

UNITED STATES OF AMERICA	)	
	)	
v.	)	<b>DEFENSE REQUEST FOR WITNESS</b>
	)	<b>(Professor Michael Schmitt)</b>
DAVID M. HICKS	)	20 October 2004
	)	
	)	

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

**1. Witness information:**

Professor Michael Schmitt  
 Professor of International Law and Director, Program in Advanced Security Studies  
 George C. Marshall European Center for Security Studies  
 Garmisch-Partenkirchen, Germany

Office Phone: XXXX  
 XXXX

**2. Need for translator:** None

**2. Synopsis of testimony:** It is anticipated the Mr. Schmitt will testify as an expert in the law of armed conflict (law of war), including but not limited to, the following:

a. Professor Schmitt will testify regarding the applicability of the Law of Armed Conflict (LOAC) to hostilities prior to the commencement, during, and following active U.S. and coalition military operations in Afghanistan. He will explain that an international armed conflict did not begin until October 7, 2001, because before that date there were was no armed conflict between States; therefore, the law of armed conflict did not apply until that date. This testimony will demonstrate the erroneous nature of the time period contained in charge 1.

He will further testify that the international armed conflict between the United States and the former government of Afghanistan, the Taliban regime, likely ended in 2002 when the new interim government of Afghanistan, headed by Mr. Karzai, took power in Afghanistan. He will further testify that the only portion of the LOAC currently applicable to ongoing U.S. military operations in Afghanistan would be the provisions of Common Article 3 of the Geneva Conventions because the military operations taking place in Afghanistan against the remnants of the former Taliban regime constitute, at most, a non-international armed conflict. He will further testify that the ongoing military operations against al Qaida in Afghanistan do not trigger the LOAC because al Qaida is neither a state entity, nor a rebel group operating in the United States.

Professor Schmitt will also testify that the assertions by the prosecution that al Qaida is a “virtual state” are unsupported by any reasonable interpretation of international law and/or the LOAC.

He will further testify that the prosecutions assertions that the President's statements that the United States is at war with the al Qaida, or is engaged in an armed conflict with al Qaida, have no bearing on the application of the LOAC, and that prosecution assertions that such statements trigger the application of the LOAC as it applies to Mr. Hicks continued detention as an enemy combatant by the United States are incorrect.

Professor Schmitt will also testify regarding the requirements under the LOAC for an individual to be considered a lawful combatant. He will testify that under the LOAC, Mr. Hicks should have been granted an Article 5 tribunal soon after he was taken into custody by the United States. He will further testify regarding the implications of Mr. Hicks' attempts to comply with the LOAC as it pertains to lawful combatants.

Professor Schmitt will also testify regarding the implications of Mr. Hicks' alleged status as an unprivileged belligerent, and the implications of that status. Specifically, he will testify that the offense of "murder by an unprivileged belligerent" is not a war crime as contained in charge 2 and one of the objects of Charge 1. He will testify Mr. Hicks' that the mere status of unprivileged belligerent is not an offense under the LOAC, and that if, in fact, he aided in a murder, attempted to murder, or in fact participated in the murder of American personnel and/or coalition partner personnel, Mr. Hicks could only be tried under the domestic law of a state with domestic jurisdiction over Mr. Hicks.

The above testimony is relevant to the defense motions to dismiss or for appropriate relief for imposition of improper pretrial detention; the international armed conflict in Afghanistan has ended; for failure to state an offense of "murder by an unprivileged belligerent;" for failure to state an offense of "destruction of property by an unprivileged belligerent; and other defense motions.

It should be noted the defense may ask Professor Schmitt to testify regarding other concepts relevant to the LOAC that are implicated by Mr. Hicks' case. This synopsis is not intended to convey every possible point, opinion, or relevant fact that Professor Schmitt has to offer as part of his testimony. Please refer to the arguments in the defense motions. The motion documents contain additional cites to relevant legal concepts about which Professor Schmitt may testify.

3. **Source of knowledge:** I have spoken to him previously.

4. **Use of testimony:** This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

5. **Reasonable availability of witness:** Mr. Schmitt is available to testify by telephone.

6. **Alternative to live testimony:** The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS**

13 September 04

**MEMORANDUM FOR THE CHIEF DEFENSE COUNSEL**

**SUBJECT: Request for expanding the scope of assistance of law of war consultant**

1. I am requesting our defense team's consultant in international humanitarian law/law of war consultant, Michael Schmitt, be allowed to assist the defense team at Guantanamo Bay during motions hearing.
2. At present, the current approval of Mr. Schmitt's assistance is on an ad hoc basis as reflected in enclosure 1. It is imperative that the defense have the ability to utilize our consultant in preparation and during any cross-examination of government expert witnesses which can only be effectively done with Mr Schmitt in attendance of the motion hearing.
3. The first motion hearing is tentatively set for 2 November 2004.

A handwritten signature in black ink, appearing to read 'MD MORI', written over a horizontal line.

**MD MORI  
Major, U.S. Marine Corps  
Detailed Defense Counsel**

commission of the important opportunity to question Professor Schmitt regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

7. **Is the witnesses cumulative with other witnesses:** No.

8. **Attachments:** CV of Mr. Schmitt

By:

\_\_\_\_\_  
M.D. MORI  
Major, U.S. Marine Corps



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF PROSECUTOR  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

October 22, 2004

MEMORANDUM FOR DETAILED DEFENSE COUNSEL ICO DAVID MATTHEW HICKS

SUBJECT: Witness Request for Professor Michael Schmitt

1. On October 20, 2004, the Defense Counsel in U.S. v. Hicks requested the above-named witness be produced for live testimony at Guantanamo Bay, Cuba. For the reasons laid in our Motion to Exclude Attorney and Legal Commentator Opinion Testimony of October 13, 2004 and Reply thereto of October 22, 2004, we object to this form of testimony. Accordingly, your request is denied.

Lieutenant Colonel, U.S. Marine Corps  
Prosecutor  
Office of Military Commissions

Attachment:  
As stated



-----Original Message-----

**From:** Reppert, John Dr  
**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  
**Sent:** Friday, October 15, 2004 17:57  
**To:** Reppert, John Dr.  
**Cc:**

**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.

Thank you,

Will Gunn

Col Will A. Gunn

Chief Defense Counsel

Office of Military Commissions



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

Rec'd 60CT04 fml



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



operations against al Qaida in Afghanistan do not trigger the LOAC because al Qaida is neither a state entity, nor a rebel group operating in the United States.

Professor Schmitt will also testify that the assertions by the prosecution that al Qaida is a “virtual state” are unsupported by any reasonable interpretation of international law and/or the LOAC. He will further testify that the prosecutions assertions that the President’s statements that the United States is at war with the al Qaida, or is engaged in an armed conflict with al Qaida, have no bearing on the application of the LOAC, and that prosecution assertions that such statements trigger the application of the LOAC as it applies to Mr. Hicks continued detention as an enemy combatant by the United States are incorrect.

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3. **Source of knowledge:** I have spoken to him previously.

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7. **Is the witnesses cumulative with other witnesses:** No.

8. **Attachments:** CV of Mr. Schmitt

By: \_\_\_\_\_  
M.D. MORI  
Major, U.S. Marine Corps



## Professor Michael N. Schmitt

### Current Position

Director, Leaders of the 21<sup>st</sup> Century Program and Professor of International Law, College of International Security Studies, [George C. Marshall European Center for Security Studies](#), Garmisch-Partenkirchen, Germany

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### Education

#### *Academic*

LL.M, Yale Law School  
JD, University of Texas  
MA (National Security and Strategic Studies), Naval War College  
MA (Political Science/History), Southwest Texas State University  
BA (Political Science/History), Southwest Texas State University

#### *Professional*

Naval War College  
Air War College  
Air Command and Staff College  
Marine Command and Staff College  
Air Force Squadron Officers School

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### Professional Affiliations

Member, [Institute of International Humanitarian Law](#)  
Member, [International Law Association](#) (British Branch)  
[NATO School](#), Adjunct Faculty  
[American Society of International Law \(ASIL\)](#)  
[Société Internationale de Droit Militaire et Droit de la Guerre](#), UK Branch  
Editorial Board, [International Law Studies Series](#)  
Executive Committee, [Lieber Society](#), [ASIL](#)

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### Professional Experience

2003-Present: Director, Leaders of the 21st Century Program and Professor of International Law, George C. Marshall European Center for Security Studies.

1999-2003: Director, Executive Program in International and Security Studies, George C. Marshall European Center for Security Studies  
1998-1999: Professor and Deputy Head, Department Of Law, United States Air Force Academy  
1997-1998: Visiting Scholar, Yale Law School  
1996-1998: Professor of International Law, Naval War College  
1997: Staff Judge Advocate, Operation Northern Watch (No-Fly Zone Over Iraq)  
1995-1996: Student, United States Naval War College  
1993-1995: Staff Judge Advocate, Incirlik Air Base, Turkey  
1991-1993: Staff Judge Advocate, Iraklion Air Station, Greece  
1990-1991: Student, Yale Law School  
1988-1990: Assistant Professor of Law, United States Air Force Academy  
1987-88: Defense Counsel, Florennes Air Base, Belgium  
1986-87: Deputy Staff Judge Advocate, Florennes Air Base, Belgium  
1984-1986: Assistant Staff Judge Advocate, Incirlik Air Base, Turkey  
1981-1984: Student, University Of Texas Law School  
1979-1981: Chief, Operational and Targeting Intelligence, Incirlik Air Base, Turkey

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## Awards

### *Scholarship*

Annual Waldemar Solf Lecture, U.S. Army Judge Advocate General's School, 2003  
Elected Member, International Institute of Humanitarian Law, 2002  
Klaus Kuhn Prize, International Institute of Humanitarian Law, 2000  
Hugh Nott Prize, Naval War College, 1999  
Military Operations and Law Prize, Naval War College, 1996  
Society for Strategic Air Command Award, Best Air Force Law Review Article, 1994  
Ambrose Gherini Prize for International Law, Yale Law School

### *Professional*

American Bar Association, Special Commendation for Exemplary Commitment to Public Service, 39th Wing Law Center, 1995  
American Bar Association, Outstanding Air Force Lawyer Award, 1991-92  
Outstanding Judge Advocate, U.S. Air Forces, Europe, 1991  
New York Bar Association Award for Trial Advocacy, USAF Judge Advocate General's School, 1987  
Outstanding Judge Advocate, U.S. Air Forces, Southern Europe, 1985  
Joint Meritorious Service Medal  
Meritorious Service Medal (eight)  
Air Force Achievement Medal (Specific Accomplishment)  
Humanitarian Service Medal  
Southwest Asia Service Medal (with Battle Star)  
Armed Forces Expeditionary Medal

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2 Gernackerstrasse  
82467 Garmisch-Partenkirchen  
Germany  
Phone XXXX Fax XXXX

Michael Schmitt  
George C. Marshall European Center for Security Studies  
CMR XXXX, Box XXXX  
APO AE XXXX

E-mail: [XXXX](#)



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

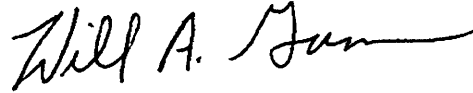
SUBJECT: Expert Law of War Consultant for United States v.  
Hicks

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



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

**Received**  
SEP 23 2004  
K/S  
Office of Appointing Authority



**From:** XXXX. CIV (L)

**Sent:** Thursday, October 28, 2004 4:54 PM

**To:** XXXX CIV (L); 'Mori, Michael, MAJ, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX, LtCol, DoD OGC'; 'Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC)'; XXXX; XXXX; XXXX, COL, DoD OGC'; XXXX, MSG, DoD OGC (XXXX)'; 'Lippert, Jeffery MAJ Bamberg Law Center'; XXXX, MAJ, DoD OGC (XXXX)'; Brownback, Peter E. COL (L)

**Subject:** United States v. Hicks, Decision of the Presiding Officer, D30

United States v. Hicks

Decision of the Presiding Officer, D30

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

By Direction of the Presiding Officer

XXXX

Assistant to the Presiding Officers

XXXX

Voice: XXXX

Fax: XXXX