars. A Bill of Particulars may be amended at any time subject to such conditions as justice requires....

RULE 24. PRESENCE OF THE ACCUSED. The accused shall be present at all times during the trial, except during any period of escape from custody after arraignment. The accused's presence shall not be required upon any review of his case, nor upon consideration of any petition for a New Trial.

RULE 25. SPECIFIC RIGHTS OF THE ACCUSED.

a. *Service of Charges.* Upon reference for trial, the accused shall be furnished a copy of the charges and specifications against him. If the charges and specifications are stated in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

b. *As a Witness.*

(1) The accused shall be entitled to remain silent, or, at his own request but not otherwise, to be sworn to testify as a witness in his own behalf, or to make an oral unsworn statement to the Commission.

(2) The Law Member of a General Military Commission or the President of a Special Military Commission may, at the request of the accused, permit him to testify as a witness for a limited purpose only, excepting therefrom all testimony relative to the issue of his guilt or innocence.

(3) The accused shall be entitled to testify as a witness in his own behalf with respect to less than all the offenses charged against him, in which case he may not be questioned about any offenses concerning which he does not testify.

c. *Representation by Counsel.*

(1) The accused shall be entitled, if he so desires, to assistance by one of his prisoner comrades in the conduct of his defense, and to be represented prior to and during trial by Counsel appointed by the convening authority, or by available Counsel of his own choice.

(2) The accused shall be entitled to reasonable opportunity to consult with his Counsel before and during the trial.

(3) The accused shall be entitled to representation by Counsel until completion of all appellate review on his case or until the expiration of the time during which he may submit a petition for a New Trial, whichever is later.

d. *Defense Witnesses.* An accused shall be entitled to call witnesses to testify in his behalf and to have all reasonable facilities in this regard extended to him.

e. *Cross Examination.* The accused shall be entitled to cross examine, personally or through Counsel, each adverse witness who personally appears before the Commission.

Attachment 1 to RE 31A
Page 4 of 7

f. *Challenges.*

(1) Each accused shall be entitled, except as otherwise provided herein, to challenge any member of the Commission for cause, and to present evidence relative to such challenge.

(2) Each accused shall, except as otherwise provided herein, be entitled to one peremptory challenge.

g. *Interpretation for Accused.* The accused shall be entitled to have the substance of the proceedings and any documentary evidence translated when he is unable otherwise to understand them, and, in addition, the accused shall be entitled, if he deems it necessary, to the services of a competent interpreter.

RULE 26. PRIVILEGES AND FACILITIES AFFORDED DEFENSE COUNSEL. Advocate or Counsel conducting the defense on behalf of the accused, upon trial, review, and consideration of a petition for a New Trial, shall have at his disposal the reasonably necessary facilities to prepare the defense of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defense, including prisoners of war.

RULE 27. TIME OF TRIAL.

a. *Limitation on Commencement of Proceedings.* Trial shall not commence until the expiration of a period of at least three weeks from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross, the Prisoners' representative, and the accused of the notice required by Rule 53, below.

b. *Preparation of Defense.* No trial shall commence until the Advocate or Counsel conducting the defense on behalf of the accused shall have had at his disposal a period of at least two weeks to prepare the defense of the accused.

c. *Timely Selection of Individual Defense Counsel.* An accused shall be afforded reasonable opportunity before trial to secure Counsel of his own choice, but no court shall be prevented from proceeding because of the inability of an accused to secure Counsel of his own choosing.

RULE 28. PRELIMINARY MOTIONS. Prior to trial, both prosecution and defense will furnish opposing Counsel copies of any preliminary motions to be made to the Commission....

RULE 30. CHALLENGES.

a. *For Cause.* No challenges for cause may be asserted in the case of trial by a Special Military Commission consisting of only one member.

b. *Peremptory.* No peremptory challenge may be asserted against the Law Member of a General Military Commission, nor in the case of trial by a Special Military Commission, consisting of only one member.

RULE 31. RELIEF FROM PREJUDICIAL JOINDER. For good cause shown, a Commission may, in its discretion, grant a severance in the case of a joint or common trial, or provide whatever other relief justice requires.

RULE 32. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. The accused shall be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution.

Attachment 1 to RE 31A
Page 5 of 7

RULE 33. EVIDENCE. These commissions will follow the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951....

RULE 37. VOTING.

a. *Findings and Sentence.*

(1) All voting on the findings and sentence shall be by secret written ballot.

(2) The concurrence of at least two-thirds of the members of the commission present at the time the vote is taken shall, except as provided herein, be necessary for conviction and for sentence.

(3) The concurrence of at least three-fourths of the members of the Commission present at the time the vote is taken shall be required for any sentence to life imprisonment or confinement in excess of ten years.

(4) The concurrence of all the members of the Commission present at the time the vote is taken shall be required for any death sentence....

SECTION VI. MISCELLANEOUS

RULE 46. DOUBLE JEOPARDY. No accused shall be punished more than once for the same act or on the same charge pursuant to United Nations authority.

RULE 47. EX POST FACTO OFFENSES. No person shall be tried pursuant to these Rules for an act which was not forbidden by recognized law in effect at the time the said act was committed.

RULE 48. OFFICIAL POSITION AND SUPERIOR ORDERS. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Action pursuant to the order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if a Commission determines that justice so requires.

RULE 49. PRINCIPALS AND ACCESSORIES. Anyone who commits any of the offenses defined in Rule 5, or who aids, abets, counsels, commands, permits, induces, or procures its commission, is a principal; and anyone who causes an act to be done, which, if directly performed by him, would be an offense under Rule 5, is also a principal and punishable as such....

RULE 53. NOTICE OF TRIAL.

a. *Persons Upon Whom Served.* Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate shall be notified at the address previously indicated by him to the convening authority, as soon as possible and at least three weeks prior to trial, that judicial proceedings will be instituted against the accused. The prisoner's representative and the accused shall be similarly notified.

b. *Contents of Notice.* The notice required by Rule 53a, above, shall contain the following information: (1) surname and first name of the accused, his rank, his army, regimental, personal, or serial number, his date of birth, and his profession or trade, if any; (2) place of internment or confinement; (3) specification of the charge or charges on which the accused is to be arraigned, giving the legal provisions applicable; (4) designation of the Commission which will try the case, likewise the date and place fixed for the opening of the trial.

c. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case.

Attachment 1 to RE 31A
Page 6 of 7

RULE 54. PARTICIPATION OF INTERNATIONAL COMMITTEE OF THE RED CROSS.

a. *Presence at Trial.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate, if present, shall be entitled to attend all trials held pursuant to these Rules unless the proceedings are held in camera for purposes of state or military security. (No proceedings in camera will be held, however, without the concurrence of the Commander-in-Chief, United Nations Command, or his successor.)

(2) Where such Delegate has requested permission to attend proceedings to be held in camera, this request will be communicated immediately to Headquarters, United Nations Command. Attention: Command Judge Advocate.

b. *Selection of Counsel.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, the convening authority shall furnish such Delegate, on request, a list of available persons qualified to present the defense.

(2) Failing a choice of Counsel by the accused, the Delegate of the International Committee of the Red Cross, if requested, may select available Counsel for him and shall have at his disposal at least one week for such purpose.

(3) In the event that both the accused and International Committee of the Red Cross Delegate fail to select Counsel, the accused shall be represented by the Defense Counsel designated in the order appointing the Commission.

(4) Where the accused or the International Committee of the Red Cross Delegate retains individual Counsel to represent the accused, the Defense Counsel named in the order appointing the Commission may be excused from the proceedings or retained as advisory, associate, or assistant Defense Counsel, at the option of the accused.

Attachment 1 to RE 31A
Page 7 of 7

e. In his Order, the President determined that “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁴

f. The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed”⁵ He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.⁶

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)⁷ and over offenses (violations of the laws of war and all other offenses triable by military commission).⁸ The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions”⁹

h. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom, and on or about January 12, 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

i. On February 7, 2002, the President of the United States issued a memorandum in which he determined that none of the provisions of the Geneva Conventions “apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a high contracting party to Geneva.” (President’s memorandum dated February 7, 2002, attached)

j. The President determined that the Accused is subject to his Military Order on July

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.

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 commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

⁴ 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).

⁵ *Id.* at Section 2(a).

⁶ *Id.* at Section 2(b).

⁷ Military Commission Order (MCO) No. 1, para. 3(A).

⁸ *Id.* at para. 3(B).

⁹ *Id.* at para. 8(A).

3, 2003.

k. The Appointing Authority approved the charges in this case on June 9, 2004 and on June 25, 2004 referred the same to this military commission in accordance with commission orders and instructions. The case was thereafter docketed to be heard at the U.S. Naval base at Guantanamo Bay, Cuba.

l. On June 28, 2004, a plurality of the Supreme Court of the United States, in the case of *Hamdi v. Rumsfeld*, reaffirmed that “the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, ‘by universal agreement and practice’, are ‘important incident[s] of war.’” 124 S.Ct. 2633, 2639 (2004).

4. Legal Authority.

- a. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)
- b. Madsen v. Kinsella, 343 U.S. 341 (1952)
- c. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999) (citing United States v. Ayala, 43 M.J. 296 (1995), and United States v. Stombaugh, 40 M.J. 208 (1994))
- d. The President’s Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.
- e. Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003)
- f. Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1)a (hereinafter MCI No. 9)
- g. 10 U.S.C §821
- h. 10 U.S.C. §836
- i. International Criminal Court, Statute, Article 69 (Available at <http://www.un.org/law/icc/statute/romefra.htm>)
- j. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 89 (Available at <http://www.un.org/icty/legaldoc>)
- k. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 89 (Available at www.icttr.org/english/rules)

5. Discussion.

Contrary to the Defense assertions, military commissions have been part of the system of laws of the United States since the founding of our country and are have been sanctioned as an appropriate forum for the prosecution of unlawful combatants for violations of the laws of war and other offenses. The use of military commissions has been consistently approved by the United States Supreme Court and confirmed by Congress.

The Defense motion presents a somewhat interesting history of the development of the UCMJ over the last half-century, but addresses little relevant to the case in hand, that is, whether the procedures accorded by Commission Law are supported by legal precedent and whether they meet with standards of fundamental fairness. A review of precedent and of the procedures accorded reveal that the Defense assertions are completely unfounded. Many of the arguments made by the Defense in this motion are addressed in the Prosecution Response to Defense Objection to the Structure and Composition of the Panel, which we incorporate by reference and will avoid repeating. We will briefly touch upon the Defense's objections in this response.

a. Military Commissions Accord the Accused Basic and Fundamental Rights.

The Defense, in its motion, makes the claim that the Military Commission procedures deny the accused basic and fundamental rights recognized in both the civilian and military justice systems in the U.S. and the 1950 United Nations (UN) military commissions. Other than the reference to the use of a presiding officer instead of a judge, the Defense fails to give any specific examples of which fundamental rights are not provided or why the Accused is entitled to any procedures of the 1950 UN military commissions as a matter of law.

The President has broad authority to define the structure and procedures of military commissions. *Madsen v. Kinsella*, 343 U.S. 341 (1952). The structure and procedure he directs do not have to accord with a 1950 UN military commission. The real question is whether the present procedures afford the Accused with a fundamentally fair trial, which they do. Procedures accorded an accused under the Military Commission process match fundamental aspects of both the U.S. and international systems. A review of Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003) (hereinafter MCO No. 1) shows that individuals subject to trial by the military commissions have all of the rights recognized as necessary for a full and fair process. Persons accused of crimes are assigned counsel at no cost or may choose another available defense counsel ("one or more Military Officers who are judge advocates of any United States armed force"). *Id.* § 9.4(c)(2). An accused person may also retain a civilian attorney of choice at no expense to the United States government, provided that such attorney meets certain criteria. *Id.* § 9.4(c)(2)(iii)(B). Once charged, the Accused will receive a copy of the charges "sufficiently in advance of trial to prepare a defense, be presumed innocent until proven guilty and be found not guilty unless the offense is proved beyond a reasonable doubt. *Id.* §§ 9.5(a), (b), (c). The prosecution must provide the defense "with access to evidence [it] intends to introduce at trial" and to "evidence known to the prosecution that tends to exculpate the Accused." *Id.* § 9.5(e). The Accused is permitted but not required to testify at trial, and the Commission may not draw an adverse inference from a decision not to testify. *Id.* § 9.5(f). The Accused "may obtain witnesses and documents for [his] defense, to the extent necessary and reasonably available as determined by the Presiding Officer," *id.* § 9.5(h), and may present evidence at trial and cross-examine prosecution witnesses, *id.* § 9.5(i). In addition, once a Commission's finding on a charge becomes final, "the Accused shall not again be tried" for that charge. *Id.* § 9.5(p).

Further, the military commissions are directed to provide for a "full and fair trial," to "[p]roceed impartially and expeditiously," and to "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer[.]" *Id.* §§ 9.6(b)(1),(2),(3).

Once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must “transmit the authenticated record of trial to the Appointing Authority,” *id.* at § 9.6(h)(1), which “shall promptly perform an administrative review of the record of trial,” *id.* § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are “administratively complete,” the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers, at least one of whom has experience as a judge. *Id.* § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel “has formed a definite and firm conviction that a material error of law occurred.” *Id.* § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1) (hereinafter MCI No. 9).

On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt “be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense” and (2) the sentence imposed “be approved, mitigated, commuted, deferred, or suspended.” MCI No. 9, § 4C(1)b. “An authenticated finding of Not Guilty,” however, “shall not be changed to a finding of Guilty.” MCO No. 1, 32 C.F.R. § 9.6(h)(2). The Secretary must review the trial record and the Review Panel’s recommendation and “either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition,” if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission’s findings or “change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof.”

All of the rights set forth above meet the requirements of fundamental fairness recognized in both national systems and international treaties.

b. The role of the Presiding Officer is not determinative of whether the Accused will receive a fair trial conducted in accordance with the law.

This again is nothing more than a speculative complaint by the Defense. The Defense provides no specific facts or law in support of its conclusion, other than that the United States does not use a presiding officer any longer for Courts-Martial. The point that the Defense ignores is that U.S. law authorizes the President to determine what rules of procedure and evidence should be implemented at military commissions. The recognition of the validity of this process by the Congress and U.S. Supreme Court is addressed fully in response to other Defense motions. The relevant facts are: the Presiding Officer is a judge advocate and former military judge, the members are senior military officers who have all, at one time or another, received training on military law and the Uniform Code of Military Justice, counsel for both parties are experienced judge advocates and, all of these individuals have been directed by the President and the Secretary of Defense to ensure that the proceedings are “full and fair.” The role of the Presiding Officer is but one part of the process. It will require the diligent exercise of their obligations by all of the individuals involved in the process – just as it does in any legal system – to ensure that fairness and justice prevail.

c. The Presiding Officer is not subject to unlawful command influence.

Once again, the Defense assertions are nothing more than speculation. To raise the issue of unlawful command influence in good faith, the Defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999)(citing United States v. Ayala, 43 M.J. 296 (1995), and United States v. Stombaugh, 40 M.J. 208 (1994)). Prejudice is not presumed until the Defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the trial. *Id.* The Defense has failed to produce any evidence that the Accused has suffered prejudice at the hands of the Presiding Officer.

d. The standard for admissibility at military commissions is appropriate and fair.

The Defense assertion that the standard for admissibility at the military commissions – evidence that would have probative value to a reasonable person – is “pathetically weak” and other such phrases is another unsupported and unwarranted allegation.

Research of the standards of admissibility in international criminal law or many national systems around the world reveals the fallacy of the Defense’s position. The “probative value” standard is the basic evidentiary standard for admissibility at the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It is also consistent with the standard of admissibility for civil law countries, such as France and Belgium. Moreover, the probative value standard is not inconsistent with common law standards of evidence, which provide that evidence must be relevant, *i.e.*, reliable and material. The bald assertion by the Defense that the impact of the probative value standard will be the introduction of incompetent and unreliable evidence is unsupported by way of example, citation, or proof of any form. The “fairness” of the military commission process will be determined by the application of the recognized rights and standards contained in the President’s order, MCO No. 1, and the Military Commission Instructions.

e. The procedures of the military commissions are Congressionally sanctioned.

As with the other unsupported assertions made by the Defence in this motion, the statement that the “archaic and discredited” procedures of the military commissions are not Congressionally sanctioned is wrong.

The jurisdiction of and procedures governing military commissions – which have tried *unlawful belligerents* since the earliest days of the United States – have been sanctioned by Congress. With the codification of the UCMJ in Title 10 of the U.S. Code, Congress specifically preserved the jurisdiction and procedures for military commissions in Article 21 as they have historically been recognized. As the Supreme Court recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), a case decided after the UCMJ’s enactment:

Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their*

*jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth. * * **

With this practice before them, the Committees of both Houses of Congress recommended the reenactment of Article of War 15 as Article 21 of the new code. They said, "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial."

Madsen, 343 U.S. at 346-347, 351 n.17 (emphasis added).

By enacting Articles 21 and 36, Congress made it clear that it wished to preserve the historical precedent that "the[] procedure" for military commissions has not been "prescribed by statute"; rather, "[i]t has been adapted in each instance to the need that called it forth." Madsen, 343 U.S. at 346-347. If Congress intended to *depart* from that longstanding practice by subjecting the commissions to a rigid and uniform set of procedures—tying the President's hands during times of war in the process—it surely would have done so more plainly. *See id.* at 346 n.9 ("The commission is simply an instrumentality for the more efficient execution of * * * the war power vested in the President as Commander-in-chief in war. * * * In general, [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require[.]" (quoting William Winthrop, *Military Law and Precedents* 831 (2d ed. 1920)))

Both the Supreme Court and Congress have had numerous opportunities to limit the jurisdiction of commissions, restrict the President's discretion or require specific rules and procedures, but have not, rather they have confirmed the President's authority and discretion. Congress has amended the UCMJ several times, and each time has confirmed, in Article 36, the President's authority and discretion to determine the rules of procedure and evidence applicable to military commissions.

6. Attached File. None.

7. Oral Argument. If Defense is granted oral argument, Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

9. Additional Information. None.

//Original Signed//


Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

)
)
) **Defense Objection to the Structure
and Composition of the
Commission**
)
)

)
) 9 September 2004
)
)

The Defense in the case of the *United States v. David M. Hicks* forwards to the Appointing Authority, the Defense's objection to the structure and composition of the military commission on the ground that, *inter alia*, it is not based on any established judicial system.

Discussion:

1. The military commission structure is invalid and is not based on any recognized legitimate system of civilian, criminal, international, or military law.
2. The commission system does not follow U.S. civilian or military jurisprudence, which provide for an independent judge to decide issues of law, and a jury to decide issues of fact.
3. The commission system does not have the composition established by international criminal tribunals, in which only trained legal professionals sit as adjudicators of both law and fact.
4. The structure of the military commission is not based on any existing legal system. It is more akin to the outdated pre-UCMJ court-martial system B a system that has been rejected by Congress and the evolving standards of military justice as reflected in the UCMJ.
5. A system that utilizes members untrained in the legal profession to decide issues of law is fundamentally flawed. This fatal deficiency is only compounded by the complex issues of international law and law of war that will be litigated in a process devoid of any substantive or procedural guidance, and which charges offenses not recognized by the law of war, and which have been created to operate retrospectively. These disciplines of the law require legal professionals with specific and sufficient education in these subject matters, a requirement that all current members lack.
- 6 This intractable problem with the Commission's composition is exacerbated by the presence of one lawyer B the Presiding Officer. The President's Military Order makes the equality among all members unmistakably clear, including the Presiding Officer. Yet the PO's unique status as a lawyer will inevitably exert undue influence on the other, non-lawyer, members with respect to their determination of legal issues (particularly since, as objected to in a separate submission, the PO, who himself lacks education in international law issues, intends to instruct the other members on the law). Thus, the Commission, with its two-tiered composition of one lawyer and four non-lawyers, improperly, and contrary to the PMO, positions the PO as a Agreater among equals.@

7. The use of the same members on four similar commissions only adds to the members= confusion. The members, uneducated in the subject matter, and untrained in the exercise of judicial responsibilities, cannot be expected to compartmentalize four cases B which are proceeding simultaneously B so that they can faithfully and effectively discharge their obligation to treat the legal and factual issues in each separately. Indeed, the common issues of law, and common mixed issues of law and fact, that each of the cases will present will preclude these inexperienced members from affording each accused the individualized determination of the issues to which he is entitled. Jurists are qualified in the abstract to hear similar cases and decide the law for each; jurors are *never* placed in the same position for obvious reasons that apply with more force here since they will also shoulder the burden of deciding legal issues, and mixed issues of law and fact.

Conclusion:

The Defense requests that all members be replaced with legal professionals who possess extensive experience in international criminal law and/or the law of war, including the Geneva Convention and other applicable international treaties and provisions.

M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



September 22, 2004

MEMORANDUM FOR Major M.D. Mori, Detailed Defense Counsel, *U.S. v. Hicks*

SUBJECT: *U.S. v. Hicks*: Defense Objection to the Structure and Composition of the Commission

On September 9, 2004, you submitted to the Appointing Authority for Military Commissions an objection to the structure and composition of the Commission in which you requested that all of its members be replaced with legal professionals possessing experience in international criminal law and the law of war.

The Military Commission Orders and Instructions do not provide the Prosecution or Defense Counsel an avenue through which to raise objections or file motions directly with the Appointing Authority. Military Commission Instruction (MCI) No. 8, Section 4(A) provides the only proper mechanism for consideration of such motions after the case has been referred to a Military Commission. Section 4(A) states that "the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate." Accordingly, your objection to the composition of the Commission must first be heard by the Presiding Officer.

Therefore, your request will not be considered by the Appointing Authority at this time.

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



FOR OFFICIAL USE ONLY

Review Exhibit 32-A
Page 3 of 7

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

)
)
) **Defense Objection to the Structure
and Composition of the
Commission**
)
)

)
) 9 September 2004
)
)

The Defense in the case of the *United States v. David M. Hicks* forwards to the Appointing Authority, the Defense's objection to the structure and composition of the military commission on the ground that, *inter alia*, it is not based on any established judicial system.

Discussion:

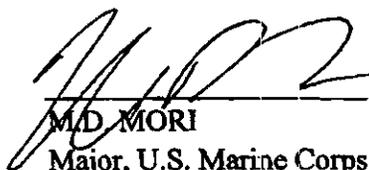
1. The military commission structure is invalid and is not based on any recognized legitimate system of civilian, criminal, international, or military law.
2. The commission system does not follow U.S. civilian or military jurisprudence, which provide for an independent judge to decide issues of law, and a jury to decide issues of fact.
3. The commission system does not have the composition established by international criminal tribunals, in which only trained legal professionals sit as adjudicators of both law and fact.
4. The structure of the military commission is not based on any existing legal system. It is more akin to the outdated pre-UCMJ court-martial system – a system that has been rejected by Congress and the evolving standards of military justice as reflected in the UCMJ.
5. A system that utilizes members untrained in the legal profession to decide issues of law is fundamentally flawed. This fatal deficiency is only compounded by the complex issues of international law and law of war that will be litigated in a process devoid of any substantive or procedural guidance, and which charges offenses not recognized by the law of war, and which have been created to operate retrospectively. These disciplines of the law require legal professionals with specific and sufficient education in these subject matters, a requirement that all current members lack.
6. This intractable problem with the Commission's composition is exacerbated by the presence of one lawyer – the Presiding Officer. The President's Military Order makes the equality among all members unmistakably clear, including the Presiding Officer. Yet the PO's unique status as a lawyer will inevitably exert undue influence on the other, non-lawyer, members with respect to their determination of legal issues (particularly since, as objected to in a separate submission, the PO, who himself lacks education in international law issues, intends to instruct the other members on the law). Thus, the Commission, with its two-tiered composition of one lawyer and

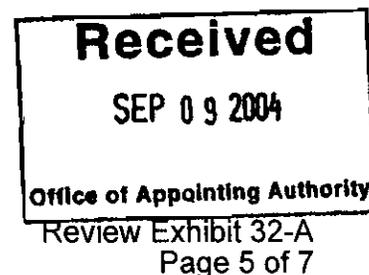
four non-lawyers, improperly, and contrary to the PMO, positions the PO as a "greater among equals."

7. The use of the same members on four similar commissions only adds to the members' confusion. The members, uneducated in the subject matter, and untrained in the exercise of judicial responsibilities, cannot be expected to compartmentalize four cases - which are proceeding simultaneously - so that they can faithfully and effectively discharge their obligation to treat the legal and factual issues in each separately. Indeed, the common issues of law, and common mixed issues of law and fact, that each of the cases will present will preclude these inexperienced members from affording each accused the individualized determination of the issues to which he is entitled. Jurists are qualified in the abstract to hear similar cases and decide the law for each; jurors are *never* placed in the same position for obvious reasons that apply with more force here since they will also shoulder the burden of deciding legal issues, and mixed issues of law and fact.

Conclusion:

The Defense requests that all members be replaced with legal professionals who possess extensive experience in international criminal law and/or the law of war, including the Geneva Convention and other applicable international treaties and provisions.


M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel



[REDACTED] DoD OGC

From: [REDACTED] DoD OGC
Sent: Monday, September 13, 2004 10:55
To: [REDACTED] CPT, DoD OGC
Subject: MAJOR MORI RESPONSE

Sir,

Major Mori said the "Defense Objection to the Structure and Composition of the Commission" is a separate objection besides the interlocutory question.

V/R

Craig E. Lyons

[REDACTED]

9/15/2004

Review Exhibit 32-A
Page 6 of 7

UNCLASSIFIED

**OFFICE OF THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
INTERNAL ROUTING AND TRANSMITTAL FORM**

THRU:	SUSPENSE: 9/20/04			
FOR:	ACTION OFFICER: CPT Connolly			
SUBJECT: Defense Objection to the Structure and Composition of the Commission COPY PROVIDED TO: _____ for info only _____ for info and comment.	ACTION OFFICER PHONE:			
	TASKER NO: 126			
<p>PURPOSE:</p> <p>DISCUSSION:</p> <p>RECOMMENDATION:</p> <p>APPROVED _____ DISAPPROVED _____ SEE ME _____</p>				
COORDINATION				
NAME	PHONE	CONCUR/NONCONCUR COMMENTS	INITIALS	DATE
DATE RECEIVED BY OAA:			ELECTRONIC FILE LOCATION: M:/MCAA/	

**IN THE UNITED STATES MILITARY COMMISSION
AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA	)	PROSECUTION RESPONSE TO DEFENSE OBJECTION TO THE STRUCTURE AND COMPOSITION OF THE MILITARY COMMISSION
)	
v.)	
)	
DAVID M. HICKS)	
	)	12 October 2004
)	

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.
2. Prosecution Position on Defense Motion. The Defense objection and requested relief should be denied.
3. Facts.

a. The President’s Military Order (PMO) of 13 November 2001, concerning the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,”¹ authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals “for any and all offenses triable by military commission.”² The Order does not establish the structure of commissions or qualifications of commission members, but delegates authority on such matters to the Secretary of Defense.³

b. In Military Commission Order No. 1 (MCO 1), and subsequent orders and instructions issued under his authority, the Secretary of Defense established procedures for the appointment of military commissions and set forth various rules governing the structure, composition, jurisdiction, and procedures for military commissions appointed under the PMO.⁴

c. MCO 1 specifies that each commission will consist of no less than three and no more than seven members. All members will be commissioned officers of the United States armed forces. The Appointing Authority (AA) shall personally select only those officers he determines to be “competent to perform the duties involved.”⁵ One of the

¹ President’s Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(*hereinafter* PMO).
² PMO §4(a).
³ PMO §6(a).
⁴ Military Commission Order No. 1 (Mar 21, 2002)(*hereinafter* MCO 1).
⁵ *Id.* ¶4.

members shall be designated as the Presiding Officer (PO) and must be a judge advocate of any U.S. armed force.⁶

d. The Accused was designated by the President for trial by military commission and charges against the Accused were referred to a Commission appointed in accordance with commission orders and instructions.

4. Analysis

a. The President has Lawful Discretion to Determine the Structure and Composition of Military Commissions.

The President has authorized the trial of certain individuals for violations of the law of war and other offenses triable by military commission. His authority for doing so is derived from 10 U.S.C. §821 and §836, and from his power as Commander in Chief, and explicit Congressional authorization to use all means necessary to defend the Nation.⁷ While Congress has clearly authorized the President to establish military commissions, it has chosen not to define the structure and composition of military commissions or the qualifications of commission members. On the contrary, Congress has given the President wide discretion to promulgate regulations governing these and other aspects of the commission process.

Unlike courts-martial, which are extensively regulated in the Uniform Code of Military Justice (UCMJ), nothing in the UCMJ specifies the structure and composition of military commissions or restricts the President in defining the structure of military commissions. In Article 36, Congress delegated to the President the power to prescribe rules of procedure and evidence for all types of military tribunals. It is the stated intent of Congress that such rules governing military commissions shall “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 only “so far as he considers practicable.”⁸ In section 1 of the PMO, the President expressly found 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 cases in the United States district courts.”⁹

The President’s broad authority to define the structure and procedures of military commissions was recognized by the United States Supreme Court in *Madsen v. Kinsella*,¹⁰ which affirmed the conviction and sentence of an American civilian by military commission in occupied Germany: “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent

⁶ MCO 1, ¶4A(4).

⁷ The President asserts the legal basis of the PMO in the introductory paragraph: “By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows...”

⁸ 10 U.S.C. §836.

⁹ PMO §1(f).

¹⁰ 343 U.S. 341, 347-48 (1952)

governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.*¹¹

The President is not required by law to conform military commissions to any particular military, civilian or international model. Existing models of judicial procedure, historical practice, and analogies to courts-martial may be useful sources of comparative analysis and practical guidance, but the structure and composition of the Commission in each case is determined by Commission Law¹² and the discretion of the Appointing Authority in selecting individual members.¹³ The Defense objection fails to offer any legal basis to challenge the President's authority to adopt the structure and composition of the Commission in this case. Rather, the Defense offers an unsupported complaint and a request for a tribunal that suits its own desires. An Accused has no right to select a tribunal of his own choosing.¹⁴

b. The Military Commission Is Based Upon Existing Legal Systems and Precedents.

Historically, military commissions and international military tribunals in which the United States has participated, follow the basic structure adopted under Commission Law. Such tribunals have traditionally consisted of three or more members serving as triers of both fact and law.¹⁵ This was the model used, for example, at the International Military Tribunals at Nuremberg,¹⁶ the American war crimes tribunals in Germany and the Philippines,¹⁷ and in the famous German saboteur cases, which were reviewed by the Supreme Court in *Ex Parte Quirin*.¹⁸ As the Defense itself points out, this is also the structure used in contemporary international war crimes tribunals, such as the International Criminal Tribunal for the Former Yugoslavia.¹⁹ The Defense assertion that the Military Commission in his case is "not based on any recognized legitimate system of civilian, criminal, international, or military law" is simply false.

¹¹ *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

¹² Part I (Preamble) of the Manual for Courts-Martial (2002), states: "*Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*" ¶2(b)(2)(emphasis added).

¹³ MCO 1, ¶4A(1)(AA appoints commission members).

¹⁴ See *Colepaugh v. Looney*, 235 F.2d 429, 432-433 (10th Cir. 1956) ("an accused has no constitutional right to choose the offense or the tribunal in which he will be tried").

¹⁵ See Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar 2002, at 41 *et seq.*

¹⁶ See Major Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96 (Jun 2003)(describing in detail the structure, composition and procedures of the IMT).

¹⁷ See *International Law, Vol. II*, DEP'T OF ARMY PAM. 27-161-2 (Oct 1962)(describing the the structure and composition of American military commissions for the trial of war crimes after WWII).

¹⁸ 317 U.S. 1, 22-24 (1942). For further details on the structure, composition and procedures of the Quirin Commission see transcript of proceedings and related documents, available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/indexnazi.htm

¹⁹ INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, RULES OF PROCEDURE AND EVIDENCE (as amended through Dec. 13, 2001) available at <http://www.un.org/icty/index.html>

The Commission appointed in this case also shares some characteristics of courts-martial under the UCMJ, which provides for a variety of court structures. Summary courts-martial consist of one commissioned officer, who is not required to possess legal qualifications; special courts-martial consist of at least three members, with or without a military judge; and general courts-martial are composed of a military judge and not less than five members.²⁰ In a special court-martial without a military judge, the president of the court is a voting member and also exercises “the same authority and responsibility as a military judge.”²¹ Like a military commission, this kind of special court-martial makes the presiding officer a voting member of the court. Under Article 25, UCMJ, “Any commissioned officer on active duty is eligible to serve on all courts-martial.”²² Each member of a court-martial must be individually selected by a convening authority based upon factors of “age, education, training, experience, length of service and judicial temperament.”²³

Military commissions are structured and selected in a manner very similar to courts-martial. All members of a military commission must be commissioned officers individually selected by the Appointing Authority based upon their competence to perform the duties of a member.²⁴ Each commission shall consist of at least three members and no more than seven members,²⁵ each possessing an equal vote on all issues of law and fact.²⁶ While the commission does not have a military judge *per se*, it does have a presiding officer with authority to control the proceedings and perform a variety of quasi-judicial functions necessary to ensure a full, fair, and expeditious trial.²⁷

Although it is beyond the scope of this memorandum, a survey of criminal courts throughout the civilized world reveals a rich variety of procedural, evidentiary and structural differences. For example, it is common in European nations within the Civil Law tradition to try criminal cases before courts composed of both professional and lay judges, each having an equal vote in deliberations.²⁸ Under international legal norms, a wide variety of procedural variations may be accommodated consistent with the goal of fundamental fairness. The field of comparative legal studies yields the central insight that it is possible to achieve fundamental fairness in different systems of law and through a variety of adjudicative processes.²⁹

c. Military Commission Rules and Procedures Incorporate Principles of U.S. Law and Provide for Full and Fair Trials.

²⁰ 10 U.S.C. §816.

²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(b)(2) & R.C.M. 801 (2002).

²² 10 U.S.C. §825.

²³ *Id.*

²⁴ DoD Dir. 5105.70, ¶4.1.2

²⁵ MCO 1, ¶4A(2).

²⁶ *Id.*, ¶6F. *cf* MCI 8, ¶4A.

²⁷ MCI 8, ¶5.

²⁸ See HERBERT JACOB ET AL., COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE 207-09 (France) and 282-85 (Germany)(1996).

²⁹ See generally, *id.* at 1-14 (discussing value of comparative legal studies).

Although the Defense objection focuses on Commission structure and composition, the touchstone of Commission Law is fundamental fairness, not adherence to any particular form of court structure. A “full and fair trial,” not structural familiarity, is the proper measure of a military commission process.³⁰

Contrary to the Defense objection, Commission Law incorporates numerous salient principles of existing U.S. and international legal systems. We need not consider the many procedural variations that the President and Secretary of Defense *might* have chosen to employ. We need only assess whether that purpose is served under the rules given. The Defense fails to articulate how the structure of the Commission in this case undermines the goal of a fair trial.

Commission Law incorporates essential principles of fairness and due process. The Defense objection states that Commission Law is “devoid of any substantive or procedural guidance.” This is refuted by reference to the orders and instructions that govern the process. Commission Law mandates the following procedural safeguards which are derived from U.S. military and civilian law, as well as international law:³¹

- The presumption of innocence
- Burden on the Prosecution to prove guilt beyond a reasonable doubt
- The Accused’s ability:
 - To obtain witnesses and evidence
 - To cross-examine witnesses
 - To an attorney-client privilege
 - To testify or to remain silent at trial with no adverse inference drawn from silence
 - To be represented by detailed defense counsel at no cost to the Accused
 - To be represented by civilian counsel at no cost to the United States

These and other procedural protections are designed to ensure a full and fair trial for the Accused. Trials will be open to media and other observers to the extent possible consistent with national security.³²

d. The Military Commission is Capable of Performing Its Adjudicative Functions.

The Defense argues, in essence, that the Members appointed in this case will be unable to perform their adjudicative functions competently because they lack training and experience in the law of armed conflict and will be confused by simultaneous consideration of different cases. This argument exaggerates the difficulty of the task, underestimates the competence of the Members, and fails to state an objection based on law.

³⁰ PMO, §4(2).

³¹ See MCO 1, ¶5.

³² MCO 1, ¶6B(3).

The Defense asks that all members of the Commission be replaced by “legal professionals who possess extensive experience in international criminal law and/or the law of war, including the Geneva Convention and other applicable international treaties and provisions.” This request is based upon the naked assumption that only legal experts are capable of interpreting and applying the law. This is a false assumption, contradicted by the assumptions that undergird the law of armed conflict itself as well as historical and contemporary military and civilian legal systems that depend on the legal understanding and sound judgment of lay judges and jurors.

The Appointing Authority is required by Commission Law to appoint members and alternate members “based on competence to perform the duties involved.”³³ In making these selections, the Appointing Authority has access to the military records of the officers and a detailed knowledge of the duties that Commission members will have to perform. The Appointing Authority has chosen senior commissioned officers with extensive military experience and strong educational backgrounds.

The analytical demands of adjudication are no more complex than a broad range of professional tasks routinely performed by senior military officers. The production of a division or brigade operations order, for instance, requires thousands of contingent decisions based upon analysis of complex factors of mission, enemy, time, terrain and weather, and troops available. Such orders set in motion the movements of thousands of troops executing thousands of inter-dependent actions in support of multiple objectives.

Contrary to the unsupported assumptions of the Defense, the law of war is not beyond the ken of senior commissioned officers, regularly entrusted with such complex reasoning and decision-making. The law of war is intended primarily to ameliorate the harsh and inhuman effects of war.³⁴ It is intended to restrain commanders from the wanton and indiscriminate use of combat power on the battlefield. In other words, its principal field of application is not in courts of law but in the field of action where military force is in use. Officers trained and experienced in the application of law of war principles in the field are not only capable of applying the law of war in trials by military commission, but are possessed of insight and understanding in the application of the law in ways that may well exceed that of judge advocates.

Congress has entrusted numerous critical legal and judicial functions to military officers under the UCMJ. Most senior commissioned officers, like those appointed to serve on this Military Commission, have extensive experience in the practical application of military justice. Commanders and officers at all levels become familiar with the processes and rules of military justice through imposition of non-judicial punishment, service on summary, special or general courts-martial, service as investigating officers under Article 32, UCMJ, and by serving as convening authorities.

In view of the military justice responsibilities of officers, professional military education emphasizes the values and rules of military justice. Beginning with pre-commissioning courses and extending through officer basic and advance courses, senior

³³ MCO 1, ¶4A(3).

³⁴ FM 27-10, p. 3 (purposes of the law of war).

service colleges, and general officer pre-command courses, military officers receive extensive training in military justice, law of war and other relevant subjects. This training and experience in the legal aspects of military service have created a tradition of legal competence among commissioned officers. The Supreme Court has recognized the unique legal competence of military officers in matters of military justice in the case of *Weiss v. United States*.³⁵ Surveying the numerous legal functions and responsibilities of all commissioned officers under the UCMJ, the Court noted: "Although military judges obviously perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system."³⁶

The considerations outlined here should be sufficient to dispel any doubts about the competence of senior military officers to sit as triers of fact and law in military commissions. The experience of history further attests to this conclusion. A survey of the use of military commissions throughout our nation's history shows that line officers are capable of performing competently and fairly as members of military commissions.

e. Multiple Cases will Not Confuse the Members.

Commission Law allows for multiple cases to be referred to one military commission. The Defense contends that Commission Members who lack judicial experience "cannot be expected to compartmentalize four cases—which are proceeding simultaneously." According to the Defense, members will be prone to confusion, unable to separate issues pertaining to the cases, and will fail to provide an "individualized determination of the issues" which is essential to fundamental fairness. These concerns over the ability of the Commission to provide individualized justice are misplaced.

The senior military officers appointed to this Commission routinely handle operational matters of great complexity, as their records and testimony in *voir dire* clearly demonstrated. The AA clearly believed that they were competent and capable to perform the intellectual tasks required. Moreover, the Defense exaggerates the challenge of compartmentalization. While multiple cases may be referred to one commission, all of the cases referred thus far involve one Accused. Both military and civilian courts allow for the joinder of multiple defendants in one trial.³⁷ Such joint trials often involve complex conspiracies and overlapping evidence of guilt. Yet the law expects and common experience shows that lay jurors are capable of reaching individualized determinations of guilt or innocence in such trials.

Finally, the normal practice of docketing will ordinarily separate the trial of each Commission case to avoid simultaneous proceedings. If some overlap does occur, the Prosecution is confident that the Members will be able to separate the issues.

f. Unique Legal Qualifications of the PO Will Not Jeopardize the Equal Vote of All Members.

³⁵ 510 U.S. 163, 174-75 (1994) (holding that the method of detailing and the lack of fixed terms for military judges does not violate the Due Process Clause of the 5th Amendment or the Appointments Clause of Art. II).

³⁶ *Id.*

³⁷ See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 812 (Joint and Common Trials).

The Defense asserts that the appointment of a PO with professional legal qualifications and experience will threaten the “equality among all members.” According to the Defense, the legally trained PO will naturally become a “greater among equals” and improperly influence the other members “contrary to the PMO.”

What the Defense argues here is that the disparity in legal qualifications between the PO and other members, which is anticipated but not required by MCO 1, is inconsistent with the PMO. According to the Defense, “The [PMO] makes equality among all members unmistakably clear, including the Presiding Officer.” This is incorrect. The PMO is silent on the composition of the commissions, qualifications of members and the voting rules for commissions. These aspects of Commission Law are delegated to the Secretary of Defense.³⁸ The source of the equal vote rule relied upon by the Defense is found in MCO 1,³⁹ which also specifies qualifications of the PO and other members.

The principle of equality among members means that each Member has an equal vote and voice in deliberations. Commission Law does not require equal personal qualifications among the Members of the Commission. The Defense cannot cite a single authority in military nor civilian law that requires complete equality in education and experience among judges or juries in any system of law. One of the foundational assumptions of military justice, accepted by Congress in the UCMJ and confirmed in practice, is that members of courts-martial will be able to do their duty and follow instructions to maintain their independence in deliberations and voting, despite vast differences in rank or other criteria.⁴⁰

The Defense underestimates the independence of the members and overestimates the value of legal credentials. While the PO is the only lawyer on this Commission, other members have equal military rank, comparable experience and advanced educational degrees. All members will have equal access to the legal briefs and evidence as they deliberate and vote on legal and factual issues presented to the Commission.⁴¹ All Members have equal opportunity to call and question witnesses and to query counsel on disputed issues of law and fact.⁴² All Members have an equal vote under Commission Law. The Prosecution has no doubts that all Members will perform their duties without undue influence from the PO.

³⁸ PMO, §6(a).

³⁹ MCO 1, ¶6F (setting forth voting procedures for the Commission). Commission Law requires that votes be taken by secret written ballot. The Court of Military Appeals has traced the history of the secret ballot procedure and found that “the rationale behind the secret written ballot rule is to prevent unlawful influence or use of superiority in rank to influence the vote of junior members.” *United States v. Greene*, 41 M.J. 57 (1994)(citations omitted).

⁴⁰ See *United States v. Greene*, 41 M.J. 57 (CMA 1994)(holding that failure of military judge to instruct members of court-martial regarding the use of secret written ballot was harmless error where the following instruction was given” “each of you has equal voice and vote....The senior member’s vote counts as one, the same as the junior member’s.”); see also *United States v. Accordino*, 20 M.J. 102 (CMA 1985)(holding that improper use of rank to influence a junior member’s vote constitutes unlawful command influence under M.R.E. 606(b)).

⁴¹ MCI 8, ¶4 (“...the full Commission shall adjudicate all issues of fact and law in a trial.”)

⁴² MCO 1, ¶6D(2)(c).

5. Legal Authority.

- a. President's Military Order of November 13, 2001.
- b. Manual for Courts-Martial (2002).
- c. Military Commission Order No. 1.
- d. Military Commission Instruction No. 8.
- e. DoD Dir. 5105.70.
- f. *Ex parte Quirin*, 317 U.S. 1 (1942).
- g. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- h. *Weiss v. United States*, 510 U.S. 163 (1994).
- i. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956).
- j. *United States v. Greene*, 41 M.J. 57 (CMA 1994).
- k. *United States v. Accordino*, 20 M.J. 102 (CMA 1985).
- l. 10 U.S.C. §§816, 821, 825 and 836.

//Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA)	
)	
v.	)	DEFENSE REQUEST
)	
	)	FOR CONTINUANCE
)	
DAVID HICKS	)	20 August 2004
)	
)	

The Defense in the case of the *United States v. David Hicks* provides the following request for a continuance:

I. This request is filed in accordance with the President’s Military Order of November 13, 2001.

II. Relief Requested: A continuance of proceedings until the agreement between the U.S. government and U.K. government regarding the trial of British citizens before military commissions is completed.

III. Overview: The agreement between the U.S. and Australian governments regarding the trial of Australian citizen detainees before a military commission includes the provision that any favorable condition created by the agreement between the U.S. and U.K. governments with respect to the trial of British citizens would be incorporated into the agreement between the U.S. and Australia. Presently, the U.S. and U.K. have not reached such agreements, although discussions are ongoing. As a result, a commission trial of Mr. Hicks before the U.S. and U.K. governments reach an agreement for the treatment of British detainees will deprive Mr. Hicks of favorable conditions that may be granted the British citizens (and, in turn, applicable to Australians such as Mr. Hicks) currently designated for trial by military commissions.

III. Facts:

- a. On 3 July 03, the President of the United States designated six individuals for trial by a military commission. These six individuals included Mr. Hicks and two British citizens.
- b. On 18 July 03, the President of the United States decided to delay any military commission proceeding against British nationals, pending the outcome of discussions between Lord Goldsmith, Attorney General for the United Kingdom, and the General Counsel for the Department of Defense, Hon. William J Haynes II. On 21 and 22 July 03, Lord Goldsmith met with Mr. Haynes to discuss and review potential options for disposing of the British detainees’ cases. (See attachment 1 hereto).

Review Exhibit 33A
Page 1 Of 4

- c. On 23 July 03, the Department of Defense issued a "press release" stating discussions between the General Counsel's office and an Australian delegation lead by Minister of Justice Chris Ellison regarding the potential options for the disposition of Australian detainee cases. The press release also stated that military commission proceedings would not begin until after further discussions between the U.S. and Australia. The release further stated that discussions were still ongoing with British representatives, and that military commission proceedings would not begin against any British national until completion of those discussions. (See attachment 2 hereto).
- d. On 25 November 03, the DOD issued a statement that the U.S. and Australian governments had reached an agreement on assurances, clarifications, and modifications that benefit the Australians facing the commission process. This press release did not disclose any agreement that favorable conditions granted to the British detainees would flow to the Australian detainees facing a military commission. (See attachment 3 hereto).
- e. On 3 December 03, Military Defense counsel requested from the Appointing Authority's office for military commissions written confirmation of any assurances, clarifications and/or modifications regarding Mr. Hicks' case. On 8 December 03, the Appointing Authority responded to the Defense request. The Appointing Authority's office's response did not disclose any agreement that favorable conditions granted to the British detainees would apply to the Australian detainees facing a military commission. (See attachment 4 hereto).
- f. On 16 February 04, Mr. Robert Cornall, Secretary, Australian Attorney General's office, explained to the Legal and Constitutional Legislation Committee during Estimate hearings that "[w]e have an agreement with the United States that, if the outcome negotiated by the British in respect of their detainees is more favorable than the outcome we have negotiated, then the benefit of those additional negotiations should flow through to the Australian detainees as well." (See attachment 5 hereto).
- g. On 19 February 04, Jack Straw, Foreign Secretary for the United Kingdom, announced that five of the nine Britons being held at Guantanamo Bay would be released within the following weeks, and that discussions were continuing regarding the four remaining British detainees. He announced that the British government's position with respect to the four remaining British detainees was that they "should be tried in accordance with international standards or returned to the U.K." (See attachment 6 hereto).
- h. During the last week of June 04, Lord Goldsmith, Attorney General for the United Kingdom, communicated that the military commissions do "not provide a fair trial by international standards." (See attachment 7 hereto).

Review Exhibit 33A

Page 2 Of 4

- i. On 30 June 04, the Prime Minister of the United Kingdom reiterated that the four remaining “British detainees should either be tried fairly in accordance with international standards or return to the U.K.” (*See* attachment 8 hereto).
- j. There has not yet been any publicly released agreement between the U.S. and U.K. regarding the British detainees.

IV. Discussion:

Mr. Hicks should not be brought to trial until all governmental agreements affecting his case are finalized.

On 25 November 2003, the United States and the Government of Australia reached an agreement regarding Australian citizens being tried in the military commission system. It appears that the agreement contains, in effect, a “favored nation clause” in that if the outcome negotiated by the government of the U.K. regarding its detainees is more favorable than the agreement Australia has with the U.S. regarding Mr. Hicks, those additional benefits granted to the U.K. detainees would also be afforded Mr. Hicks.

Negotiations are continuing toward an agreement between the United States and the U.K. regarding the disposition of the British detainees held at Guantanamo Bay by the United States.

Negotiations toward an agreement between the United States and the U.K. regarding the disposition of those countries’ detainees held by the United States at Guantanamo Bay are continuing.

From public statements of government leaders of the U.K., the U.K. position on its citizens held at Guantanamo Bay is that the British detainees will either face a military commission process that complies with international legal standards or will be returned to the U.K. Five of the original nine British citizens have already been returned without facing military commission proceedings.

The U.K.’s position, as manifested by the public statements of the U.K.’s highest government officials, is that its citizens held at Guantanamo Bay will either face a military commission process that complies with international legal standards, or be returned to the U.K. Five of the original nine British citizens confined at Guantanamo Bay have already been returned without facing military commission proceedings.

In light of the current British position on commissions, Mr. Hicks stands to benefit substantially, if not dispositively, from the agreement between the U.S. and U.K. regarding the commission process for British citizens, and any subsequent advantages that flow therefrom to the British detainees as a result of any further negotiations. Mr. Hicks would either face a completely different commission system, affording him all the rights and protections under international law, and/or be repatriated to Australia.

Review Exhibit 33A

Page 3 Of 4

The U.S. and the U.K. have agreed on one substantive issue. Military commission proceedings will not begin on British citizens until completion of discussions between the U.S. and U.K. governments. This condition applies to Mr. Hicks as well, per the U.S. and Australia agreement, and no commission proceeding should take place regarding Mr. Hicks until the completion of the U.S. and U.K. agreement.

Proceeding to trial before the U.S. and U.K. agreement is completed will deprive Mr. Hicks of a commission in accordance with international legal standards or the opportunity to return to his country of citizenship. Such action will substantially prejudice Mr. Hicks.

Granting the continuance until such time as the U.S. and U.K. complete their negotiations will not prejudice the government.

The defense requests the proceedings against Mr. Hicks be continued until negotiations between the U.K. and the United States are completed, so that any benefits granted to the U.K. detainees can be granted to Mr. Hicks, up to and including, not being subjected to a military commission at all, and/or repatriation to Australia.

4. Witnesses and Evidence:

Attachment (1): DOD Statement on British Detainee meetings of July 23, 2003

Attachment (2): DOD Statement on Australian Detainee Meetings of July 23, 2003

Attachment (3): U.S. and Australia announce agreements on Guantanamo Detainees of November 25, 2003

Attachment (4): Letter from Legal Advisor to the Appointing Authority of December 8, 2003

Attachment (5): Transcript from Estimates in the Senate Legal and Constitutional Legislation Committee, Canberra, Commonwealth of Australia of 16 February 2004 (pages L&C 71 to L&C 76)

Attachment (6): News article of 19 February 2004, U.K. AFP entitled Five British Detainees held at Guantanamo Bay to go home "in weeks".

Attachment (7): News Article of 24 June 2004, The Associated Press, entitled British Official Rips U.S. Guantanamo Plan.

Attachment (8): News Article of 30 June 2004, PA News, entitled Blair says Talks Continuing over Guantanamo Britons

5. Oral Argument: The Defense requests oral argument on this motion.

By: //signed//
M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

 //signed
JOSHUA L. DRATEL
Civilian Defense Counsel

Review Exhibit 33A

Page 4 Of 4

UNITED STATES OF AMERICA)

v.)

DAVID MATTHEW HICKS)

**Prosecution Response to Defense
Request for Continuance**

24 August 2004

1. Timeliness. This response is filed in a timely manner.
2. Relief Sought. The Prosecution requests denial of the Defense's Motion for Continuance.
3. Overview. This is a political question, not one that should be considered by this panel. Even if it were considered, the Australian government has indicated that it is satisfied with these proceedings and desires that they be conducted expeditiously.
4. Facts. On 3 July 2003, the President of the United States determined that the Accused is subject to the President's Military Order of 13 November 2001, thereby granting jurisdiction for the Accused to be tried by military commission. On 9 June 2004, the Appointing Authority approved charges against the Accused and on 25 June 2004 referred them to this Military Commission, with an instruction to the Presiding Officer to notify him by 15 July 2004 of the initial trial schedule. (Approval of Charges dated 9 June 2004 and Referral of Charges dated 25 June 2004).

5. Law Supporting the Relief Sought

a. Applicable provisions of Military Commission Order Number 1:

(1) Section 6(A)(2): The Appointing Authority may approve and refer for trial any charge against an individual within the jurisdiction of a Commission.

(2) Section 4(A)(5): The Presiding Officer "shall ensure the expeditious conduct of the trial."

(3) Section 6(B)(1) and (2): The Commission shall "provide a full and fair trial" which shall "proceed impartially and expeditiously... and prevent[] any unnecessary interference or delay" (emphasis added).

b. Courts have declined to adjudicate issues deemed political questions. The Supreme Court of the United States in *Baker v. Carr*, 369 U.S. 186, at 210 (1961) stated that if any one of the following six criterion can be satisfied, then an issue is nonjusticiable: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or

Review Exhibit 33-B
Page 1 of 3

the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id* at 210.

6. Discussion

a. The Defense is attempting to politicize this proceeding. They seek an indefinite delay, speculating that there may be political concessions favorable to the Accused some time in the future. We have no doubt that the United States will honor any agreements it may have with Australia. However, ensuring that the United States does so is a political and diplomatic matter; it is not the duty of this Commission.

b. Discussions that may be from time to time occur between the United States and Australia do not in and of themselves create rights that the Accused can invoke. The Office of the Appointing Authority is the appropriate authority to implement any assurances that may be made in such discussions. For instance, if the United States assured Australia that it would allow the Accused to make a phone call to his family, the Office of the Appointing Authority would be the authority to ensure this happened. The Accused would have no standing to complain if this failed to occur.

c. Furthermore, the assertion that diplomatic arrangements with Australia require that this case be put in abeyance is not supported by the facts. First, the Appointing Authority clearly has not interpreted the status of diplomatic agreements to require him to put this case in abeyance, or else he would not have referred it to this Commission. Once he did so, it became the Commission's and the Presiding Officer's duty expeditiously to conduct a full and fair trial. Second, as evidenced by the attached article, the Prime Minister of Australia very recently indicated that he is satisfied with the military commission process and hopes "it is dealt with in a very expeditious fashion."

7. Names of Documents Attached in Support of this Motion. The following documents are attached to this filing and are provided in support of this motion:

a. *Associated Press* Article: "Prime Minister Says He's Satisfied Guantanamo Bay Offers Australian-style Justice" dated August 23, 2004.

8. Oral Argument. The Prosecution requests oral argument on this motion.

9. Legal Authority. The following legal authority has been cited in support of this motion:

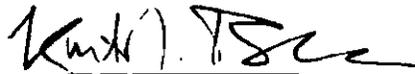
a. President's Military Order of November 13, 2001;

b. MCO No. 1;

c. *Baker v. Carr*, 369 US 186, at 210 (1961).

10. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

11. Additional Information. None.



KU [REDACTED]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

From: [REDACTED]

Sent: Friday, October 29, 2004 2:19 PM

To: 'Mori, Michael, MAJ, DoD OGC'; [REDACTED]

[REDACTED] Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC); [REDACTED]

[REDACTED] Lippert, Jeffery

MAJ Bamberg Law Center; [REDACTED]

[REDACTED] Brownback, Peter E. COL (L)

Subject: US v Hicks, Decision D28

The Presiding Officer has reviewed, and denied, the defense request for continuance in the proceedings (D28). See Section 5, MCI #8 dated August 17, 2004.

By Direction of the Presiding Officer

[REDACTED]

Review Exhibit 33C

Page 1 Of 1

UNITED STATES OF AMERICA)	
)	
	)	DEFENSE REQUEST
v.)	
	)	FOR CONTINUANCE
)	
DAVID HICKS	)	28 October 2004

The Defense in the case of the *United States v. David Hicks* provides the following request for a continuance:

I. This request is filed in accordance with the President's Military Order of November 13, 2001.

II. Relief Requested: A continuance of proceedings until such time as Professor Michael Schmitt, the Hicks defense team expert international humanitarian law/law of war (IHL) consultant, is available to travel to Guantanamo Bay to assist the defense team to prepare and during the presentation of motions to dismiss and/or motions for appropriate relief before the panel.

III. Discussion:

On 19 July 2004, BG Thomas Hemingway, Legal Advisor to the Appointing Authority, acting on behalf of the appointing authority, granted the defense request for Professor Schmitt to act as the Hicks defense team expert consultant on IHL.

In the preparation of motions to dismiss and/or motions for appropriate relief, the defense has consulted extensively with Professor Schmitt both by telephone and in person at the Marshall Center in Germany.

On 21 September 2004, Col Gunn, Chief Defense Counsel, requested Mr. Schmitt's attendance at the motion hearing from the Appointing Authority. On 5 October 2004, the Appointing Authority approved the request for Mr. Schmitt's attendance at the motion hearing but stated his attendance should not impair the mission of the Marshall Center.

The defense has requested through the Dean of the Marshall Center that Professor Schmitt be made available to travel to Guantanamo Bay during the week of 1 November 2004 so the defense could continue to call on him in his role as the defense expert IHL consultant.

The Dean of Marshall Center has found that Professor Schmitt absence prior to the middle of December would impair the operations of the Marshall Center.

Review Exhibit 34A
Page 1 of 2

The defense has relied heavily on the advice and expert opinions regarding IHL and other international law topics in preparing its motions. The defense believes the representation of Mr. Hicks will be impaired if Professor Schmitt is not present in Guantanamo Bay to assist the defense in final preparation and presentation of evidence, initial arguments, and rebuttal arguments on its motions to dismiss and/or motions for appropriate relief currently scheduled for the week of 1 November 2004.

Professor Schmitt will be able to travel to Guantanamo Bay after 15 December 2004 to assist the defense. The Dean of the Marshall School has approved Mr. Schmitt's attendance during this time period.

IV. Conclusion: Given the above, the defense requests a continuance of Mr. Hicks' case until no earlier than 15 December 2004, to enable Professor Schmitt to travel to Guantanamo Bay to continue to consult with and assist the defense in the preparation and presentation of evidence, initial arguments, and rebuttal arguments on its motions to dismiss and/or motions for appropriate relief.

- V. Attachments:
1. Appointing Authority approval of Mr. Schmitt of 19 July 2004.
 2. Request by Col Gunn to Appointing Authority for Mr. Schmitt of 21 September 2004.
 3. Approval by the Appointing Authority of 5 October 2004.
 4. E-mail from Col Gunn to Dean of Marshall Center of 15 October 2004 and reply from Dean to Col Gunn of 20 October 2004.

VI. Oral Argument: The Defense requests oral argument on this motion.

By: //signed//
M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

 //signed
JOSHUA L. DRATEL
Civilian Defense Counsel

Review Exhibit 34A
Page 2 of 2



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



July 19, 2004

MEMORANDUM FOR Major Michael D. Mori, USMC, Detailed Defense Counsel for
David Hicks

SUBJECT: Request for Law of War Consultant

I am in receipt of your July 12, 2004 request for permission to have Michael Schmitt, Army civilian employee, as an expert consultant in international humanitarian law/law of war to assist you in your representation of Mr. David Hicks.

I concur with Michael Schmitt assisting you, but only on an ad hoc basis as a member of Defense Team for the limited purpose of evaluating the evidence and military commission charges against David Hicks. As a member of the Defense Team, Mr. Schmitt will be subject to the requirements of Military Commission Instruction No. 4, including specifically Section 3(B)(4).

Regarding members of the Defense Team, please note that all classified documents and the information contained therein shall only be disseminated to those who have the appropriate security clearance and an official need to know the information to assist the Defense in the representation of David Hicks before a military commission.

My concurrence should not be interpreted as an intention to have Mr. Schmitt "detailed" to the Office of the Chief Defense Counsel, or for him to provide support to the Defense Team that impairs his ability to perform his assigned duties at the George C. Marshall European Center for Security Studies. Any request to expand the scope of Mr. Schmitt's assistance to the Defense Team for David Hicks should be forwarded to the Chief Defense Counsel.

If you have any questions regarding this memorandum you may call me at (703) 697-4938.

Thomas L. Hemingway
Brig Gen, USAF
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel

A77K... 354
Review Exhibit

Page 1 of 1



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

21 September 2004

MEMORANDUM FOR MR. JOHN ALTENBURG, THE APPOINTING AUTHORITY

FROM: Col Will A. Gunn, Chief Defense Counsel

SUBJECT: Expert Law of War Consultant for United States v.
 Al Qosi

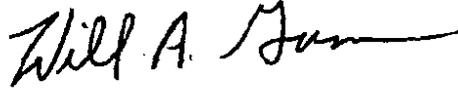
In the attached letter from Major Mori, he requests that Mr. Michael Schmitt be made available for the Hicks defense team so that Mr. Schmitt can attend the motions hearings during the first week of November 2004. In a letter dated July 19, 2004, BGEN Hemingway stated that Mr. Schmitt could assist the Hicks team on an ad hoc basis as a member of the defense team for the limited purpose of evaluating the evidence and charges against David Hicks. The Hicks team anticipates that evidence will be presented during the first week of November pertaining to various motions relating to Mr. Schmitt's area of expertise. They are requesting that he be present so that he can evaluate the evidence that is presented and advise the Hicks defense team.

BGEN Hemingway states in his letter of approval that any request to expand the scope of Mr. Schmitt's assistance to the defense team should be forwarded to me. While I do not see the Hicks team's request as an expansion of Mr. Schmitt's assistance, I am forwarding this request to you out of an abundance of caution. In particular, I draw your attention to the language in BGEN Hemingway's letter that states that his concurrence should not impair his ability to perform his "assigned duties at the George C. Marshall European Center for Security Studies." Mr. Schmitt's attendance at the hearings in Guantanamo may impact his teaching schedule at the Marshall Center. However, Mr. Schmitt is a DoD employee working for a DoD entity. As a result, section 5 of the President's Military Order of November 13, 2001 applies. This section requires departments, agencies and entities of the United States to Cooperate with the Secretary of Defense in conducting Military Commissions. Accordingly, I request that you please take actions to ensure that Mr. Schmitt is available to attend the

ATTACHMENT 2
 Review Exhibit 34A
 Page 1 of 2



Military Commission proceedings scheduled for the Hicks case in early November. If Mr. Schmitt is not available, it may be appropriate to detail another expert to the Hicks team or delay the motion hearings until Mr. Schmitt is available.



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

ATTACHMENT 2
Review Exhibit 34A
Page 2 of 2

FOR OFFICIAL USE ONLY



OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

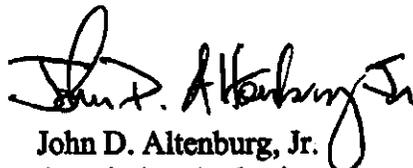
October 5, 2004

MEMORANDUM FOR Colonel Will A. Gunn, U.S. Air Force, Office of Military
Commissions, Chief Defense Counsel

SUBJECT: Law of War Consultant for *United States v. Hicks*

I have reviewed your September 21, 2004 memorandum requesting that Mr. Michael Schmitt be made available to advise the Hicks Defense Team at U.S. Naval Base, Guantanamo Bay, Cuba during motions hearings. The request is approved.

In his initial request of July 12, 2004, Major Mori stated that "[Mr. Schmitt's] supervisors have endorsed his consultation on [this] case" and that "his personal attendance would only be required for actual commission hearings involving issues in which he consults." This approval comes with the understanding that Mr. Schmitt's participation in the motions hearings does not impair the mission of the George C. Marshall European Center for Security Studies. In addition, my approval does not constitute "detailing" Mr. Schmitt to the Office of the Chief Defense Counsel.


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

cc: Presiding Officer
Major Mori

ATTACHMENT 3
Review Exhibit 35A
Page 1 of 1
Rec'd 6 Oct 14 2004

FOR OFFICIAL USE ONLY

-----Original Message-----

From: Reppert, John Dr. [mailto:reppertj@marshallcenter.org]
Sent: Wednesday, October 20, 2004 11:18
To: Gunn, Will, Col, DoD OGC
Subject: RE: Participation in Consulting Work at Guantanamo

COL Gunn,

I appreciate your request for Mike Schmitt as we share the same high value of his counsel. I also appreciate both the importance of this specific case and the possibility that this will become a precedent with great significance for the field of law.

Unfortunately, the timing of the request is at a time when he has both leadership responsibilities for a section of students who have travelled here from 15 countries to study and at a time when he is specifically engaging more than 90 of our students here on the importance of the Law of War and its implications for their states, a critical part of our security education.

As he earlier indicated, he is available in both December and in January, if there is any flexibility in the timing and we would be honored to support this important effort then. John Reppert, Dean

-----Original Message-----

From: Gunn, Will, Col, DoD OGC [mailto:gunnw@dodgc.osd.mil]
Sent: Friday, October 15, 2004 17:57
To: Reppert, John Dr.
Cc: 'schmitt@aya.yale.edu'; Altenburg, John, Mr, DoD OGC; 'morimd@cox.net'; Hemingway, Thomas, BG, DoD OGC
Subject: Participation in Consulting Work at Guantanamo

Dr. Reppert, I'm the Chief Defense Counsel in the Office of Military Commissions. One of your faculty members, Michael Schmitt, has been serving as a consultant for the military commission case of David Hicks, an Australian citizen. Major Mori, the lead military attorney on the Hicks defense team, has informed me that due to Mr. Schmitt's teaching obligations during the first week of November, you have denied Major Mori's request to have Mr. Schmitt present in Guantanamo for consultations during that period. I am writing to request you to reconsider your decision. The hearings in the Hicks team in early November represent the first motion hearings in the military commissions that were authorized by President Bush on Nov 13, 2001. Moreover, they represent the first military commissions hearings the United States has conducted in nearly 60 years. Because of major developments in international and military law since the last military commissions were held, these hearings promise to deal with issues of significant importance. The manner in which the commissions are conducted (particularly, the way that the defense of Mr. Hicks is conducted) will impact the world's perception of fairness of this process and our nation.

If you allow Mr. Schmitt to participate, we will do everything in our power to limit his time away from the Marshall Center. Again, I urge you to reconsider. If you have any questions, I can be reached at the below number.

4 to
ATTNMENT 34A
Review Exhibit
Page 1 of 2

Thank you,

Will Gunn

Col Will A. Gunn

Chief Defense Counsel

Office of Military Commissions

(703) 607-1521 ext. 184

DSN 327-1521 ext. 184

will.gunn@osd.pentagon.mil

ATTACHMENT 4 to
Review Exhibit 34A

Page 2 of 2

UNITED STATES OF AMERICA)	
)	
	)	PROSECUTION RESPONSE TO
v.	)	DEFENSE REQUEST FOR
	)	CONTINUANCE (OF MOTIONS
	)	HEARING)
DAVID M. HICKS	)	(D29)
	)	28 October 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.
2. Position on Motion. The Prosecution opposes the Defense request for continuance and requests that it be denied.
3. Facts. The Prosecution does not dispute any of the factual assertions made by the Defense.
4. Legal Authority Cited. None.
5. Discussion

a. The Appointing Authority approved the requested presence of Mr. Schmitt at the motions hearings, provided that it would not impair the mission of the Marshall Center. However, such presence apparently would impair its mission. There is no indication that the Appointing Authority contemplated delaying the hearing a month and a half to accommodate the Marshall Center's schedule.

b. A significant amount of logistics and preparation have been devoted in anticipation of the motions hearings scheduled to start in four days. The Defense fails to establish why a continuance is necessary or appropriate simply because its consultant cannot be there in person. Phone consultation, apparently used in the past, is a viable alternative. In fact, in its request for this individual as a witness, Defense indicates he is available by phone.

c. Defense Counsel are fully capable of presenting and arguing its motions without the presence of Mr. Schmitt, with phone consultation as needed.

6. Attached Files. None.
7. Oral Argument. None requested.

Review Exhibit 3413
Page 1 Of 2

8. Witnesses/Evidence. None.

//Original Signed//



Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 34B

Page 2 Of 2

From: [REDACTED]

Sent: Friday, October 29, 2004 2:20 PM

To: 'Mori, Michael, MAJ, DoD OGC'; [REDACTED]

[REDACTED] Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC); [REDACTED]

[REDACTED]

[REDACTED] Brownback, Peter E. COL (L)

Subject: US v. Hicks, Decsion D29

The Presiding Officer has reviewed, and denied, the defense request for continuance in the proceedings (D29). See Section 5, MCI #8 dated August 17, 2004.

By Direction of the Presiding Officer

[REDACTED]

Review Exhibit 34C
Page 1 Of 1