

**IN THE UNITED STATES MILITARY COMMISSION  
AT GUANTANAMO BAY NAVAL BASE, CUBA**

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UNITED STATES OF AMERICA )

v )

IBRAHIM AHMED MAHMOUD AL QOSI )

**DEFENSE MOTION FOR  
ORAL DEPOSITIONS<sup>1</sup>**

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The Commission has the power, consistent with general legal procedures and military law, to order depositions to preserve relevant testimony. The Defense requests oral depositions of witnesses who can provide key testimony to support Mr. al Qosi's defense, and whose availability to attend the 8 February 2005 trial is questionable. The Defense requests the Commission order the requested depositions to take place.

**FACTS**

1. In December 2001, Mr. al Qosi was detained in [REDACTED] and shortly thereafter transferred to the control of United States' authorities. Since early 2002, he has been detained at Guantanamo Bay, Cuba pursuant to presidential order,<sup>2</sup> undergoing almost daily interrogation sessions.
2. On 28 June 2004, the Government referred a charge of conspiracy against Mr. al Qosi. The Government has charged that, from 1989 to 2001, Mr. al Qosi was a member of the organization known as "al Qaida," and that during that period of time conspired with others to engage in illegal activities "in the context of and associated with armed conflict."
3. The Defense seeks oral depositions of the following persons: Former Presidents George H.W. Bush and William J. Clinton, and former Secretary of State Madeleine Albright. These individuals set United States foreign policy during the charged time period. The Defense believes that they will be able to provide detailed testimony concerning whether the United States was in an armed conflict during the charged time period (as alleged) and, if so, what type of armed conflict the United States was in fact fighting. Along these lines, the Defense believes that these individuals will be able to provide detailed testimony regarding the official United States position as to the status of the organization known as "al Qaida" during the charged time period, United States actions taken against that organization (including what they were and when they were taken), United States involvement in Sudan relative to Usama bin Laden's legitimate business activities, and United States support for "training camps" in Afghanistan. All of

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<sup>1</sup> **TIMING:** This motion is timely filed, the Defense having given notice of its intent to file the same on 15 September 2004. **REQUESTED RELIEF:** The Defense requests the relief sought in paragraph 10, *infra*.

<sup>2</sup> See Presidents Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002)(hereinafter "PMO, 13 Nov 02").

these matters relate directly to facts material to motions filed in this matter, and trial on the merits of the charge against Mr. al Qosi.

4. Additionally, the Defense seeks oral deposition of General Geoffrey Miller. General Miller was the former Commander of Camp Delta and the Defense believes he will be able to provide detailed testimony concerning the methods and means of interrogation used at Guantanamo Bay Naval Facility, as well as the incentives and disincentives provided detainees to cooperate with their interrogators and jailors. The Defense expects the Government to offer statements purportedly obtained from Mr. al Qosi while he has been imprisoned at Guantanamo Bay and subject to the interrogation that General Miller oversaw.<sup>3</sup> Thus, all of the matters the Defense seeks to learn from General Miller relate directly to the voluntariness, and thus admissibility, of these purported statements.

### LAW

5. **Commission Law:** The President has ordered that these Military Commissions be run to, at a minimum, provide for “a full and fair trial.”<sup>4</sup> Department of Defense Military Commission Order No.1 (21 March 2002) provides that “[t]he Accused may obtain witnesses and documents for the Accused’s defense, to the extent necessary and reasonably available as determined by the Presiding Officer.”<sup>5</sup> Further, Commission rules are “relaxed” as to the form that evidence can take in Commission proceedings. In addition to the “probative value to a reasonable person” standard of Order No. 1, ¶(6)(1), the Commission rules permit testimony in the form of “sworn and unsworn” statements.<sup>6</sup>

6. To facilitate securing information, the Commission is given the power to ensure witnesses and evidence are available to the Defense, in a variety of forms and by a variety of methods. Order No. 1, ¶6(A)(5) delineates these forms and methods:

The Commission shall have the power to:

- (a) Summon witnesses to attend trial and testify;
- (b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;
- (c) Require the production of documents and other evidentiary materials; and
- (d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer’s own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President’s Military Order and this Order.

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<sup>3</sup> *But see* Defense Motion to Compel Discovery, dtd 17 Sept 04 (the Defense has yet to receive notice from the Government of witnesses it intends to call in the 8 February 2005 trial in this matter).

<sup>4</sup> PMO, 13 Nov 01 at §4(c)(2).

<sup>5</sup> Order No. 1, at ¶(5)(H).

<sup>6</sup> Order No. 1, at ¶(6)(D)(3).

7. The language of Order No. 1, ¶6(A)(5)(d) seems to provide the mechanism for securing evidence likewise found in Rules for Courts-Martial [RCM] 702. RCM 702 allows oral depositions of necessary witnesses on a showing that the deposition is necessary "in the interest of justice," and should only be denied for "good cause."<sup>7</sup> The Discussion to that Rule notes that "oral depositions may be approved without the consent of the opposing party."<sup>8</sup>

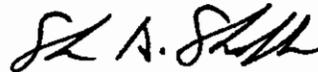
### ARGUMENT

8. Given the "relaxed" evidentiary standard employed by the Commission, an oral deposition is an appropriate method of securing relevant testimony. An oral deposition allows this relevant testimony to be secured before trial, and to be presented in a form that has even greater probative value than others forms of evidence that the Commission is allowed to consider. The Commission has the power to order the taking of testimony in this form.

9. The information sought by the Defense is relevant to the matters noted above (*see* ¶¶3-4, *supra*). These matters relate directly to the details of the charge brought by the Government against Mr. al Qosi, and to the legal matters related to the ability of the Commission to hear that charge. These individuals are unlikely to be available to travel to Guantanamo Bay for trial in this matter (or motion hearings), and under Commission rules are not required to be present at either in order for their testimony to be considered.

### REQUESTED RELIEF

10. The Defense requests that the Presiding Officer enter an order allowing the requested oral depositions to proceed and issuing process under Order No.1, ¶(6)(A)(5) to effectuate those oral depositions.



SHARON A. SHAFFER, Lt Col, USAF  
Defense Counsel



BRIAN M. THOMPSON, Capt, USAF  
Assistant Defense Counsel

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<sup>7</sup> RCM 702(a), (c)(3).

<sup>8</sup> RCM 702(c)(3)(B).

**CERTIFICATE OF SERVICE**

I hereby certify that on 17 Sept 2004, I sent this Defense Motion for Oral Depositions to the Presiding Officer and the legal assistant to the Presiding Officer via e-mail and hand-delivered a copy to the prosecutor.



BRIAN M. THOMPSON, Capt, USAF  
Assistant Defense Counsel

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UNITED STATES OF AMERICA )

v. )

SALIM AHMED HAMDAN )

PROSECUTION RESPONSE TO  
DEFENSE MOTION TO CHALLENGE  
FOR CAUSE

7 September 2004

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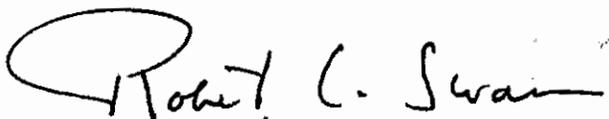
1. Timeliness. This Prosecution response is filed within the timeframe and guidance set by the Presiding Officer on the record at the hearing held on 24 August 2004.
2. Relief Sought. The Prosecution respectfully requests that the standard outlined below be adopted as Commission Law regarding disqualification for good cause of potential Military Commission members. We further request that the transcript of both the classified and unclassified voir dire conducted in the case of *United States v. Hicks* be made a part of the record in *United States v. Hamdan* and that it be considered in assessing whether good cause grounds exist for challenge. In light of the Prosecution's proposed standard, the Prosecution in the above-captioned case does not object to the Defense challenges for good cause of Colonel [REDACTED] Lieutenant Colonel [REDACTED] and Lieutenant Colonel [REDACTED]. The Prosecution requests that the Defense challenge for cause of Colonel [REDACTED] be denied.

With respect to the Presiding Officer, Colonel Brownback, we request that he closely evaluate his own suitability to serve as the Presiding Officer in light of the Prosecution's proposed standard below with particular attention focused on whether his impartiality might reasonably be questioned based upon articulable facts. We further request that he exercise his authority pursuant to Section 3(A) (3) of Military Commission Instruction No. 8 and forward a recommendation to the Appointing Authority as to whether good cause exists for his removal.

2. Statement of Facts. The Prosecution alleges the facts contained in the current record, specifically all testimony taken during both classified and unclassified *voir dire* of the members, and the memorandum and questionnaires filled out by Presiding Officer and other Commission Members that were made a part of the record. The Prosecution also reiterates its request above to append to the record a transcript of the classified and unclassified *voir dire* of the members taken in the case of *United States v. Hicks* on 25 August 2004.

3. Proposed Standard. For the reasons stated in the Prosecution's memorandum of law regarding an appropriate standard for challenges for cause filed on 7 September 2004, the Prosecution respectfully requests that the following standard be adopted and established as Commission law:

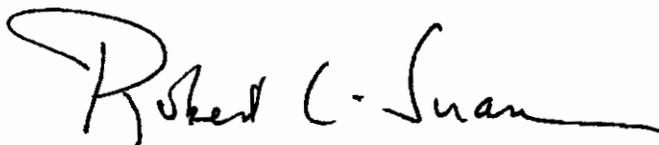
A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts.



ROBERT L. SWANN  
Colonel, U.S. Army  
Chief Prosecutor

CERTIFICATE OF SERVICE

I certify that the above Prosecution response was served in person on Defense Counsel for the Accused this 11 day of September 2004.



ROBERT L. SWANN  
Colonel, U.S. Army  
Chief Prosecutor